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2022 Recent Developments in Employment Law

Indiana Continuing Legal Education Forum (ICLEF)

2022 Recent Developments in Employment Law
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Please feel free to contact ICLEF with additional suggestions on ways we may further improve our electronic publications. Thank you.

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RECENT DEVELOPMENTS IN EMPLOYMENT LAW 2022

December 20, 2022

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DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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RECENT DEVELOPMENTS IN EMPLOYMENT LAW 2022

Agenda

8:30 A.M.	**Registration**
8:55 A.M.	Welcome and Introduction - *Mark R. Waterfill,* Program Chair
9:00 A.M.	COVID Issues in the Workplace - *Craig W. Wiley, Megan A. Van Pelt*
9:30 A.M.	ADA Update - *Kimberly D. Jeselskis*
10:00 A.M.	Impact of *Dobbs* on Employers and Employees - *K. Brooke Salazar*
10:30 A.M.	**Break**
10:45 A.M.	Social Media in the Workplace - *Jan Michelsen, Christina M. Kamelhair*
11:15 A.M.	Retaliation - *Stephanie Jane Hahn*
11:45 A.M.	Covenants Not to Compete - *David J. Carr*
12:15 P.M.	**Lunch Break**
1:15 P.M.	Layoffs: WARN, OWBPA, Compliance with Wage Statutes, and More! - *Hannesson I. Murphy*
1:45 P.M.	FLSA Update - *Kathleen M. Anderson*
2:15 P.M.	How to Respond to the EEOC and Other Government Agencies - *Bianca V. Black*
2:45 P.M.	**Break**
3:00 P.M.	Harassment and Workplace Investigations Update - *Catherine F. Duclos*
3:30 P.M.	Ethical Issues for Employment Lawyers - *James J. Bell*
4:30 P.M.	**Adjournment**

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RECENT DEVELOPMENTS IN EMPLOYMENT LAW 2022

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RECENT DEVELOPMENTS IN EMPLOYMENT LAW 2022

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December 20, 2022

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Mark R. Waterfill, Attorney at Law, P.C., Plainfield

Over his career, *Mark R. Waterfill* has handled over 100 bench trials and more than a dozen jury trials. He has argued appellate cases before the United States Court of Appeals for the 7th Circuit, the Indiana Court Of Appeals and the Indiana Supreme Court. Mr. Waterfill is an aggressive and effective lawyer who finds creative solutions for his clients' legal problems.

Mark R. Waterfill has practiced law for over 30 years, with a particular focus on employment law for both businesses and employees. He assists people across Indiana from his Indianapolis office.

Mr. Waterfill is a seasoned litigator who fights for clients at the negotiation table and in the courtroom. His practical approach to litigation gets favorable results without the cost and time investment of a trial. He also knows that sometimes trials are unavoidable and prepares every case for the courtroom. He strives to get the best possible outcomes his clients' cases.

BARNES & THORNBURG LLP

Kathleen M. Anderson has been an advocate for businesses and entrepreneurs throughout the country for more than 25 years. Kathleen, who focuses her practice on litigation and counseling, has been recognized on the Best Lawyers in America and Chambers USA.

Kathleen brings expertise, a partnering mentality and no-nonsense focus to her representation of businesses. Kathleen co-leads the firm's nationwide Wage and Hour Practice Group.

- Kathleen's employment litigation practice covers the full spectrum of litigation and counsel services, including pre-litigation counseling; risk and litigation management; and trials, hearings, and appeals before federal and state courts, administrative agencies, and other tribunals. She has experience in alternative dispute resolution proceedings, including arbitration, mediation and conciliation.

- Kathleen regularly represents and counsels businesses in relation to employment law, including trade secrets and unfair competition; employee raiding, equal employment opportunity; federal and state wage and hour issues and claims; wage/hour investigations and audits; workplace investigations; non-competition, non-solicitation and other restrictive covenant claims; discrimination; retaliation; whistleblower; reductions in force; internal complaints and investigations; and tort and other claims.

- Kathleen represents clients in complex litigation, including in class actions, wage and hour (FLSA) collective actions and in actions brought against businesses by and before federal agencies, including the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL).

- Kathleen litigates wage and hour cases, including class, collective and hybrid actions in federal and state courts. These cases involve a range of allegations, including those related to exempt status/misclassifications, 'off the clock' work, bonuses, vacation pay, time keeping, compensable time, overtime pay, time and payroll records, tip and service charges, meal periods, reimbursements and retaliation.

- Kathleen has been quoted in publications throughout the country, including the New York Times, the Wall Street Journal, and Reuters.

James J. Bell, Hoover Hull Turner LLP, Indianapolis

James J. Bell is a partner with Hoover Hull Turner LLP and practices in the areas of criminal defense and attorney discipline defense. He also represents judges in ethics inquiries, attorneys in civil litigation and provides ethics advice to attorneys. He is listed in The Best Lawyers in America and was recognized seven times as one of the top 50 Super Lawyers in Indiana. James was the 2018 President of the Indianapolis Bar Association and is the past chair of the IndyBar Criminal Justice Section. James has served as Chair of the Indiana State Bar Association's Legal Ethics Committee and Criminal Justice Section. He is a former state court major felony public defender, former federal CJA panelist, and former member of the Indiana Federal Community Defenders Board of Directors. For six semesters, James taught professional responsibility as an adjunct professor at the Indiana University Robert H. McKinney School of Law. He is a regular contributor to The Indiana Lawyer and Res Gestae where he writes about attorney ethics.

Bianca V. Black, Littler Mendelson P.C., Indianapolis

Bianca Black focuses on a wide array of employment matters involving discrimination, harassment, ADEA, ADA and FLSA in both state and federal court.

Bianca has handled administrative proceedings before the EEOC and Indiana Civil Rights Commission. She has appeared in several matters in hearings before the Indiana Workers' Compensation Board. Bianca also counsels employers on employment policies, compliance and workers' compensation issues.

Bianca is very active in the local community, including assisting the IndyBar and the pro bono committee in community service projects.

David J. Carr, Ice Miller LLP, Indianapolis

David J. Carr is a partner in Ice Miller LLP in Indianapolis, Indiana, and Chair of the Employment Litigation Group. He serves as a contributing editor on four ABA employment law treatises. He advises and represents employers in all manner of employment matters, including class and collective actions, as well as trade secrets and non-competes. Mr. Carr received his B.A. from DePauw University, *summa cum laude* and Phi Beta Kappa, in 1981. He earned his Juris Doctorate from Georgetown University Law Center in 1984. He is listed in Best Lawyers in America, Chambers USA, and has been inducted into the College of Labor and Employment Lawyers. He was named by *Best Lawyers in America* as *"Lawyer of the Year" for Indianapolis Management Labor and Employment Law* in 2013, and again in 2022. This year he was named the National Management Chair of the American Bar Association Labor Section Committee on Rights and Responsibilities in the Workplace.

Catherine F. Duclos, J.D., AWI-CH

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Catherine Duclos is an Indianapolis attorney whose practice is devoted to independent investigations of harassment, discrimination, and workplace disputes. She is a former chair of the Labor, Employment & Benefits Section of the Indiana State Bar Association and has over 25 years of human resources and employment law experience. Catherine's background includes complex litigation on behalf of employers (with a national law firm) and employees (as a founding member of a highly regarded litigation firm in Atlanta). Immediately prior to becoming a neutral investigator, Catherine was Deputy General Counsel for an international media conglomerate where she had responsibility for all labor and employment law matters in the United States, Mexico, and Canada.

Catherine is a regular speaker on harassment and the principles of effective investigations. In 2020, she chaired a full-day program on Harassment and Workplace Investigations for the Indiana Continuing Legal Education Forum ("ICLEF"). Other speaking engagements include: "The Importance of Effective Workplace Investigations in the #MeToo Era" at ICLEF's Advanced Employment Law program; "Conducting Effective Internal Investigations" for Indy SHRM and the Indiana Bankers Association; "Investigating Sexual Harassment" for the Public Agency Training Council; "Harassment and Workplace Investigation Update" at ICLEF's annual Developments in Employment Law program; "How #MeToo Has Affected Workplace Investigations" at The Indiana Lawyer's Hot Topics in Employment Law program; "Top Ten Mistakes That Lead to Employee Litigation" at the National Meeting of the Association of Corporate Counsel; and "Reducing Legal Exposure for Employment Law Claims" at ICLEF's Corporate Counsel Institute.

Catherine is also a frequent writer on workplace investigations and other employment law topics. Her article, "You Can Help Your Clients Stop Workplace Harassment by Minding Your Ps and One Q," appeared in the June/July 2022 issue of *Res Gestae*, the Indiana State Bar Association Journal. She previously authored "Sexual Harassment Claims Under Georgia Law – A Roadmap," for the Georgia Bar Journal. She is a chapter editor for the Supplement to the ABA/BNA treatise on Employment Discrimination (Chapter 20: Sexual and Other Forms of Harassment) and has been an editor or contributing author for ABA/BNA treatises on the FMLA, the FLSA, and the ADEA.

Certificates and Ratings

- AWI-CH (Association of Workplace Investigators Certificate Holder, which signifies the holder has passed a series of tests to assess knowledge of investigation, analysis, interviewing, and report writing skills)
- AV rating by Martindale-Hubbell

Admissions, Professional Associations & Memberships

- Admitted to the Bar in Georgia (inactive) and Indiana
- Association of Workplace Investigators
- Indiana State Bar Association (former chair of the Employment, Labor & Benefits Section)
- Society for Human Resource Management
- Indy SHRM

Education

Indiana University Maurer School of Law, J.D. *cum laude*
Indiana University Kelley School of Business, B.S., Finance and Business Administration

Stephanie Jane Hahn

Ms. Hahn established her boutique employment law firm in January of 2009 on the north side of Indianapolis. Stephanie Jane Hahn, Attorney at Law, PC, limits its representation to individuals, and groups of individuals, in matters of employment and labor law. Ms. Hahn's Firm represents both private and public sector employees.

Ms. Hahn and her Firm represent only employees throughout the state of Indiana before federal and state courts and federal and state agencies. Ms. Hahn has been representing clients in matters of employment law since 1995. She also has experience training employees on employment law matters.

Ms. Hahn has been named to the Top 25 Women Lawyers in the State of Indiana. She has also been named a Superlawyer for 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, and 2021 in the area of employment law. Ms. Hahn is a frequent lecturer on matters of employment and labor law. She has spoken frequently at Indiana Continuing Legal Education Foundation seminars and has participated and presented at a number of other employment and labor law seminars.

Ms. Hahn is a Past Chair of the Indiana State Bar Association's Employment and Labor Law Council. She sat on the Indiana State Bar Association's Employment and Labor Council from 2005 through 2012. In addition to serving as the Chair, Ms. Hahn served as the Chair Elect, Vice Chair, Secretary/Treasurer, and as a member at large on the Employment and Labor Council for the Indiana State Bar Association.

For more information about Ms. Hahn or her practice, please visit her website at www.StephanieHahn.com or contact her at intake@stephaniehahn.com, 3815 River Crossing Parkway, Suite 100, Indianapolis, Indiana 46240, 317-569-2323.

Kimberly D. Jeselskis, Jeselskis Brinkerhoff and Joseph, LLC, Indianapolis

Kim Jeselskis focuses her practice on employment and labor law. She represents both individuals and employers in a wide range of employment law, labor law, and benefits matters, including discrimination, harassment, retaliation, whistleblower, the Family and Medical Leave Act (FMLA), wage and overtime violations, wrongful termination, short-term disability benefits, and longterm disability benefits.

Kim also advises and represents clients with severance agreements, executive agreements, and restrictive covenants, such as non-compete, non-solicitation, confidentiality, and nondisclosure agreements. Kim's practice encompasses all aspects of the employment relationship — from hiring to termination and post-employment issues. As a Registered Civil Mediator, Kim also mediates employment related disputes.

Kim represents clients in litigation in both federal and state courts, and before government agencies and tribunals, such as the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB), the Indiana Civil Rights Commission (ICRC), the State Employees' Appeals Commission (SEAC), the Department of Labor (DOL), and the Indiana Wage and Hour Division.

Christina M. Kamelhair, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis

Christina Kamelhair is an experienced employment litigator who defends businesses against claims of discrimination, harassment, retaliation, and wrongful termination. Christina practices in federal and state court, and before agencies including the EEOC and Indiana Civil Rights Commission, and her cases involve claims under Title VII, the ADEA, the ADA, the FMLA, and various state laws. Prior to moving back to her home state of Indiana, Christina practiced in Nevada for several years, including at Ogletree's Las Vegas office.

Individual claims in agency and court actions. Christina has taken and defended numerous depositions, and prepared and argued a wide variety of legal motions, including several successful motions for summary judgment.

Mediations and negotiations. Christina represents employers in formal, court-ordered settlement conferences, in mediation programs at the administrative level, and in informal, voluntary claim resolution negotiations. Christina has negotiated favorable outcomes for clients in each of these forums.

Workplace investigations. Christina handles workplace investigations and helps employers across various industries respond to harassment and other internal complaints.

Jan Michelsen, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Indianapolis

Jan Michelsen concentrates her practice in counseling and defending management in a wide range of labor and employment law matters, including employment discrimination litigation, EEOC and administrative agency charges and complaints, sexual harassment, the ADEA, the ADA, the FMLA, WARN, in federal and state courts and before regulatory agencies. She also counsels in the area of employment contract disputes, employee privacy issues, social media electronic communications, wage and hour issues, wrongful discharge claims, and other state tort claims, such as defamation and negligent retention. She has been involved in labor/management relations; union avoidance training and campaigns; arbitrations; and proceedings before the National Labor Relations Board.

She provides a wide range of employers with timely, practical advice on discipline, termination, reasonable accommodation, FMLA compliance, and separation agreements. Jan also conducts employment audits, reviews employee handbooks, and works with clients to develop effective, enforceable personnel policies. She provides practical and engaging training sessions to supervisors and managers on a variety of employment topics, including harassment, employee handbooks, union avoidance, social media, and workplace investigations, designed to provide an overview of employments laws, improve clients' success in managing workers, help them identify and address workplace issues, increase productivity and satisfaction, and avoid employment-related claims and lawsuits.

Prior to her legal career, Jan directed communications, strategic planning, and marketing functions as Director of Business Development at Indiana University Medical Center.

Hannesson I. Murphy, Barnes & Thornburg LLP, Indianapolis

Hans Murphy negotiates and drafts employment agreements, confidentiality agreements, and non-competition and non-solicitation agreements. He advises on the creation and maintenance of effective policies and procedures to govern the workplace, as well as counsels employers with respect to disciplining and terminating employees, reductions in force, and ensuring that group terminations comply with the requirements of federal statutes and regulations. He also defends employers against contract, discrimination, harassment and wrongful discharge claims.

Hans has helped employers with a wide variety of legal matters, including claims involving breach of contract, defamation, discrimination, harassment and wrongful discharge. He has advocated employer positions in connection with privately negotiated settlements, arbitration proceedings and hearings, administrative proceedings, class and collective actions, and litigated claims in state and federal courts across the country, from the filing of a claim through trial and on appeal.

A featured speaker and educator, Hans regularly conducts trainings for employers on ways to improve their employment practices, and frequently presents at seminars for groups such as the Indiana Chamber of Commerce, the Association of Corporate Counsel and the Society for Human Resource Management (SHRM). Hans has presented on such topics as hiring and firing employees in Indiana; protection of a company's intellectual property, trade secrets and confidential information; how the Affordable Health Care Act will affect employers; steps for effectively handling class action litigation; and properly classifying workers as independent contractors.

In the last several years, Hans has provided legal counsel pertaining to non-competition and trade secrets issues at the local, regional and national levels. He frequently lectures on the subject of 50-State Non-compete Enforcement, to assist employers with making sense of the different rules and regulations that apply in this area from state to state. Hans serves as the editor for the Practical Law Company's resources on Indiana non-compete laws and trade secrets. He also has published several articles for the Defense Trial Counsel of Indiana (DTCI) on non-compete enforcement, as well as a variety of other topics, and is a frequent contributor to the firm's employment blog, BTCurrents. Additionally, Hans has co-authored several guides for the Indiana Chamber of Commerce, including the current editions of the Indiana Chamber of Commerce's Indiana Employer's Guide to Monitoring Electronic Technology in the Workplace and the Indiana Chamber of Commerce's Indiana Guide to Hiring and Firing.

Hans is about cutting to the chase when it comes to what his clients need to succeed. He doesn't believe in wasting time, money or resources and focuses on advice and

actions that diffuse stress and resolve issues. On many occasions, he protects his client's reputation and bottom line by keeping them out of court. However, in the event litigation should ensue, he is dedicated to serving as a formidable advocate.

Prior to joining Barnes & Thornburg, Hans was an attorney in the civil litigation practice of a Miami, Florida, commercial law firm, practicing in general civil litigation, including admiralty law, medical malpractice, products liability, commercial liability, insurance defense, personal injury and employment. Hans has been involved in much more than just employment disputes, which helps him to serve as a well-rounded adviser today.

Megan A. Van Pelt, Jackson Lewis P.C., Indianapolis

Megan A. Van Pelt is an associate in the Indianapolis, Indiana, office of Jackson Lewis P.C. She represents employers in labor and employment litigation matters, including preventative advising and counseling.

Megan represents employers in individual, class, and collective employment actions brought in state and federal court, including cases involving claims of discrimination, harassment, retaliation, wrongful termination, failure to accommodate disabilities, breach of contract, wage and hour and a variety of other statutory and common law claims. In addition, Megan represents employers before state and federal agencies including the Equal Employment Opportunity Commission, the Indiana Civil Rights Commission and the Indiana Workers' Compensation Board. Megan devotes a portion of her practice to defending employers in Fair Credit Reporting Act ("FCRA") class actions.

Prior to joining Jackson Lewis, Megan was an associate at a mid-sized insurance defense firm in the employment department where she gained valuable experience specializing in the defense of workers' compensation claims and representing employers in workplace disputes involving federal and state employment claims.

While attending law school, Megan served as the executive notes editor of the Indiana Journal of Global Legal Studies, where she managed the publication of Volume 25. She also served as the executive judge coordinator of the Trial Advocacy Board. In addition, Megan was selected as a member of the Order of the Barristers for her commitment to oral advocacy. She was honored as a finalist in the Indiana University Trial Competition and the Indiana State Bar Association Law Student Conclave. Megan finished law school in the top of her class receiving the CALI Excellence for the Future award in Pre-Trial Litigation.

As an undergraduate at Indiana University, Megan was a Division 1 student athlete honored with the 2013 Hoosier Award.

K. Brooke Salazar, KB Salazar Legal LLC, Carmel

Brooke Salazar: I am a third-generation entrepreneur passionate about improving people's lives both in and out of the workplace. I began as a paralegal on death penalty cases and transitioned to the corporate world because I wanted to make a difference in people's lives daily.

I found my calling in Human Resources. and was in HR leadership for many years. I performed workplace investigations, developed anti-discrimination and harassment policies, and was instrumental in aligning people strategy with business strategy for well over a decade before I became a lawyer.

Coming from in-house roles, I am in the unique position to appreciate the need of business counsel to operate in both an agile and innovative manner. After having managed in-house legal budgets for years, I also recognize the need to budget and proactively develop measures for compliance.

I recognize the practical implications that policies have not just from a legal standpoint but from the vantage point of employees spending more time at work than with his/her/their families. My calling was to the law to couple my love of helping people with legal strategy.

Craig W. Wiley
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CRAIG W. WILEY is a Principal in the Indianapolis office of Jackson Lewis P.C. Mr. Wiley concentrates his practice in state and federal court in a broad range of labor and employment litigation matters, including Title VII, ADA, FMLA, ADEA, FLSA, wage and hour issues, covenants not to compete, trade secret litigation, and executive compensation and severance agreements. As a member of the firm's College and University practice group, Mr. Wiley has also litigated Title IX cases. He also handles cases under the Fair Housing Act.

Mr. Wiley served as the law clerk to United States Magistrate Judge Tim A. Baker, Southern District of Indiana. He has been awarded an AV rating the by Martindale-Hubbell, its high accolade, and a testament that his peers rank him at the highest level of professional excellence. Mr. Wiley has also been named an *Indiana Super Lawyer*, and in *Best Lawyers in America*.

Mr. Wiley has published numerous articles on topics ranging from employment discrimination law, federal civil practice, and ethics in employment law. His publications have appeared in the *Indiana Lawyer*, *Federal Lawyer*, *HR Notes*, *Indianapolis Business Journal*, *The Workplace Lawyer*, and *The Education Law Newsletter*.

From 2002-2010, Mr. Wiley authored a monthly column published in the *Indiana Lawyer* entitled *Update on Labor & Employment Law*, and is a past editor of *The Workplace Lawyer*, a bi-annual newsletter issued by the Indiana State Bar Association's Employment & Labor Law Section. Mr. Wiley is a co-author of *The Employment and Labor Law Handbook for Indiana Lawyers*, a publication by the Indiana State Bar Association's Employment and Labor Law Section. He also has been a guest lecturer in local and state-wide continuing legal education forums.

Mr. Wiley served as instructor for the Indiana University School of Continuing Studies, where he taught a class entitled *Personnel Law* to students seeking a certificate in human resource management.

Mr. Wiley is a past president of the Indianapolis Chapter of the Federal Bar Association, and was one of the youngest presidents in the chapter's history. He is a past Chair of the Indiana State Bar Association's Employment and Labor Law Section, a past Chair of the Indianapolis Bar Association's Labor and Employment Law section, and is a former Member-at-Large for Indianapolis Bar Association's

Board of Managers. Mr. Wiley is a past member of the Indianapolis Bar Association's Professionalism Committee, and is currently a member of the Government Committee.

Mr. Wiley was awarded the President's Award for Service to the Profession from the Indianapolis Bar Association. Mr. Wiley was recognized as an Up and Coming Lawyer by the Indiana Lawyer's Leadership in Law Awards. He is also a Distinguished Fellow of the Indianapolis Bar Foundation.

Mr. Wiley is a member of the Beech Grove High School Hall of Fame. He also serves as a Judge Pro Tempore for the Marion Superior Court.

In 2012, Mr. Wiley was appointed City Attorney for the City of Beech Grove, Indiana, where he counsels the Mayor and Common Council on a variety of issues pertaining to municipal law. Mr. Wiley also serves as the City Prosecutor, In that capacity, he is a Deputy Marion County Prosecutor. He is a member of the Indiana Municipal Lawyers Association.

Mr. Wiley has argued and/or appeared in cases before the United States Court of Appeals for the Sixth and Seventh Circuit, and the Indiana Supreme Court.

Mr. Wiley earned his B.S. in Education from Indiana University Bloomington, and his J.D. from Indiana University Maurer School of Law.

The Mayor of Indianapolis appointed Mr. Wiley to the Indianapolis/Marion County Building Authority Board of Trustees

EDUCATION

Indiana University Maurer School of Law

J.D., 1998

Indiana University

B.S. (Education) 1995

HONORS AND RECOGNITIONS

- *Best Lawyers in America*
- *Indiana Super Lawyer*
- Indianapolis Bar Association, *President's Award for Service to the Profession*
- *Distinguished Fellow*, Indianapolis Bar Foundation
- Past President, Indianapolis Chapter of the Federal Bar Association

- *Indiana Lawyer*, *Up and Coming Lawyer Award, Law and Leadership*
- Past Chair, Employment and Labor Section, Indiana State Bar Association
- Past Chair, Labor and Employment Law Section, Indianapolis Bar Association
- *AV® Rating*, Martindale Hubble
- Beech Grove High School Hall of Fame

PROFESSIONAL ASSOCIATIONS AND ACTIVITIES

- Indianapolis Chapter of the Federal Bar Association, Past President
- Indiana State Bar Association's Employment and Labor Law Section, Past Chair
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Section One

COVID-19 Issues in the Workplace

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Section One

JacksonLewis

COVID-19 Issues in the Workplace

December 20, 2022

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Pandemic/Vaccine Statistics

The CDC Statistics

As of November 23, 2022

United States

Reported cases: 98,481,551
Deaths: 1,075,779

Indiana

Reported cases: 1,959,451
Deaths: 25,138

The CDC Statistics

Fully Vaccinated Americans

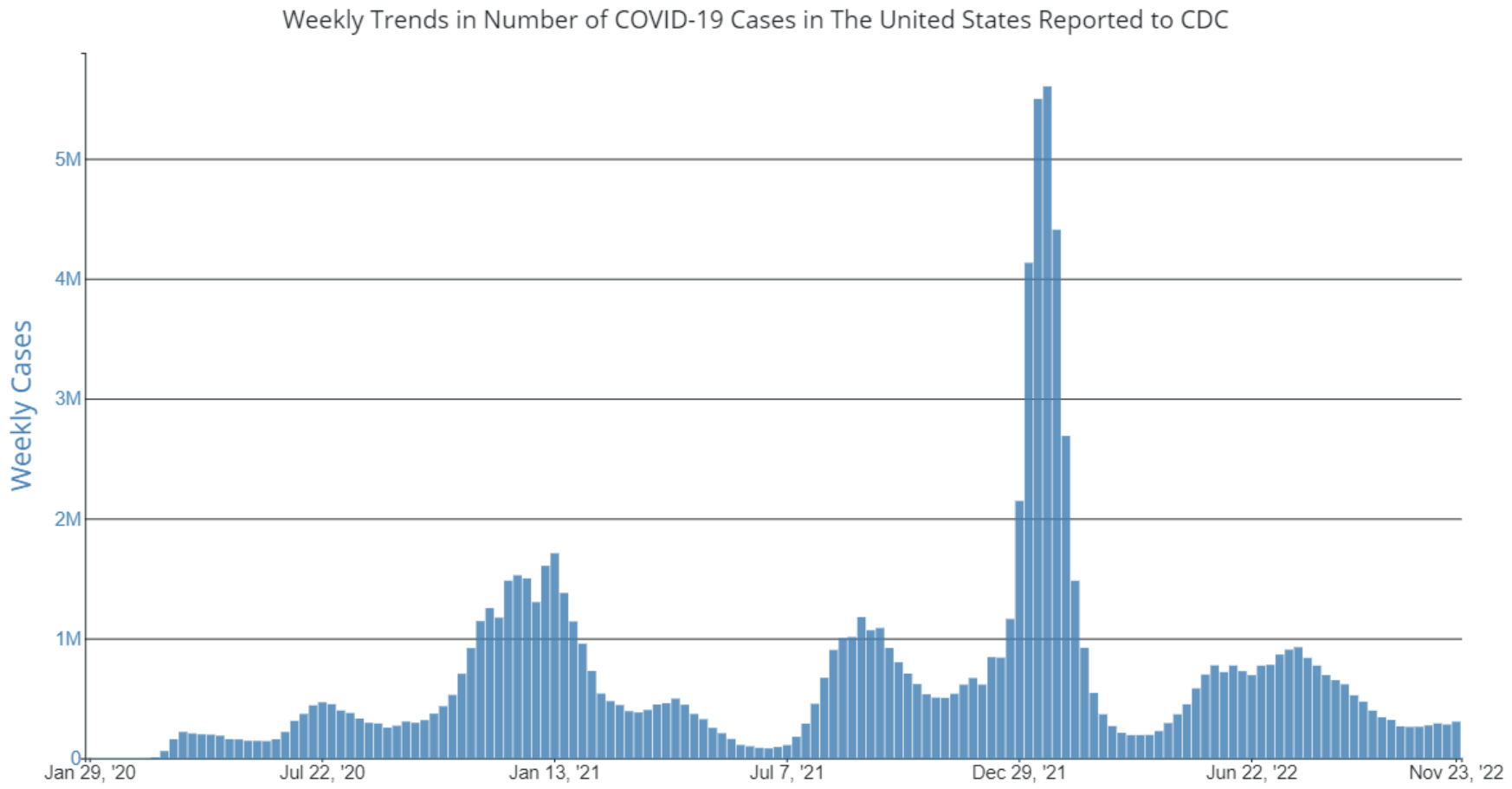
- 228,390,445 million (68% of population)

Fully Vaccinated Hoosiers

- 635,429 million (55% of the population)

Hundreds of lawsuits are challenging vaccine mandates

Case Counts on the Decline



Current CDC COVID-19 Guidance

Exposure

- CDC **no longer recommends** quarantine following COVID-19 exposure, **regardless of vaccination status.**
- CDC recommends anyone exposed to COVID-19 **wear a high-quality mask for 10 days and get tested on day 6.** Previously, the CDC recommended a 5-day quarantine for anyone who was not up to date with vaccinations.

COVID-19 Symptoms or Positive Test

- Employee should stay **home for at least 5 days**. After 5 days, if the individual is fever-free for 24 hours without the use of medication, and their symptoms are improving (or they never had symptoms) they can end isolation and return to work.

Can You Mandate The COVID Vaccine?

What About Vaccine Mandates?

- The only federally required COVID-19 mandate is the CMS Mandate (February 28, 2022 vaccination deadline), which applies to many healthcare employers.

- OSHA ETS and federal contractor mandate are on hold due to legal challenges and/or federal government has indicated that it will not enforce.

May Employers Mandate a COVID-19 Vaccine?

- Employers may opt to make a vaccine mandatory.
  - To keep customers, employees safe and/or for business liability reasons

- Employees who object to receiving the vaccine on medical or religious grounds will be entitled to reasonable accommodation through the ordinary EEO process.

- *See* EEOC's What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws ("WYSK"), Questions K.1 through K.10, added 12/16/2020 (https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws)

Exceptions To “Mandate”

- Employers cannot mandate under following circumstances:
  - Employee with disability that prevents him/her from taking vaccine, or
  - Employee with sincerely held religious belief that prevents him/her from taking vaccine.
  - Potential: pregnancy or breastfeeding needs.
- Under these circumstances, the employer may **not** automatically exclude the employee from the workplace or terminate the employment.

Disability Analysis

- If an employer determines an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a ***reasonable accommodation*** (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

- Reasonable accommodations process:
  - Flexible and interactive
  - Consider: Remote work, leave of absence, remote work area

ADA Undue Hardship

- Undue Hardship under the ADA: “significant difficulty or expense”

- In determining whether an accommodation is an undue hardship, the employer should conduct an individualized assessment of the current circumstances considering:
  - The prevalence in the workplace of employees who already have received a COVID-19 vaccination.
  - The amount of contact (close contact) that occurs in the workplace.
  - The amount of contact with others, whose vaccination status could be unknown (in particular customers, vendors, etc.).
  - The amount of contact with others in vulnerable populations.
  - The effectiveness of other controls in the workplace, which may be evidenced by the incidence of outbreaks in the facility.
  - The current rate of infection/incidence of the virus in the surrounding community.

Sincerely Held Religious Belief Analysis

- Once on notice, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship
- Undue Hardship under Title VII– having more than a *de minimis* cost or burden on the employer.
  - Lower threshold than the ADA.
- Employer should ordinarily assume employee's request for religious accommodation is based on a sincerely held religious belief.
- If employer has an *objective* basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

Encouragement May Be Better Course.

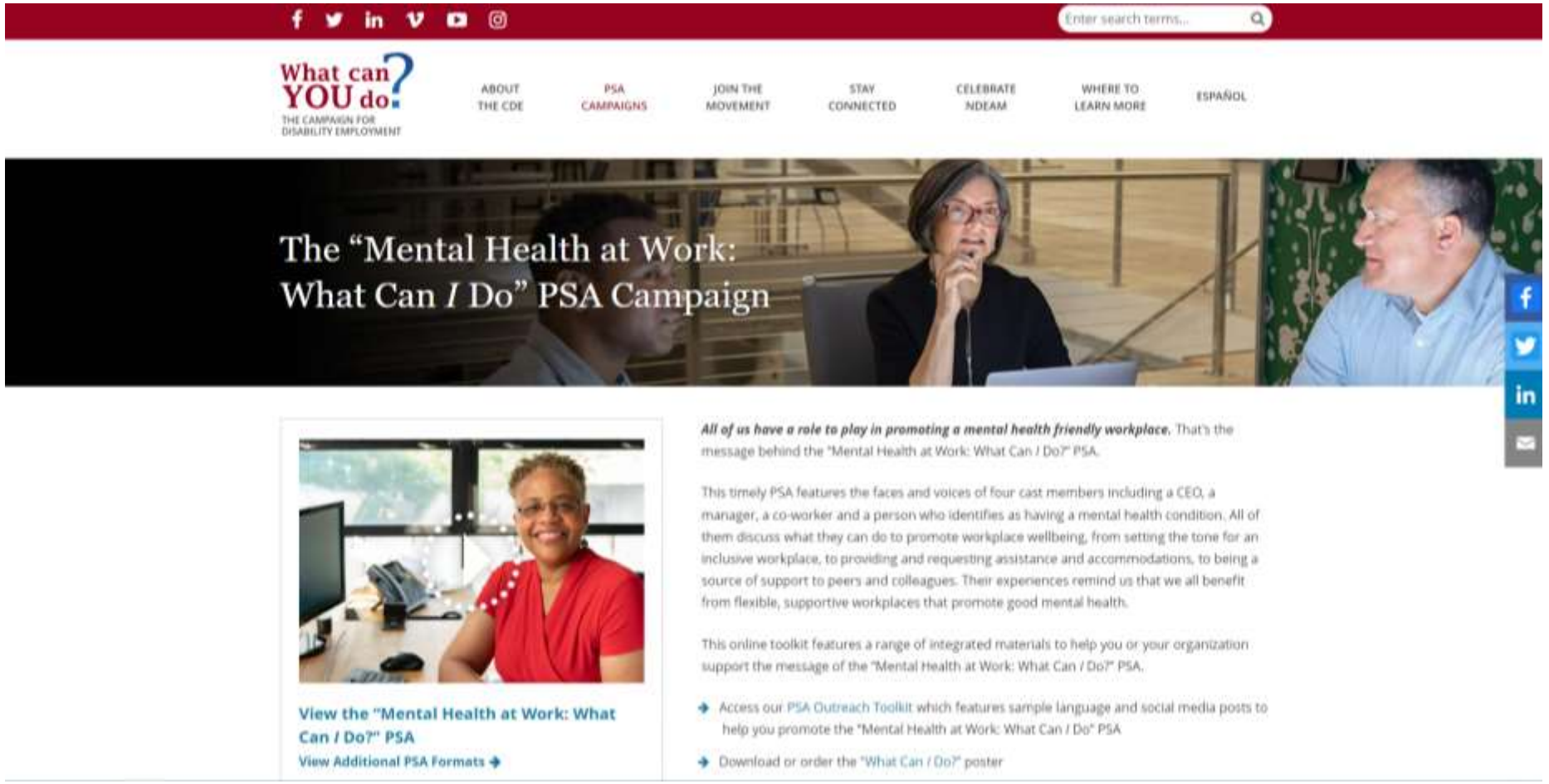
- Educate employees regarding the risks and benefits of vaccination in order to encourage employees to make informed decisions.
- Communicate clearly and frequently with employees to emphasize how vaccinations lead to a safer workplace.
- Lead by example in having management take the vaccines first.
- Make obtaining the vaccine as easy and convenient as possible for employees.
- Cover costs associated with getting vaccinated.
- Provide nominal incentives to employees who get vaccinated.
  - Note: HIPAA / ADA rules concerning wellness plans may be implicated.
- OVER COMMUNICATE!

COVID-19 and Employment Law Issues

Federal Law / Statutes In Play

- ADA
  - Employers are increasingly facing tricky ADA issues regarding reasonable accommodations relating to leave, modified work schedules, and telework.
  - Key driver: employer return-to-workplace mandates
  - Changes to work environments during the pandemic may affect disability accommodation obligations even after the pandemic ends.
  - EEO pandemic guidance cautions employees with mental health conditions may have a harder time readjusting
- FMLA
  - Always a consideration
- GINA
  - No, as administering and/or requiring proof of vaccination alone does not involve: the use of genetic information to make employment decisions, or the acquisition or disclosure of "genetic information" as defined by the statute.
  - EEOC filed a case about collecting COVID-19 testing results of employees' family members (GINA violation)

Mental Health Accommodation Requests Continue to Increase

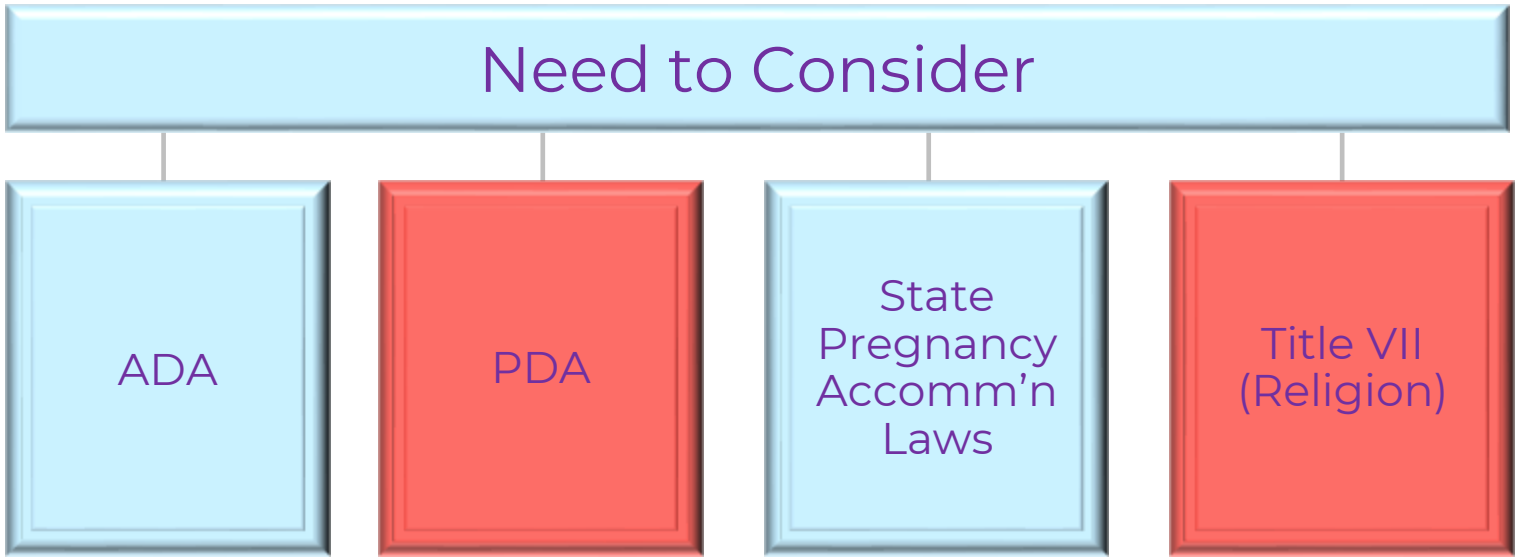


The Question We Get the Most Often

Rebecca has been working from home during the pandemic. We have asked her entire team to return to the office. Rebecca has asked that we accommodate her by allowing her to continue to work from home.

Do we have to allow Rebecca to continue to work remotely?

Ask Yourself: *Why* does the Employee Want to Continue to Work From Home?



If You Are Considering Denying the Request, How Will you Show What Changed?

Job Duties while Working from Home?	Was the employee only required to handle some of her job duties while working from home and now employee will resume full duties?
Team Structure upon Return?	Will the employee's team structure change upon return to work?
Performance?	Did employee have problems performing her job duties while working from home?
What Would Documents and Employees Say?	What would your documentation show about employee's ability to do the job working from home? What would co-workers say about necessity of being in the office 100% to do the job?

What NOT to Say

Comments in recent cases remind employers what not to say:

- Supervisor coached employee about importance of “being here”
- Supervisor told employee that if she “wanted to take time off to be a mother, then this wasn’t the job for [her] and [she] should quit”
- Employer asked applicant whether a gap in his employment was related to a medical reason
- “It’s not healthy for you, your health isn’t good”
- Supervisor stated that doctor’s notes were “fake as sh%&”
- Supervisor said they “needed someone who was going to be there and was not going to be out sick on FMLA all the time”

Other Accommodation Issues: COVID as a Disability

- EEOC clarified the issue in updated guidance on December 2021
- COVID is a physical or mental impairment under the ADA
- It may substantially limit various major bodily functions (e.g., immune system, sense of smell, digestive, neurological, brain, respiratory, circulatory, or cardiovascular functions) or major life activities such as self-care, eating, walking, breathing, concentrating, thinking
- Requires individualized assessment:
  - Limitations do not have to last a particular length of time or be long-term
  - Negative effects of medications or other treatments may cause substantial limitations
  - No substantial limitation if asymptomatic or symptoms are mild (congestion, sore throat, fever, headaches, gastrointestinal discomfort) and resolve within a matter of weeks without other effects

Transitory and Minor

- Transitory and minor impairments do not meet “regarded as” prong of disability under ADA
- But must be both transitory and minor
- “Transitory” is defined as “lasting or expected to last six months or less”
- “Minor” is undefined and may require consideration of :
  - Symptoms and severity of impairment
  - Type of treatment involved
  - Risk involved
  - Whether any kind of surgical intervention is anticipated or necessary
  - Nature and scope of any post-operative care

Transitory and Minor

- Recent cases:
- Surgery to remove nodule from lung: 2-month limitation may be disability
- Impairment lasting 2 months from lap band surgery not enough to show disability
- COVID-19 may be disability under ADA – unclear
- Less likely if no symptoms or mild symptoms and quick recovery
- More likely if “long-hauler,” or if it exacerbates other health conditions/disabilities
- Remember that COVID-19 may be an FMLA – qualifying event

Don’t Forget about FMLA!

Conflicting case law:

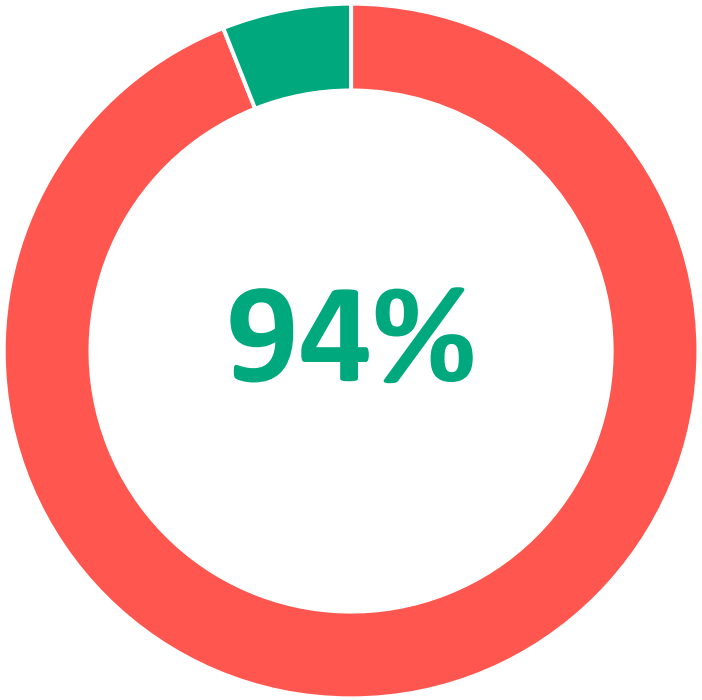
- ***N.D. Illinois, 1/12/22***: Employee tested positive for COVID and was told by doctor to self-quarantine. Following her discharge, she sued for FMLA interference. Court held that by informing the employer that she had a “highly contagious, incurable, and deadly virus that required her to self-quarantine,” she alerted the employer about a condition that likely supported FMLA leave, requiring the employer to investigate whether her condition would justify the leave.

- ***E.D. Missouri, 9/23/22***: Employee was terminated after seeking leave due to positive COVID test. Court denied FMLA interference claim because a diagnosis itself, without information specifying a “serious health condition,” does not constitute sufficient notice of the need for FMLA leave

DEI and REMOTE WORK

But What About Productivity…Or "If I Can't See Them How Do I Know They're Working"?

- The jury is still out. According to one survey in Summer 2020:



94% of employers say **productivity has remained the same or improved** since employees began working remotely

Source: Mercer (flexible working survey, 07/15/2020-08/14/2020)

Preference by Demographics

According to a February 2022 Harris Poll:

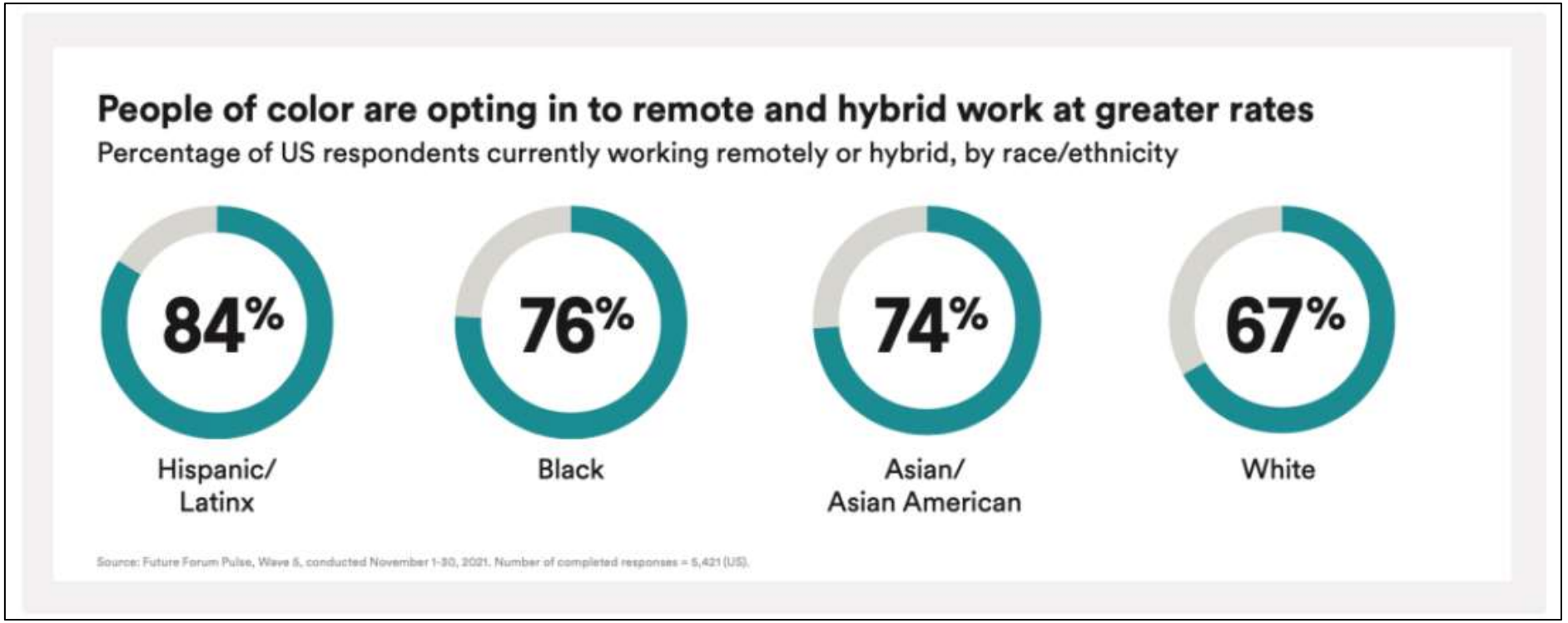
- **52% of women** say they enjoy working remotely and would like to do so in the long term, compared with **41% of men**
- **15% of women** say working in person allows for more camaraderie among colleagues, compared with **25% of men**
- **52% of Black workers** and **50% of women** say working from home is better than working in the office when it comes to advancing in their careers, compared with **42% of men**

Preference by Demographics

According to a February 2022 Harris Poll:

- **63% of Black workers** and **58% of women** say they feel more ambitious when working from home versus the office compared to **46% of men** who feel the same way
- **47% of women of color** say they worry about having to dress for work, compared with **31% of men**

Preference by Demographics



Beware of Inequities Ahead

According to Future Forum:

- US white knowledge workers spend most time in office by significant margin (up to 17%)
- Data from the Pulse shows people of color, women, and working mothers opt into flexible work at a higher rate than peers

According to a Harris Poll:

- Executives are nearly three times as likely to want to work in person as employees
- Sociologists fear that hybrid workplaces will be two-tiered, with leadership and white male employees interacting at the office, while teleworking women and people of color are left behind

EEOC Guidance On The ADA And Remote Work

- Interactive process - get information re: why accommodation is needed
- Verify that employee has disability/needs requested accommodation
  - Some continued obstacles to getting certifications from healthcare providers, so employers need to be flexible/open to alternate ways to substantiate the disability/request, i.e., prescription records, health insurance records
  - Employers encouraged to provide requested accommodation on temporary, interim, or trial basis while they obtain more information

- EEOC's Guidance is here: https://www.eeoc.gov//facts/telework.html and its Supplemental Guidance (WYSK) last updated December 16, 2020 is here: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

But You Let Me Work From Home Before!

- Must employees who are unproductive at home be allowed to telework?
  - Not necessarily.
    - An employee's demonstrated ability to telework productively and reliably can be one of the factors used to determine whether telework is a "reasonable" accommodation under the ADA
    - Just because an employee was allowed (or even required) to work from home during the pandemic does not mean doing so is automatically a "reasonable" accommodation
  - The EEOC recognizes that just because an accommodation was provided during the pandemic, does not mean the employer must provide it after the pandemic
    - ***BUT*** the employer will need to be able to explain what changed
  - Conversely, accommodations that may be reasonable outside the pandemic may not be reasonable now
    - EEOC recognizes that budgetary issues may create an undue hardship now, where typically it might not ("[p]rior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources")
    - The employer may have permitted the employee to forego some essential job functions during the crisis, or it may be more difficult for the employee to work from home now that others will be back at work collaborating

Medical Inquires During the Pandemic

How are Requests for Medical Information Treated Outside the Pandemic?

- During employment, all medical inquiries must be job related and consistent with business necessity

- Requests for medical information and medical records must be narrowly tailored - any request for information beyond those related to condition at issue is overly broad

EEOC Has “Informally” Approved

For employees who are not working from home and if it applied across the board:

- Temperature Checks
  - Because the CDC/state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions
- Requiring negative COVID-19 test
- Questions about COVID and its symptoms
  - If they have COVID-19
  - If they have COVID-like symptoms
  - If they have been tested for COVID-19

What About Asking About Family Members?

- No. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from asking employees medical questions about family members

- But can ask employees whether they have had contact with anyone diagnosed with COVID-19 or who may have symptoms associated with the disease

ADA Requires Employers To Maintain Confidentiality Of Medical Information

- If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?
  - Yes; the employer needs to maintain the confidentiality of this information
- May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?
  - Yes

Vulnerable Employees & Their Family Members

Vulnerable Employees

Do “vulnerable” employees have the right to telework?

- When an employee asks to telework due to an underlying health condition making him/her more vulnerable to COVID, this should be handled like any other ADA reasonable accommodation request:
  - Ask for medical documentation
  - Work with the employee in an interactive process
  - Evaluate potential reasonable accommodations
- Employers are encouraged to provide requested accommodation on temporary, interim, or trial basis while they obtain more information
- If telework is not possible, consider medical leave, as well as possible FMLA issues

Vulnerable Family Members

- Do employees with vulnerable family members have the right to telework?
  - EEOC Guidance (Question D.13) ***Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?***
    - No.* Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated.
    - For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure
  - Some jurisdictions may extend accommodation requirements to family members (but not under ADA)
  - **BEST PRACTICE:** Consider permitting telework in this situation where feasible. Use legitimate, neutral criteria as much as possible.

Best Practices for Employers

Best Practices

1. Redistribute Equal Employment Opportunity Policies, Anti-Discrimination and Anti-Harassment Policies, and Open-Door Policies to ensure employees are familiar with the policy and aware of reporting procedures should an issue arise
2. Conduct separate training for supervisors and subordinates on anti-discrimination and anti-harassment
3. Conduct separate training for supervisors and subordinates on diversity and inclusion that addresses unconscious bias and microaggressions
4. Conduct pay equity audits to ensure employees are being paid equitably

JacksonLewis

Thank you.

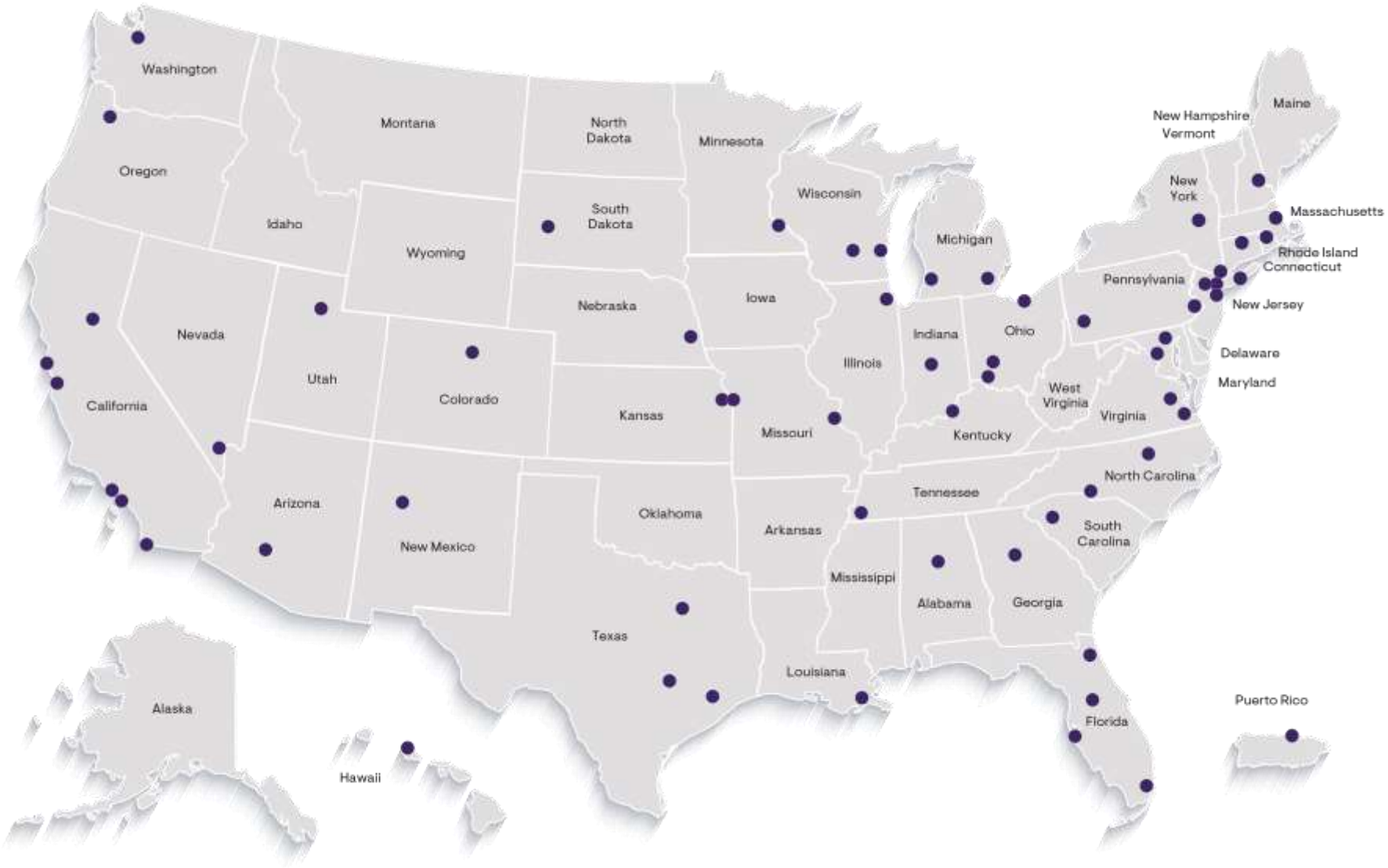
About Jackson Lewis
Firm Overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm
- We are founding members of L&E Global, a global alliance of premier employer’s counsel firms

Strategically Located to Serve Employers' Needs

61
Locations Nationwide

950+
Attorneys



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Designated as a **"Powerhouse"** in Everyday Employment Litigation in Complex Employment Litigation in *BTI Litigation Outlook 2019: Changes, Trends and Opportunities for Law Firms.*

Section Two

RECENT DEVELOPMENTS IN EMPLOYMENT LAW

The Americans with Disabilities Act

December 20, 2022

Prepared and presented by:

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Section Two

The Americans with Disabilities Act……..….Kimberly D. Jeselskis

RECENT DEVELOPMENTS IN EMPLOYMENT LAW

The Americans with Disabilities Act

I. Overview.

The Americans with Disabilities Act of 1991 ("ADA"), as amended, makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA requires an employer to provide a reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, except when such accommodation would cause an undue hardship. The ADA also limits an employer's ability to make disability-related inquiries or require medical examinations in certain situations. The ADA is enforced by the Equal Employment Opportunity Commission.

II. 2022 Decisions Regarding the ADA (as of 12/12/2022).

- Between January 1, 2022, and December 12, 2022, the Seventh Circuit published seven (7) decisions relating to the ADA in the workplace.
    - Four (4) decisions in 2021; and
    - Thirteen (13) decisions in 2020.
- Six (6) of the decisions addressed summary judgment.
    - All summary judgment decisions were affirmed in favor of the employer.
- One (1) decision addressed a post-verdict motion for judgment as a matter of law and motion for a new trial. Court upheld jury verdict in favor of employee.
- Unlike prior years where most cases involved reasonable accommodation issues, this year there were decisions on a variety of ADA issues – failure to hire, failure to promote, failure to accommodate, termination, hostile work environment, and medical examinations.
- No US Supreme Court cases this year
- No state court opinions this year.

III. Published Cases.

Pontinen v. United States Steel Corporation, 26 F.4th 401 (7th Cir. 2022).

- Decided February 11, 2022. Appeal from the Northern District of Indiana.
- District Court granted summary judgment in favor of Employer. Employee/applicant appealed.
- Seventh Circuit affirmed.
- Issues: Failure to hire and direct threat.

Summary:

Employee suffered three or four seizures during his lifetime. His third seizure happened in June 2014 and was followed two months later by a "heat-related illness," but could have also been a seizure. Before his second and third seizures, Employee felt some fuzziness in his left eye. Employee said the fuzziness gave him somewhere between thirty seconds and two minutes to prepare for the oncoming seizure.

After the June 2014 seizure, Employee began seeing a neurologist. The neurologist determined that his seizure disorder was not well controlled and prescribed him medication. After the possible seizure in August 2014, neurologist switched medication. By the end of October 2014, neurologist thought the seizure disorder was well controlled and noted that Employee should not miss his medication.

Employee continued to see his neurologist from 2015 to 2017. Neurologist noted that the seizure disorder seemed well controlled and told Employee he should never miss his medication. In 2016, Employee asked if he could stop taking his medication. The neurologist recommended against it. Employee continued to ask neurologist if he could get off anti-seizure medication. In 2017, although neurologist recommended against it, he started Employee on a tapering program. However, Employee just stopped taking the medication.

In May 2017, Employee applied for Utility Person position, which is a safety sensitive and safety critical position that involves safety hazards because the individual in the position is at risk for burn injuries, falls, and being struck by equipment. After a training period, the Utility Person is expected to move into a position that involves operating overhead mobile cranes of various sizes and types.

Employee received an offer contingent upon passing a pre-placement fitness-for-duty examination. The exam revealed that Employee had a history of seizures. Employee disclosed that he had 4 seizures in his life. During the exam, Employee disclosed that he had stopped his medication without neurologist approval. Employer then sought information from Employee's neurologist. Neurologist performed EEG and results were normal.

Employer also reviewed whether Employee would qualify under the DOT regulations. The regulations require that the driver should have no established medical history or clinical diagnosis of epilepsy or any other condition likely to cause a loss of consciousness or any loss of ability to

control a commercial motor vehicle. Handbook also requires an unmedicated driver to be seizure-free for 10 years.

Based on all of the information, Employer determined that Employee could work, but only if he avoided jobs higher than 5 feet, extensive ladder/stairs climbing, exposure to hazardous machinery, and operating cranes or mobile equipment. Human Resources concluded that the restrictions could not be accommodated and on July 17, 2017, rescinded the job offer.

Employee sued under the ADA, arguing Employer discriminated against him on the basis of a real or perceived disability when it rescinded the offer. Employer filed summary judgment, which district court granted because Employee's "uncontrolled epileptic condition would have posed a direct threat to the health and safety of himself and others." Employee appealed. Seventh Circuit affirmed.

Employer has the burden to show that qualification standards that "tend to screen out…individual[s] with a disability" escape liability because those qualification standards are necessary to prevent a "direct threat to the health or safety of other individuals in the workplace." Direct threat "means a significant risk of substantial harm…that cannot be eliminated or reduced by reasonable accommodation."

Direct threat determination is based on an "individualized assessment of the individual's present ability to safely perform the job." A reasonable medical judgment must inform the individualized assessment. The individualized assessment must consider: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm.

Medical Evidence – Court found that the Employer's decision was based on adequate medical evidence, including, the DOT regulations, the neurologist's records and EEG findings, and the physical examination.

Individualized Assessment—Employee argued that the assessment was not individualized, but instead based on preconceived notions of seizures. Court disagreed. Court focused on the fact that the medical restrictions placed on Employee were based primarily on the fact that Employee suffered from uncontrolled seizures, which was supported by Employee's own statements, his neurologist's records, and the physical examination. Court also noted that it was undisputed that when Employee has seizures, he tends to lose consciousness. Thus, the medical restrictions were based on information pertinent to Employee's personal experience with his seizure disorder and that is sufficiently individual. Court also agreed that the undisputed evidence shows that his disorder was uncontrolled at the time he applied for the position because he stopped taking his medication against medical advice.

Direct Threat—Employer has to show that the evidence on the question of direct threat is so one-sided no reasonably jury could find for Employee.

1. **Duration of the Risk:** Court found the duration of the risk is indefinite because neurologist warned Employee that going off his medication would put him at an

elevated risk of having a seizure, yet Employee insisted on discontinuing the medication.

2. **Nature and Severity of Potential Harm:** Court found that the nature and severity of the risk weigh in favor of a direct threat finding. Employee's seizures cause him to lose consciousness and Employee's "warning signal" before 2 of his 3 or 4 seizures is not guaranteed. If Employee had another seizure, no guarantee that he would have a warning signal or have long enough to get to safety.

3. **Likelihood that Harm Will Occur:** Court found that harm is likely to occur given Employee's uncontrolled medical condition.

4. **Imminence of Harm:** Court agreed that Employee's seizures are fairly rare as he only had 4 over several years. However, just before Employee started controlling his seizures, he had two seizures within a few months. Stopping medication also puts him at a higher risk of having another seizure. Court found that this factor weighed in favor of Employer, but not has heavily as the others.

5. **Weighing the Factors:** Court determined that the factors weigh in favor of a finding that there is a direct threat.

*****Seventh Circuit did not address the disability discrimination claim because it found the direct-threat analysis to be dispositive.

See v. Illinois Gaming Board, et. al., 29 F.4th 363 (7th Cir. 2022).

- Decided March 21, 2022. Appeal from the Central District of Illinois.
- District Court granted summary judgment in favor of Employer. Employee appealed.
- Seventh Circuit affirmed.
- Issues: medical examination without job-related justification.

Summary:

Employee is a law-enforcement officer who began to exhibit signs of paranoia. Complained that his supervisor was spreading malicious rumors about him to try to intimidate him. Employee said that his wife was afraid someone would harm him. When the odd behavior continued, management became concerned about Employee's mental stability and placed him on administrative leave pending a fitness-for-duty examination. A few weeks later, Employee passed the exam and returned to work.

Employee sued Employer claiming Employer discriminated against him by requiring him to undergo a medical examination without job-related justification. The district court granted summary judgment in favor of Employer. Employee appealed. Seventh Circuit affirmed.
The ADA prohibits employers from making certain medical inquiries or requiring medical examinations unless they are justified by business necessity. The Seventh Circuit has repeatedly held that the ADA permits fitness-for-duty examinations when public-safety employees are

involved. The undisputed evidence showed that Employer reasonably believed there was a possibility that Employee was suffering from paranoia. Employee had nothing to refute this evidence. Thus, given Employee's position, Employer's requirement that he pass a fitness-for-duty examination before returning to work was job related and consistent with business necessity as required by the ADA.

EEOC v. Wal-Mart Stores, Inc., 38 F.4th 651 (7th Cir. 2022).

- Decided June 30, 2022. Appeal from the Western District of Wisconsin.
- District Court denied Employer's motion for judgment as a matter of law and motion for new trial. Employer appealed.
- Seventh Circuit affirmed.
- Issues: reasonable accommodation, termination.

Summary:

Employee was a cart attendant for Employer from 1998 to 2015. Employer described the essential functions of a cart attendant in its job description, which included, maintaining availability of and organizing carts/flatbeds, assisting customers, loading merchandise into vehicles, and properly and safely using cart retrieval equipment. In performing his role, Employee was assisted by a full-time job coach paid for by Medicaid. Employee is deaf, legally blind, and experiences anxiety. Employee communicates via sign language, gestures and facial expressions. During his 16 years with Employer, Employee had 3 job coaches.

In 2015 Employee's store got a new manager. Around June 2015, the store manager decided to observe Employee at work. The store manager told Employee's job coach and Employee's foster mom that he was concerned that the job coach was doing 90-95% of Employee's job. Store manager suspended Employee and told Employee's foster mom, who sometimes substituted for the job coach, to complete paperwork as if Employee were a newly hired cart attendant, including having a physician complete an Accommodation Medical Questionnaire.

In March 2016, Employer sent Employee a letter asking to continue in the interactive process. Employer had not allowed Employee to return to work. By that time, Employee had filed an EEOC Charge. The EEOC sued Employer, alleging that Employer violated the ADA by refusing to allow Employee to continue to use a job coach and by ending his employment. The case went to trial. At trial, the district court adopted Employer's proposed jury instruction regarding the cart attendant's essential job duties and whether Employee performed those duties. The jury returned a verdict in favor of Employee and awarded $200,000 in compensatory damages and $5,000,000 in punitive damages. District court reduced the punitive damages award to $100,000 to satisfy the damages cap. Employer filed a renewed motion for judgment as a matter of law and moved for a new trial. The district court denied both motions. Employer appealed. Seventh Circuit affirmed.
Employer claimed that Employee could not perform certain essential job functions. Court explained that Employer was asking it to reweigh evidence rather than to accept the evidence presented at trial and evaluated by a jury. Here, Employer proposed the jury instruction that the district court adopted and read to the jury. The jury was instructed to decide the essential functions of the cart attendant and whether Employee was capable of doing those essential functions. Court

concluded that there was sufficient evidence for the jury to conclude (1) Employee was able to perform the essential functions of retrieving traditional carts; (2) retrieving motorized carts was not an essential function of the position; and (3) Employee was able to perform the essential customer service functions of the job.

Employer also asked Court to create a per se rule that as a matter of law permanent full-time job coaches are never reasonable accommodations. Court noted that it has only deemed an accommodation per se unreasonable when the accommodation itself creates an inability to do the job's essential tasks. In this case, the accommodation of a job coach did not render Employee unable to perform the essential job duties.

Employer also argued that Employee was not entitled to punitive damages because the underlying theory of discrimination was novel or otherwise poorly recognized. However, Court determined that the EEOC's theory that Employer violated the ADA by not permitting Employee to use a job coach as a reasonable accommodation is by no means novel. Employer was on notice that the jury could find a full-time job coach to be a reasonable accommodation.

Employer moved for a new trial because the district court decided not to bifurcate the liability and damages phases of the trial. Employer argued that the district court abused its discretion by not acknowledging "the inevitability of human nature to want to protect [Employee] from suffering." Employer focused on an unfair prejudice argument. However, Court found that the district court gave clear limiting instructions to the jury on emotional evidence and separated the liability and damages questions. Moreover, Court found nothing in the record to disagree with the district court's conclusion that judicial efficiency favored no bifurcation.

Brooks v. Avancez, 39 F.4th 424 (7th Cir. 2022).

- Decided July 6, 2022. Appeal from the Northern District of Indiana.
- District Court granted summary judgment in favor of Employer. Employee appealed
- Seventh Circuit affirmed.
- Issues: discrimination, retaliation.

Summary:

In October 2018, Employee filed a complaint with human resources ("HR") complaining that she was not getting trained on all workstations. Complaint was not ADA related. On February 6, 2019, Employee when to HR to look at her record due to confusion about what had become of her October complaint after she submitted it. After Employee was in the office for a few minutes the shift supervisor entered the office to discuss a conflict that occurred the night before between Employee and a coworker. During the course of the meeting, Employee said that she had PTSD. What occurred next is disputed. Employee testified during her deposition, "I'm, I'm a service connected veteran, and I have PTSD, and I've been experiencing a lot of hostile, um environmental-type situ…incidents that I wrote about and one of statements was missing out of my file, and I wanted to know why it wasn't there." According to HR, Employee stated to the shift supervisor, "[I] have PTSD and anything can happen." Employee denied that she made that statement. Employee did concede that after she made a statement about her PTSD, HR said to her,

"You just threatened Steve…You said you had PTSD and that anything can happen." In other words, Employee denied she made a threat, but admitted that HR accused her of making a threat. HR prepared disciplinary documentation, which Employee refused to sign.

Approximately one month later, on March 12, 2019, Employee received a 3 day suspension for a quality control issue. A couple of months later, on May 9, 2019, Employee had a dispute with a co-worker. Co-worker claimed that Employee threatened her. The following day, Employee attended a meeting with HR and her union representative. During the course of the meeting, HR accused Employee of threatening her union representative after she stated, "please help me or do I have to go to another organization to help with this harassment." Employee was suspended pending an investigation and then terminated on May 24, 2019. The termination paperwork provided that she was being terminated for making threats, for disrespectful and disruptive conduct and attitude and insubordination.

Employee sued, alleging a variety of claims, including disability discrimination and retaliation. The district court granted summary judgment in favor of Employer on all claims. Employee appealed. Seventh Circuit affirmed.

Retaliation: Court found no evidence that Employee complained about disability discrimination. Thus, retaliation claim failed. In all of the complaints relied upon by Employee, she never mentioned her PTSD or any other disability. All of her complaints alluded to age or complaints about rude, disrespectful, and unprofessional behavior by co-workers. The first time Employee ever mentioned PTSD was in the February 2019 meeting. Court found that Employee's statement at the February 6 meeting was not a complaint of disability discrimination, but rather a statement that other situations in the workplace were exacerbating her PTSD. Court determined that although Employee informed Employer at some point that she suffered from PTSD, it did not see any evidence in the record, taken in the light most favorable to Employee, that she ever made any complaints to anyone that she was being discriminated against based on her PTSD.

Discrimination: Court found that the question of pretext and employer expectations overlapped. Employer claimed that Employee was making threats and refusing to follow company rules, which are non-discriminatory reasons for her termination. Court looked at whether these reasons are pretextual. Here, Employee conceded that in both meetings management immediately asserted that she made threats. Employer had no time to collude or deliberately mispresent what they heard but acknowledged the threat immediately after Employee spoke. Employee presented no record evidence to dispute that Employer did not honestly believe she made the threats.

Parker v. Brooks Life Science, Inc., 39 F.4th 931 (7th Cir. 2022).

- Decided July 14, 2022. Appeal from the Southern District of Indiana.
- District Court granted Employer's motion for summary judgment. Employee appealed.
- Seventh Circuit affirmed.
- Issues: Retaliation.

Summary:

Employee suffers from multiple sclerosis and sciatica. In January 2017, Employer hired Employee for a part-time receptionist position. Employee's disabilities did not interfere with her ability to perform the essential functions of her role, which included letting people into the building, greeting visitors, scheduling conference rooms and ordering supplies. Employee worked from 8 am to 1 pm and then another part-time receptionist who is also disabled worked the afternoon shift.

In March 2018, Employee got a new supervisor. Supervisor praised Employee for her hard work and flexibility, but also repeatedly coached Employee on her failure to follow Employer's paid time off ("PTO") policy, which required employees to request prior approval from their supervisors for planned time off and to enter the PTO in the payroll software. The coaching started in May 2018 shortly after supervisor was hired when the supervisor arranged for a meeting with Employee and 2 human resources ("HR") representatives to review the PTO policy and ensure Employee's compliance moving forward. Supervisor considered this meeting to be a verbal corrective action.

In mid-July 2018, Employee emailed supervisor about an upcoming vacation scheduled from October 12 through October 21, 2018. Supervisor approved the time off to the extent Employee could cover it with her PTO but denied Employee's request to take unpaid days off to cover the vacation.

In August 2018, the supervisor notified Employee and the other part-time receptionist that there would no longer be a back up person for the front desk and supervisor was looking for a PRN receptionist to help out when needed. Supervisor told Employee and the other receptionist to work together to cover each other's shifts.

On October 8, 2018, Employee emailed supervisor and said she had to leave early that day and the following day for medical treatment and that the other part-time receptionist was covering for her. Supervisor asked Employee to put in PTO for the time Employee was taking off and also noted that she thought Employee would be short PTO for her October 12 to October 21 vacation. Later in the day on October 8, other employees reported to supervisor that while supervisor was out of the office the week before, Employee altered her schedule several times and had other employees covering for her.

A couple of days later, Employee told supervisor that the temporary receptionist was going to cover her shift on October 12 and on October 22, the day she was supposed to return from vacation. Supervisor told Employee that all time off needed prior approval and that she had mentioned this requirement to Employee before. Supervisor also told Employee that she was exceeding her PTO and no additional time would be approved.

Employee and supervisor met later in the day. Supervisor told Employee that she violated the PTO policy during the week that supervisor was out of the office and reminded Employee that they had discussed the PTO policy before. Employee acknowledged that they had discussed the policy and that she needed to do a better job complying with the policy moving forward. Supervisor took Employee's statement to be an admission that she violated the PTO policy.

After the meeting, supervisor emailed 2 HR employees and recommended terminating Employee because she discussed the PTO policy with her multiple times and Employee would not follow the policy. HR agreed with the termination. On October 11, 2018, supervisor met with Employee and terminated her.

Employee sued, claiming that her termination was retaliatory for requesting to leave early on October 8 and October 9 for medical treatment. The district court granted Employer's motion for summary judgment. Employee appealed. Seventh Circuit affirmed.

For a retaliation claim under the ADA, Employee must submit evidence that (1) she engaged in protected activity; (2) her employer took an adverse action against her; and (3) there was a causal connection between the two. Here, only the causation element was disputed. Employee first claimed there was suspicious timing of the decision to terminate her, which occurred just 2 days after her request to leave early on October 8 and October 9 for medical treatment. Court noted that the timing may appear suspicious in a vacuum, but suspicious timing alone rarely establishes causation especially where there is a significant intervening event that separates the protected activity and the termination. Here, that significant event was the supervisor learning that Employee altered her schedule the week that supervisor was out of the office. Supervisor learned this information after Employee requested the schedule accommodation but before supervisor recommended Employee's termination. Employee also claimed that the reason for her termination was pretextual. Employee relied on 3 emails that she interpreted as evidence that her supervisor praised her for the very same thing for which she was terminated. Court found that no reasonable juror could read the emails in the context that Employee wanted.

Swain v. Wormuth, 41 F.4th 892 (7th Cir. 2022).

- Decided July 25, 2022. Appeal from the Central District of Illinois.
- District Court granted employer's motion for summary judgment. Employee appealed.
- Seventh Circuit affirmed.
- Issues: Reasonable accommodation, disparate treatment.

Summary:

Employee worked as a civilian employee at an Army installation. He was a machinist until 2014 when he suffered from a shoulder injury. Physician gave him restrictions and Employer accommodated him by offering a permanent light duty assignment as a tool attendant. Employee accepted the job. First day on the new job did not go well because Employee had carpel tunnel surgery just days before and could not use his right hand. Employee complained about the weight of certain tool drawers he needed to open. Supervisor directed other employees to weigh each drawer and mark each drawer with the weights. Supervisor told Employee he did not need to open any unmarked drawer.

Several months later, Employee was diagnosed with a hernia. Physicians gave him a 10 pound weight restriction and recommended that he avoid lifting objects below his waist, climbing, working above shoulder height and operating machinery. Employee and supervisors agreed that

he could not perform his job duties with the restrictions. Supervisors agreed to a significant medication of Employee's work responsibilities – he would travel between cost centers driving an electric car and perform inventory checks.

Between 2014 and 2016 Employee asked for additional accommodations which Employer approved. Employee received a new scale to weigh items before he lifted them and a personal, motorized cart with power steering. In November 2014, Employee requested automatic door openers. Approximately 2 months later, Employee renewed his request and filled out reasonable accommodation paperwork. He wanted automatic door openers on 2 different doors. Supervisor approved automatic open on 1 door only. Automatic door opener was installed in August 2016.

Overtime became available for tool attendants in 2017, but Employer did not immediately consider Employee because it believed his medical restrictions precluded him from overtime. Employee's physician cleared him to work overtime. Employer then assigned Employee overtime.

Employee filed suit against Employer claiming that it failed to accommodate him and discriminated against him for not assigning overtime. District court granted Employer's motion for summary judgment. Employee appealed. Seventh Circuit affirmed.

Employee claimed that the time between his request for automatic door openers and when the openers were actually installed was an unreasonable delay and constituted a failure to accommodate. Court agreed that there was a delay but had to look at whether the delay was reasonable. Here, Employee had to fill out paperwork, the paperwork needed to be reviewed, the doors had to be inspected, parts needed to be ordered, and installation needed to be scheduled. Each step took a few months to complete until the automatic openers were installed. Court noted that given the long list of accommodations the Employer promptly provided to Employee, a reasonable juror could not attribute the delay to bad faith. There was no evidence in the record showing that Employer purposely stalled the project. Employer could have moved more quickly, but a reasonable juror could not conclude that the duration was unreasonable.

Employee claimed that Employer discriminated against him by denying him overtime. Employer argued that Employee's medical limitations prevented him from performing overtime work. Employer assigned only 1 tool attendant per overtime shift. During Employee's regular shift, other employees assisted him by lifting heavier objects. Employer did not have to assign a second overtime worker to assist Employee. The Court noted that an accommodation that is reasonable during normal work hours may not be reasonable during overtime hours.
Tate v. Dart, et. al., 51 F.4th 789 (7th Cir. 2022).

- Decided October 25, 2022. Appeal from the Northern District of Illinois.
- District Court granted Employer's motion for summary judgment. Employee appealed.
- Seventh Circuit affirmed.
- Issues: Failure to promote.

Summary:

Employee worked as a correctional officer. In his third year of employment, Employee injured his back. He returned to work under medical restrictions that required him to "avoid situations in which there is a significant chance of violence or conflict." After Employee was promoted to sergeant, Employer accommodated him by allowing him to work in the Classification Unit, where the possibility of violence or physical conflict was relatively remote. When Employee sought a promotion to lieutenant, Employer told Employee it could not accommodate him in that position because lieutenants had to be "able to manage and defuse regular, violent situations involving inmates." Employer determined that Employee could not perform this essential job function with his medical restrictions, so he remained a sergeant.

Employee filed suit alleging failure to accommodate and discrimination. District court granted summary judgment in favor of Employer. Employee appealed. Seventh Circuit affirmed.

The central issue in this case was whether being able to respond in emergencies to inmate violence is an essential function of the lieutenant position. Court looked at the seven categories of evidence set forth in 29 C.F.R. § 1630.2(n)(3):

(1) The employer's judgment as to which functions are essential;
(2) Written job descriptions;
(3) The amount of time spent on the job performing the function;
(4) The consequences of not requiring the incumbent to perform the function;
(5) The terms of a collective bargaining agreement;
(6) The work experience of past incumbents in the job; and/or
(7) The current work experience of incumbents in similar jobs.

Court noted that Employer's judgment is a factor, but not necessarily decisive. However, here, the written job description supported Employer's judgment that it is an essential job function for a lieutenant to be able to respond to emergency situations and defuse behavior with de-escalation or use of force. Court also looked at how much time a lieutenant spent performing this function and found that it depended upon, in part, the particular assignment. However, regardless of assignment, every lieutenant had to be able to respond to emergency situations. Court found that the consequence of Employee not being able to perform the job duty could be grave. In short, Court found that the undisputed facts showed that the ability to respond to violent emergencies is an essential function for lieutenants.

Section Three

Impact of Dobbs on Employers and Employees

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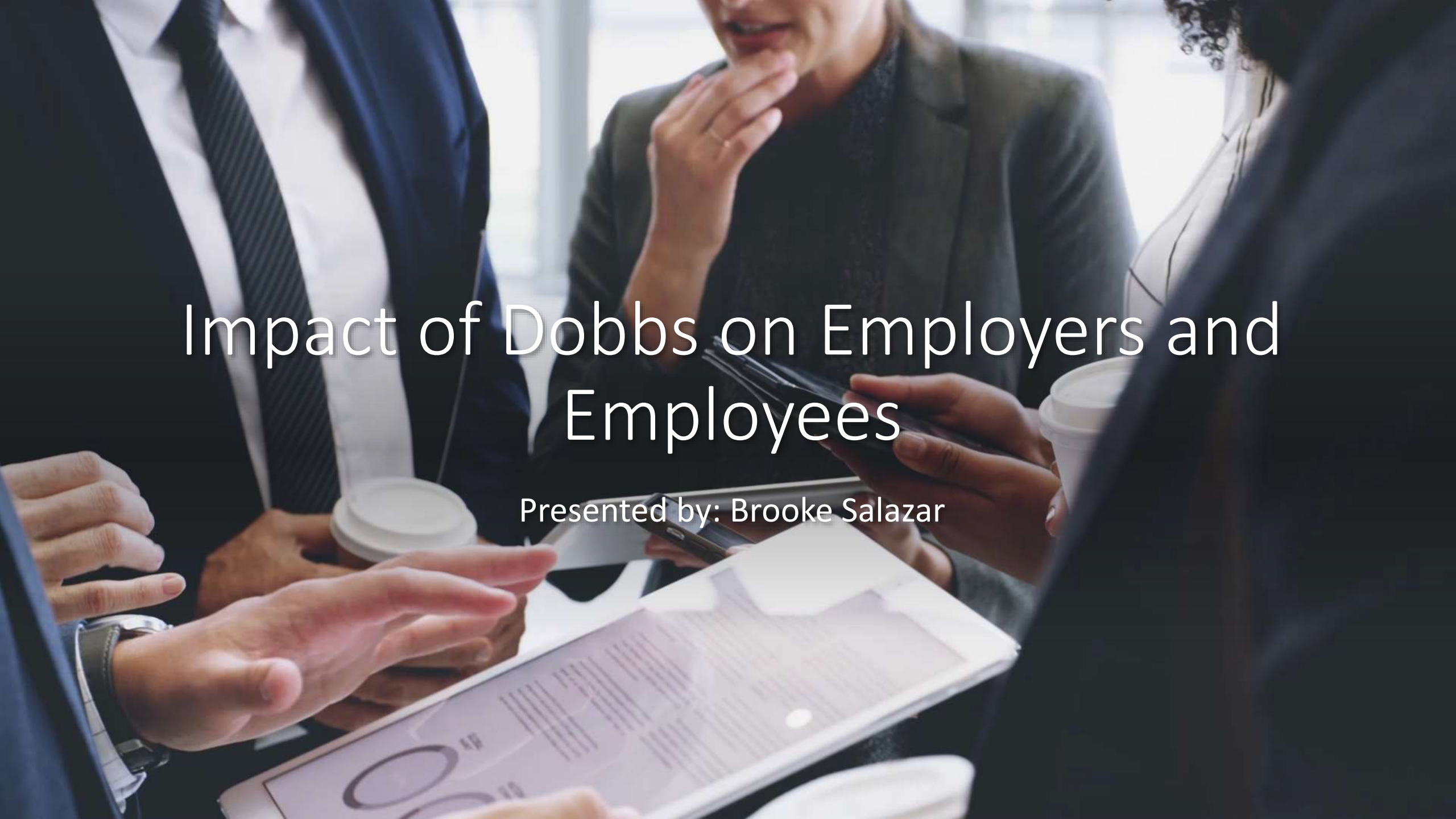
Section Three

Impact of Dobbs on
Employers and Employees…….. K. Brooke Salazar

PowerPoint Presentation



Impact of Dobbs on Employers and Employees

Presented by: Brooke Salazar

Disclaimer

- The following is not intended, nor should it be considered legal counsel or advice.
- I am not your attorney, and no attorney-client relationship has been nor will be formed prior to or during this training. Therefore, there should be no expectation of attorney-client privilege.

Agenda

- NLRB – Discussing Employee Benefit Plans
- Privacy Rule
- FMLA/ADA
- Travel Abortion Benefit Tax Liability
- Title VII: Religious Discrimination
- Pregnancy Discrimination Act
- ERISA/Non-ERISA Plans

Dobbs Impact on Employers

- Discussion of Employer Benefits
- Leave Laws
- Pregnancy Discrimination Act
- Title VIII
- HIPAA Privacy Rule
- Payroll Tax Liability
- ERISA/ Non-ERISA Plans

National Labor Relations Act

Discussing or advocating	Advocating	Protesting
Discussing or advocating for an employer to provide benefits to women seeking reproductive and abortion-related healthcare services,	Advocating for the employer to take a certain public stance on the issue, or	Protesting the employer's public position on the issue, may constitute protected activity under the NLRA.

NLRA Practically Speaking

- Social Media Posting Policy
  - Many colleagues are connected on social media and content may spill over into the workplace
  - Visibility of company attire or trademarks in personal social media posts
- Civility/Code of Conduct Policies
- Political Expression at Work
  - For example, t-shirts, bags, pins etc. with printed expressions regarding employees' stances on the matter
- Prepare Managers/Leaders on How to Answer Questions Regarding the Employer’s Decision on Abortion Coverage or Public Stance

HIPAA Privacy Rule

- Covered Entities: Health plans, health care clearinghouses and healthcare providers who electronically transmit any health information in connection with transactions for which HHS has adopted standards
- The Privacy Rule ***does not*** directly regulate employers or other plan sponsors that are not HIPAA covered entities.
- However, the Privacy Rule does control the conditions under which the group health plan can share protected health information with the employer or plan sponsor when the information is necessary for the plan sponsor to perform certain administrative functions on behalf of the group health plan. See 45 CFR 164.504(f).
    - Among these conditions is receipt of a certification from the employer or plan sponsor that the health information will be protected as prescribed by the rule and will not be used for employment-related actions.
- The covered group health plan must comply with Privacy Rule requirements, though these requirements will be limited when the group health plan is fully insured.

Privacy Rule: Fully Insured Group Health Plans

- The Privacy Rule recognizes that certain fully insured group health plans may not need to satisfy all of the requirements of the Privacy Rule since these responsibilities will be carried out by the health insurance issuer or HMO with which the group health plan has contracted for coverage of its members.

- A **fully insured group health plan** that does not create or receive protected health information other than summary health information (see definition at 45 CFR 164.504(a) (GPO)) and enrollment or disenrollment information is not required to have or provide a notice of privacy practices. See 45 CFR 164.520(a)(2) (GPO).

- Fully insured group health plans are exempt from most of the administrative responsibilities under the Privacy Rule. See 45 CFR 164.530(k). These health plans are still required, however, to refrain from intimidating or retaliatory acts (45 CFR 164.530(g) (GPO)), and from requiring an individual to waive their privacy rights (45 CFR 164.530(h) (GPO)).

HHS HIPAA Guidance

- June 29, 2022: The U.S. Dept. of Health and Human Services (HHS) addressed how the HIPAA privacy requirements (the privacy Rule) will limit access to private medical information relating to abortion and other sexual and reproductive health care, will be kept private and how other platforms (social media, messaging services etc.) are not subject to HIPAA.

HIPAA Privacy Rule:
Disclosures to Avert a Serious Threat to Health or Safety

- The Privacy Rule permits but **does not require** a covered entity, consistent with applicable law and standards of ethical conduct, to disclose PHI if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the disclosure is to a person or persons who are reasonably able to prevent or lessen the threat[1].
- According to major professional societies, including the American Medical Association and American College of Obstetricians and Gynecologists, it would be inconsistent with professional standards of ethical conduct to make such a disclosure of PHI to law enforcement or others regarding an individual's interest, intent, or prior experience with reproductive health care[2].

1. 45 CFR 164.512(j)
2. https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html#footnote21_rn1ek4i

Example: Disclosures to Avert a Serious Threat to Health or Safety

Example:

- A pregnant individual in a state that bans abortion informs their health plan administrator that they intend to seek an abortion in another state where abortion is legal. The health plan administrator wants to report the statement to law enforcement to attempt to prevent the abortion from taking place. However, the Privacy Rule would not permit this disclosure of PHI to law enforcement under this permission for several reasons, including:
- A statement indicating an individual's intent to get a legal abortion, or any other care tied to pregnancy loss, ectopic pregnancy, or other complications related to or involving a pregnancy does not qualify as a "serious and imminent threat to the health or safety of a person or the public".
- It generally would be inconsistent with professional ethical standards as it compromises the integrity of the patient–physician relationship and may increase the risk of harm to the individual.
- Therefore, such a disclosure would be impermissible and constitute a breach of unsecured PHI requiring notification to HHS and the individual affected[3].

3. https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html#footnote22_oc91mjf

FMLA

- While pregnancy itself is not a serious health condition as defined in FMLA, the continuation of treatment including any period of incapacity due to pregnancy can qualify as a serious health condition.
- Courts have also held that miscarriage is a serious health condition. *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D.N.Y 1996).
- An employee may be eligible to take FMLA leave for abortion-related care if their healthcare provider determines that they have a qualifying serious health condition.
    - When administering such leave requests, the employer should follow FMLA guidelines for obtaining certification from the employee's healthcare provider and maintaining confidentiality of the employee's medical information.

Americans with Disability Act (15 or More Employees)

- Pregnancy itself is not a disability, but if an employee experiences a disability/impairment due to a pregnancy or abortion-related condition, she may request an accommodation under the ADA.
- A pregnancy-related impairment is considered a disability if it substantially limits a major life activity (such as walking, standing, and lifting) or a major bodily function (such as the musculoskeletal, neurological, cardiovascular, circulatory, endocrine, and reproductive functions).
- Therefore, an employee who is seeking an abortion due to a disability may be entitled to take ADA-protected leave in addition to what you would normally provide under a sick leave policy, unless the leave accommodation would result in an undue hardship for the business.
- Ensure that if the employer is offering a travel reimbursement for abortion, then other necessary medical travel is covered or treated equally.

Tax Liability: Abortion Travel Cost Considerations

- IRS established by prior ruling that an expenditure made to prevent conception and childbirth, including obtaining a vasectomy, or to terminate pregnancy, is an amount paid for medical care as that term is defined in Section 213(e) of the Internal Revenue Code. Revenue Ruling 73-201.
- On the topic of travel expenses, I.R.C. Section 213(d)(2), which defines deductible "medical care" provides that "amounts paid for lodging (not lavish or extravagant under the circumstances) while away from home primarily for and essential to medical care shall be treated as amounts paid for medical care if—
  - (A) The medical care is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital) –and–
  - (B) there is no significant element of personal pleasure, recreation, or vacation in the travel away from home"
- Thus, travel undertaken to obtain medical services, which term includes abortion services, is deductible, if it otherwise complies with I.R.C. Section 213 limitations. However, under the statute, the amount considered as a deductible medical expense cannot exceed $50 for each night for each individual.

Cont’d: Tax Liability: Abortion Travel Cost Considerations

- If an employer means to reimburse the employee for any travel element, like food and lodging, most of that reimbursement is expected to be taxable wages.
- Further, employees whose unreimbursed medical expenses (unreimbursed by insurance or on a nontaxable basis, like an FSA-health reimbursement) can deduct medical expenses, as taxpayers, if they itemize deductions on their individual income tax returns, to the extent the sum of all unreimbursed medical expenses exceeds 7.5% of the taxpayer's adjusted gross income. I.R.C. § 213(a).
- The question of out of state abortion laws could still affect the taxability of any abortion coverage. Under Code Section 213, “medical care” does not include expenses for illegal operations or treatment. Treas. Reg. 1.213-1(e)(1)(ii).

Title VII: Religious Freedom

- The issue of abortion is closely intertwined with religious beliefs and practices, employers should take special care to ensure that no actions are taken against employees based on their sincerely held religious beliefs for or against abortion and that all policies and procedures are applied equally irrespective of viewpoint.
- In some cases, it may be appropriate to relieve an employee of a particular job task as a reasonable accommodation.
- This is a fact-specific inquiry, and the answer to the question will depend on the individual circumstances involved. Relevant factors include the specific nature of the duty at issue and the availability of others to perform the function

Title VII: Religious Freedom

- For example, if a self-insured plan offers travel assistance for abortion and a benefit plan administrator refuses to take part in administering the plan because of her sincerely held religious belief, then the employer should engage in a religious accommodation analysis to determine if the employee's request would place an undue hardship on the business.
- Reportedly, there has been a call from one plaintiff's attorney on LinkedIN saying, "If you or anybody that you know feels like you have been experiencing a hostile work environment or harassment due to your religious convictions, you may have a claim."[4]
- If the organization elects to make a statement regarding the Indiana stay order in January, ensure that discrimination/harassment reporting procedures are capturing any employee complaints of religious harassment.
- Both sides of the issue may have religious reservations regarding their employer's comments. There have been lawsuits by three Jewish women in Kentucky regarding religious freedom and abortion. The Satanic Temple has challenged the Indiana abortion ban as well.

4. https://www.benefitspro.com/2022/07/14/labor-of-law-employer-statements-on-abortion-could-spur-discrimination-hostile-work-environment-claims-412-132749/

Pregnancy Discrimination Act

- The Pregnancy Discrimination Act (the "PDA") amended Title VII of the Civil Rights Act of 1964 ("Title VII") to prohibit employment discrimination "on the basis of pregnancy, childbirth, or related medical conditions."
- The U.S. Equal Employment Opportunity Commission ("EEOC") takes the position that these protections also prohibit discrimination based on abortion[5].
- Specifically, Title VII protects women from being fired for having an abortion or contemplating having an abortion[6].

5. https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IC4b

6. 42 U.S.C. § 2000e(k). See *Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion."); H.R. Conf. Rep. No. 95-1786, at 4 (1978), as *reprinted* in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); see also, *Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008), cert. denied, 129 S. Ct. 576 (2008) (PDA prohibits employer from discriminating against female employee because she has exercised her right to have an abortion); *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).

ERISA

- 11 states, including Kentucky and Indiana, have enacted laws that prohibit employer health plans from covering abortion.
- However, the Employee Retirement Income Security Act of 1974 (ERISA), a federal law that governs employer-sponsored health plans, preempts the application of state insurance laws to self-funded health plans, a type of plan where the employer assumes financial risk for providing healthcare to its employees[7].
- If the employer's plan is a self-funded plan, the state abortion law may be preempted and not apply to the benefit. The chilling effect on abortion occurs in the lack of abortion services within the state.
  - ERISA cannot prevent states from enforcing criminal laws, such as those in several states that make it a crime to aid and abet abortion. Employers who adopt reimbursement policies are vulnerable to criminal charges from state and local prosecutors.
- ERISA does not preempt the application of state insurance laws to fully insured health plans, a type of plan where the employer buys coverage through a commercial insurer which is subject to state regulation, so the <u>employer with a fully insured plan will be subject</u> to the state abortion law.

7. In 2021, 64% of U.S. workers with employer-sponsored health insurance were covered by self-insured plans, according to the Kaiser Family Foundation. https://www.nbcnews.com/business/business-news/companies-offering-abortion-related-travel-expenses-legal-exposure-rcna35559

Takeaways

- Employer benefit plans that allow a travel benefit for abortion should be reviewed for the following:
  - Proper payroll taxation policies
  - Any potential disability or pregnancy discrimination claims because the health plan disallows for other type of healthcare travel and reimbursement
- Review social media, dress code and code of conduct policies to prepared for increased public expression from the workforce
  - Emphasize that policies should be uniformly applied
- Review how the employer oversees confidential health information
- Review leave policies, consider including examples

Questions?

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Section Four

ICLEF

RECENT DEVELOPMENTS IN EMPLOYMENT LAW

DECEMBER 20, 2022

Social Media in the Workplace

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Section Four

Social Media in the Workplace……....Jan Michelsen
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Introduction

Social media has dramatically changed the way people communicate in all areas of life, including work. It has replaced the water cooler of yore with a gathering spot for a wealth of data available to anyone who wants to see it, data which essentially lasts forever and which can be transmitted to millions across the globe with a single keystroke. Its pervasiveness has only broadened in recent years, as different age groups and segments of the population log on to an ever-increasing number of social media applications. More precisely, 490 million new users joined social media platforms in 2020 alone, with the pandemic driving individuals to connect with others virtually.

There is an abundance of information available, and it can be used in many different ways – whether to discipline employees for online postings, or to do some background snooping on employees' personal pages. In any event, much of the information is interesting, some of it is damning, and sometimes little of it is true or accurate. To most of us, obtaining that information "feels" simple and risk-free. It only feels that way, though. The universe of employment laws applies to virtual sleuthing no less than to old-fashioned means of communication and investigation. And consequences to both employers and employees are significant.

Like email (which for younger users, is now passé), internet postings tend to be informal, overly familiar, and careless in construction. But, like email, because they are computer (or cloud) based, they last a lifetime. It's stunning sometimes to contrast the level of care people give traditional letters, which can be destroyed permanently, with the scant attention they give to electronic mail and virtual postings, which endure in the virtual world *ad infinitum*.

Part of what makes the social media universe such complex territory is that people operate within it as if they expect it is private even when they know it is not. Said another way, the content of the information posted reflects a sense of security, while the reality of the search engines and the actual operation of the web itself demonstrate that there is no reason for anyone to feel that their private information is secure. This is worrisome for employers that seek to use the web to post internal corporate information and it is worrisome for employees who use social networking sites to share information with the world that they might (before the internet) have shared with only a select few friends. Cutting, pasting and posting is simply too easy – add the ubiquity of cell phone cameras and the resulting videos to the mix and there are few limits to what the virtual world knows almost immediately after any event occurs or information is published, even internally.

So, what does the law do with all of this? As the discussion that follows demonstrates, at least with regard to information about employees, this isn't rocket science (at least the law part) – it's the application of familiar principles to an ever-changing virtual world. With regard to corporate information, the challenges are real but can be surmounted with care.

Social media brings both risks and benefits to employers and employees. Because information can be posted immediately without much reflective thought and is instantaneously accessible by billions, the information may be damaging to both the person posting it and the company employing him or her. On the other hand, social media may be useful in making hiring decisions and determining if candidates are a good fit with the culture of the business. In addition to the business uses of social

media, attorneys routinely and successfully use this type of information in both prosecuting and defending lawsuits involving employees and former employees.

Most employers (and employees) have some understanding of how the internet, social media and related technologies can create opportunities and risks in the workplace. Much has been written about how the use of Facebook, Twitter, Instagram, Snapchat, and TikTok, at and away from work can create potential liability for unwary or careless employers. While many issues have been addressed by the courts and administrative agencies, others remain unresolved. Additionally, new challenges arise on a regular basis and in some cases from unexpected sources.

Identifying technologies that can create privacy issues

Internal Email and Internet usage

It is safe to say that virtually every employer today provides some or all of its employees with access to company email addresses. Most employers also provide employees various degrees of internet access at work for business purposes. Many employers have detailed policies addressing how these technologies can and should be used.

Blogs and Discussion Forums

These websites can take various forms and be used for various purposes. Employees may use blogs to post opinions on issues of the day, promote a business, or discuss a hobby. Blogs can also be used as an online diary. They may or may not allow visitors to leave comments. Discussion forums such as Reddit, Quora, and Digg allow users to share content and anonymously engage in large-scale public conversations.

Facebook, Twitter, and Other Social Networking Sites

These sites allow users to join groups, interact with others they "follow" or designate as friends, share pictures, send messages, and issue public or private announcements. The extent to which the content posted can be viewed by the general public is controlled by privacy settings and similar options selected by the user.

Mobile Phones and Tablets

Almost every employee will have a mobile phone, and almost all these phones have cameras and video capability. Many of these phones can access the internet as well as company email and computer systems. Tablets can do virtually everything a cellular phone can do and more. These devices and their users can be tracked by GPS and other technologies. Some employees are provided phones and tablets for business use.

Identifying issues that can arise when employees use social media

Many employers utilize technology to evaluate applicants before they are hired, and also to monitor employee conduct after they are employed. While this can provide valuable information about

applicants and warnings of potential problems, this conduct also presents a minefield of liability. Areas of possible risk include:

- Invasion of Privacy
- Discrimination
- Off-duty conduct laws
- Discrimination and retaliation claims
- Whistleblowing under the Sarbanes Oxley Act (SOX)
- Protected concerted activity under the National Labor Relations Act (NLRA)
- Stored Communications Act, Wiretap Act, and electronic monitoring statutes.
- Fair Credit Reporting Act (FCRA) violations
- Defamation
- Copyright and trademark violations
- Disclosure of proprietary, confidential and trade secret information
- Possible tort and statutory claims by coworkers against the Company including harassment, discrimination, negligent retention or supervision, and intentional infliction of emotional distress
- Possible business tort claims including tortious interference with current or prospective business relations or contracts, non-compete and unfair competition issues, and fraud
- Regulatory issues such as false endorsement, FTC Endorsement Guide issues, and securities law issues such as 10(b)-5 and selective disclosure claims.

Use of social media investigations as a basis for discipline and termination

Given the substantial risks of liability that employees can cause by use of technology and social media both in and out of the work place and on or off duty, many employers actively monitor employee blogs and social networking sites. In other cases, statements may be brought to an employer's attention through unsolicited reports. The temptation to fire an employee for what looks like clearly inappropriate or unacceptable conduct can be overwhelming. There are, however, a myriad of considerations that go into any such decision. Some of these, such as whether a termination might raise claims of discrimination or retaliation, are obvious. Others, such as whether the conduct is protected concerted activity, and therefore permitted by the National Labor Relations Act, are less well known and much less clear.

While employees have always discussed the workplace both during and outside work hours, now those conversations can take place on social media. Employee posts on Twitter, Facebook, Snapchat or other social media outlets can create unique issues for employers, particularly if an employee uses social media to discriminate against or harass another employee, disclose a trade secret or identify him or herself as a Company employee when posting a controversial statement.

The fired-for-posting scenario is alive and well in the employment law world, as people continue to get fired for complaining openly about their boss or the workplace online, making sexist or racist "jokes," and otherwise speaking inappropriately. Apparently, employees underestimate their employers' social media savvy. And even if the employer doesn't know its way around Twitter, coworkers and others who do will let them know if an employee is complaining about the company, bashing other employees, or just acting like a jerk online. Most companies have a zero-tolerance

policy toward this that will lead to immediate termination. In light of the serious business and legal concerns outlined above, many employers actively police employee blogs and social networking sites, while other employers simply wait for coworkers to report social media postings. Regardless of how the employer learns of the postings, more and more employers are disciplining employees based on social media content.

Social media monitoring doesn't stop once employees are on the job. Employers continue to monitor employees' online presence even after they're hired. Nearly half of employers (48 percent) say they use social networking sites to research current employees—10 percent do it daily. Further, a third of employers (34 percent) have found content online that caused them to reprimand or fire an employee. In some cases, employers become aware of social media use that can create legitimate grounds for termination. While this may be true in some cases, use of this data can also be fertile ground for litigation against the employer. Some areas of concern are discussed below.

Off-Duty Conduct Laws

Some states have laws that prohibit discipline or discharge for using lawful consumable products such as alcohol and tobacco. Other states protect the right to possess firearms. Thus, a YouTube video of an employee waving a gun in one hand and a beer in the other while dangling a cigarette from his or her lips might raise a number of concerns concerning the health habits, judgment, and character of the employee. Nevertheless, it might be unwise to take an adverse employment action against the employee absent a clear connection to workplace issues. For example, if a posted video included a drunken rant against a customer or threat to use the gun on someone, action may be permitted or even necessary. On the other hand, a video showing an employee engaging in or posting about less direct, clear-cut (and yet unsavory) behavior may constitute protected conduct under these laws. It is prudent to check local statutes before deciding to take adverse actions. Finally, employers are entering a brave new world with the legalization of both medical and recreational marijuana in some states. Given that marijuana is still illegal under federal law, off-duty use may or may not be protected by state courts, depending on how each individual state's law is crafted.

Discrimination and Retaliation

Employers should consider the anti-retaliation provisions of federal and state employment laws before taking adverse action against employees. Title VII, for instance, prohibits an employer from retaliating against an employee for opposing any unlawful discriminatory practice. Some employees may attempt to oppose a discriminatory practice on a social networking site or blog, which means that subsequent adverse action by the employer could lead to a retaliation claim.

Employees discharged due to use of social media may argue discriminatory enforcement. Title VII establishes that it is unlawful for an employer to discriminate due to "race, color, religion, sex, or national origin." The Americans with Disabilities Act and the Age Discrimination in Employment Act offer similar protections to disabled employees and to employees over the age of forty.

Many individuals include demographic information on social networking sites or in the content of blogs, including sexual orientation, religion, age, medical conditions, marital status, and other protected categories including pregnancy that otherwise would not be known by employers. The difficulty for employers in this type of lawsuit is the proverbial "un-ringing of the bell." The

employer is forced to argue that while it knew of information related to a protected characteristic, this information did not sway its employment decision. Moreover, it has become fairly common for employees to include LinkedIn links on their resumes that may reveal the above information as well as interests, recommendations, groups, associations, book reading lists, embedded videos, travel plans, documents, websites, and related Twitter accounts. Thus, while it might be difficult for an employee to prove that online disclosure of a protected characteristic resulted in termination, it also would be costly for an employer to successfully defend its actions in a lawsuit.

Employers should consider the impact of federal, state and local discrimination laws when considering whether and how to react to online postings. For example, acting against a male employee for making a racy post about a female employee while declining to take action against females making the same types of posts about male co-workers, could lead to claims of discrimination. On the other hand, failure to take action in both cases could support claims alleging the existence of an illegal hostile work environment. Further, statements that may appear to an employer to be offensive or inaccurate may be protected under applicable discrimination laws. For example, Title VII prohibits employers from retaliating against an employee for "opposing any unlawful discriminatory practice." *See* 42 U.S.C. Sec. 2000e-3(a). Disciplining an employee for posting an accusation of discrimination or harassment could be perceived by a court as retaliation for protected conduct.

A Tool for Harassment and Bullying

Sexual harassment claims premised on content discovered on the Internet are a continuing problem. It is not just what employees post that might matter; it is what others might do after finding those posts. For example, an employee might post a compromising cell phone photo on his or her Facebook page. Then, another employee might see that photo and copy it and attach it to an email or even a text message. That message could then make its way throughout the employee's place of business and itself become the basis of a sexual harassment claim.

The line between work and personal is a blurred one. With 24/7 connectivity, employees need not wait to be in close physical proximity to engage in behavior that may elicit claims of sexual, racial, or other harassment. And, it may be difficult to know who is doing the harassing, if posts are anonymous or by hiding behind someone else's identity. And, with a computer or phone screen as a shield, what is said may be even more aggressive or explicit than what the harasser would risk in person. What's worse, if these texts, or emails, or videos are preserved by the victim, they will serve as almost insurmountable evidence of the severity or pervasiveness of the alleged harassment. Online harassment or sexting may include derogatory terms, sexual language and propositions, nude or pornographic images, revenge porn, or even threats of violence. This may occur on Facebook and other social media sites, chat rooms, texts, voicemail, videos or photos, etc. Employers must understand that behavior outside of work hours, or away from the workplace, still can impact the employment relationship, just as harassment by a manager at a sales meeting is no less serious than what is done in the file room. If a manager or coworker is engaging in harassment or bullying, employers have an obligation to investigate, stop the conduct, and take appropriate remedial action. Consider these dangers:

- Employees may feel emboldened to pursue unwanted relationships with coworkers who use apps.

- Coworkers may make inappropriate comments regarding profile picture or romantic interests.
- If "like" not reciprocated, may lead to retaliation or animosity.
- Same issues as in past but increases frequency of such interactions exponentially.
- Could subject employer to liability for harassing, discriminating, and negligent supervision.
- Unlike objectionable graffiti, not so easy to remove and remediate.

In short, the speed of electronic communication and people's relative lack of filters (and common sense) when using social networking sites facilitate the spread of information that would have once been considered deeply private and highly embarrassing. Motivated by concerns about coworkers or superiors creating a hostile environment via social networking sites, some states have introduced or are considering legislation—even criminal laws—regarding online harassment. Indiana has not introduced similar laws—yet. "Textual harassment" is also a growing concern. Coworkers no longer have to call someone to ask them out on a date, but can simply text message them. And unfamiliar with normal social cues, the co-worker can't quite tell from the response whether the other employee was uninterested or simply playing hard to get, so another text is sent. And another. And another. Before you know it, the company is hit with a sexual harassment lawsuit and that co-worker or subordinate is armed with pages of text messages as scintillating evidence. Even if employees post harassing or derogatory information about coworkers away from the workplace, for example, an employer may be liable for a hostile work environment if it was aware of the postings, or if the harassing employee was using employer-owned devices or accounts. The issue is further complicated as more employers use a "Bring Your Own Device" policy, in which they require or expect employees to use personal laptops, smartphones, or other technology while on the job.

Best Practices

- Exercise caution and consult with employment counsel before taking an adverse employment action against an employee due to comments made on social media. Check for privacy/off-duty conduct, whistleblower and protected speech issues.

- Ensure that anti-discrimination and anti-harassment policies clearly state that harassment, discriminatory and unprofessional conduct of any kind will not be tolerated, including on social media.

- Make sure that electronic media and internet usage policies specifically state that it is a violation of company policy to use the internet/social media to sexually harass or discriminate against employees. Reinforce and reference these policies during management and employee sexual harassment/discrimination training.

- Take care when using social media as part of an employment investigation and protect against discriminatory enforcement claims.

Monitoring Use of Email, Internet Usage and Social Media

Most employers have in place controls on employee access to and use of their electronic systems, including email, access to data, and internet usage. These controls can include formal written policies, password access to internal systems and data, blocking access to certain categories of web destinations, and monitoring email usage by everything from keystroke tracking to reviewing content. Control of technology usage by employees is absolutely essential to the security of a company's valuable data. Whether through intent or negligence, employees can compromise confidential, proprietary and trade secret information by sharing it with or exposing it to outside third parties. On the other hand, about 25 states now have laws which prohibit employers from asking for or obtaining passwords to personal social media accounts. Certain laws also prohibit employers from requiring employees to change privacy settings or add individuals from the company as a friend or contact.

Careless or malicious messages by supervisors and other employees to each other or outsiders can create all manner of problems from hostile work environments prohibited by discrimination laws, to torts against employees and businesses, to unfair labor practices under the National Labor Relations Act. Inappropriate comments, whether made internally or externally, can damage the reputation of an employee, a product, or the entire company. Indeed, fortunes have been lost because someone either was not thinking or did not care when he or she created the "smoking gun exhibit" that caused a lawsuit to be lost. At the same time, failure to properly monitor, or taking disciplinary action where employee conduct might be protected by law, can cause exactly the kind of liability the employer is trying to avoid. Balancing these competing concerns is the key to minimizing the risk of liability.

As a general rule dating back to the early 2000s, an employer's polices and conduct will control the extent to which an employee might be able to establish that he or she has an expectation of privacy that might prohibit a search of a work computer. *See, e.g.*, *Levanthal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (employee could claim expectation of privacy where employer did not have a general practice of routinely conducting searches of computers and had not placed the employee on notice he should have no expectation of privacy as to the contents of his computer); *Haynes v. Att'y Gen. of Kansas*, 2005 WL 2704956 (D. Kan. Aug. 26, 2005) (computer use policy that stated "there shall be no expectation of privacy in using this system" sufficient to defeat invasion of privacy claim); *Garrity v. John Hancock Mut. Life Ins. Co*., 2002 WL 974676 (D. Mass. May 7, 2002) (no expectation of privacy relating to emails where employees were told that the company could review their emails even though employees could create personal email folders and password protect the folders).

Stored Communications Act, Wiretap Act, and Electronic Monitoring Statutes

Some states (not Indiana) require employers to provide notice to affected employees before conducting electronic monitoring of employee computer and email usage at work. The federal Electronic Communications Privacy Act ("ECPA") protects the privacy of certain electronic communications. Title I of ECPA amended the Federal Wiretap Act ("Wiretap Act"), and made unlawful the intentional interception of wire, oral, or electronic communications. Title II of ECPA created the Stored Communications Act ("SCA"), which addresses access to stored wire and electronic communications and transactional records. Under the SCA, it is unlawful to intentionally access, without authorization, a facility through which an electronic service is provided and thereby access a wire or electronic communication while it is in electronic storage. Generally, the SCA only protects communications in which the employee had a reasonable expectation of privacy. Thus, where an employer makes clear that certain communications are not protected or where an employee posts information on publicly-available social media, and when the employer does not access the data by

coercive or surreptitious means, the employee likely is not protected. *See, e.g., Snow v. DirectTV*, 450 F.3d 1314 (11th Cir. 2006) (employee failed to state SCA claim because, among other things, data at issue was made available to the public on social media pages); *Pietrylo v. Hillstone Rest. Grp.*, 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (employer liable under the SCA where two managers pressured an employee into providing her MySpace password so the managers could access a private, invitation only chat group started by plaintiffs to vent their frustrations about work with fellow employees; jury granted punitive damages, viewing the employer's actions as malicious).

Electronic data is akin to today's lockers and handbags and desk drawers in the workplace. Most employers have established policies designed to defeat any expectation of privacy an employee might have in electronic files maintained on his or her computer or other company devices via electronic use policies. However, employees often expect that what they do on their home computer or on their personal cell phone is private. This raises many questions: Do employees have any expectation of privacy in information that they post on a social networking site or elsewhere on the internet? If an employee posts something on Facebook should she anticipate that an employer will see it? If an employee posts negative comments about his job on a blog, does the employee have the reasonable expectation that the employer will not see it?

Given the above, expectations of employee privacy can be reduced by the following steps:

- Prepare and disseminate a written policy that covers all of the company's technologies (computer and data systems, email, internet usage, company issued phones, laptops, and tablets)
- Make it clear that the company retains ownership of all hardware and software (or software licenses
- Make it clear that employees have no expectation of privacy when using any company technology
- Clearly reserve the right to monitor all usage of all hardware and systems, including email, texts and web usage
- Make it clear that the Company reserves the right to require the employee to surrender all hardware and data upon request
- Make it clear that the employee is required to surrender all passwords or other access codes upon request
- Reserve the right to limit or restrict usage in the sole discretion of the company
- Train employees on proper usage of the systems to promote good business ethics and minimize risks of such things as hostile environments, inappropriate communications, misuses for non-business reasons, and creation of damaging documents that can create liability where it does not otherwise exist.

Use of social media data in the hiring process

The allure of social networking sites during the hiring process is understandable. Employers often find information that either corroborates the applicant's claimed qualifications or that disqualifies the candidate for separate reasons. Social media presents an enticing behind-the-scenes look at candidates' lives. While much of the information obtained may be innocuous, other

information can be damning or even false. It is important that employers consider the impact of employment laws before or when they inquire into prospective employees' social media use.

A survey conducted by the employment recruiting site, CareerBuilder, shows that employers' use of social media to screen candidates has increased 500% over the last decade. In that survey approximately 70% of the employers surveyed admitted to using social networking sites to research candidates. A similar survey also showed a majority of recruiters are using online search engines (i.e., Google) to research candidates.

Social media also can be used to expose candidate fabrications. When asked what job seekers lie about, more than 70% of recruiters state that candidates are most likely to inflate their job experience during the hiring process. What else do they lie about? Inflated salary, competitive offers and technical skills.

As useful as it is, however, using social media in the hiring process does raise a number of concerns.

Invasion of privacy

One issue that often arises is whether an applicant has any claim to privacy because they consider their postings "private." Generally, this question is going to turn on whether the applicant has a reasonable expectation of privacy in the information viewed. Absent some effort on the part of the employer to hack into the private portion of a social media site, the applicant is not likely to prevail on a claim that he or she had a reasonable expectation of privacy as to anything posted for public view on a web site.

Defamation

It is axiomatic that one cannot believe everything one reads on the internet. This can be particularly true with respect to social media sites. Employers need to be sure that the information they are reviewing actually relates to the applicants they are investigating. Not only do different people have the same name, but it is possible that fake sites could be created or that a genuine site has been hacked. Subsequent publication of false information, even if done only negligently, could give rise to claims for defamation.

Discrimination

Federal and state laws make it illegal to discriminate on the basis of variety of protected categories, including race, age, sex, national origin, religion, disability, genetic information, military status familial status, and sexual preference. Local laws can add personal appearance, political views, and other categories. Once an employer has accessed a social media site with pictures of the applicant and his or her interests and views and hobbies, it may become very difficult to deny knowledge of membership in a protected category. From there, the long journey through discrimination litigation could begin. This can be a costly journey—even in victory.

Fair Credit Reporting Act

Notwithstanding its title, this federal law addresses "employment background checks for the purposes of hiring." It applies when "an employer uses a third party screening company to prepare the check." Thus, employers need to verify whether third party vendors used to screen applicants are viewing social network sites to obtain information. If so, the employer needs to be sure that applicants are informed of the investigation, given the opportunity to consent, and notified if the report is used to make an adverse decision.

In 2021, Facebook had an estimated 2.9 billion unique monthly users. Instagram had approximately 1 billion active monthly users. Twitter had approximately 330 million active monthly users, and LinkedIn enjoyed an estimated 250 million unique monthly users. Given the continuing migration of our daily and personal lives into the blogosphere, it is inevitable that more and more employers are turning to the same social media to research and evaluate their employee candidates.

In a traditional hiring process, companies would weigh the candidate's resumes when deciding whether a face-to-face interview was desired. If needed, companies could request discrete items, such as transcripts and writing samples, but the universe of information available to the company's decision-makers was small and well-defined. Most companies would never dream of asking an applicant about her or his race, age, or religious beliefs before deciding whether to call them in for an interview. Thus, the employers making the hiring decisions could not plausibly be said to have made discriminatory decisions based on the unknown information. Once candidates were brought in for interviews, employers may learn of certain protected classifications (such as a candidate's race, gender and approximate age), but many others would remain unknown throughout the entirety of the hiring process.

With the proliferation of social media, however, those boundaries are falling away and the universe of available information is rapidly expanding. Once the employer views an individual's social networking page, there is no going back. Many of the social networking sites provide user profile pictures, which will automatically provide the employer with information relating to race, gender and age. Some profile pictures will disclose an individual's religious garb. Once an employer has accessed a social media site with pictures of the applicant and his or her interests and views and hobbies, it may become very difficult to deny knowledge of membership in a protected category. From there, the long journey through discrimination litigation could begin. This can be a costly journey even in victory. Moving past the page, the employer runs the risk of discovering whether the individual is disabled, was in the military, has a family, practices a certain religion (or none at all), etc.

Although social media information does not inherently lead to discrimination, employers who make adverse employment decisions after having viewed an applicant's social media profile may find themselves subject to a discrimination claim. If an employer reviewed the social media of any candidate applying for a position, each and every applicant potentially could bring a discrimination claim based on one protected classification or another. Having visited a site where the information was available, the employer could be deemed to have known of and relied upon the information, even if the employer never actually saw it. Similarly, employers could face disparate impact claims if statistics showed that applicant's with certain protected characteristics (i.e., race) in common were being systematically refused employment. Even if there is no disparate impact based on information obtained from social media, there could still be a disparate impact if the company tended to hire candidates who had social networking profiles instead of candidates who did not. This could occur

because (as a generalization) social networks tend to be comprised of younger and more affluent users.

Best practices for using social media in hiring

Social networking can be a valuable tool for companies or a trap for the unwary. For those companies wishing to engage in social media research, there are a number of precautions to take. First, the company must adopt and enforce a standard policy, which establishes specific parameters for the searches to which every candidate will be subjected. The searches should include only publicly-available information. They should be conducted after an initial interview to avoid any allegations that the company used impermissible information in deciding which candidates to call in for interviews. The policy also should designate a certain individual or department that will be responsible for conducting the searches. The designated party should be separated from the hiring decision-makers and should only pass certain, relevant information to those decision-makers. Finally, to the extent that information from social networking sites is included in the employment decision, that information should be documented and given to the candidate.

Thus, although companies may find social networking sites useful in hiring, like almost everything related to social media, there are risks and rewards. Risks include discriminatory hiring, privacy rights infringement, and consideration of non-job-related criteria. If and when an employer consults social media in the hiring process, employers should consider carefully whether searching social media sites is worth the risks in each particular case. If the decision is made to pursue this mode of data collection, consider the following:

- Review only data available to the public.
- Do not try to gain access to private data through covert means; in some states, not Indiana, you cannot ask applicants for passwords or other means of access to private social media sites. The best practice is to apply this principle to all states.
- If a third party conducts your background checks, be sure it is complying with all aspects of the Fair Credit Reporting Act.
- Try to conduct the web search as late in the process as possible to avoid claims that the applicant was prematurely screened using prohibited criteria.
- Verify that any information used in the decision making process is both authentic and accurate – if necessary and appropriate, consider asking the applicant about questionable information before relying on it.
- Provide notice to applicant and ask permission to check the sites (some employers even ask for passwords, although many states now prohibit that inquiry by statute).
- If accessing site without notice, given applicant a chance to respond to what is found. It is easy to impersonate someone on the web, and there are lots of identity and accuracy issues.
- Consider a "Chinese-wall" between the staffer who actually accesses the sites and the decision maker by providing clear instructions to the viewer about exactly what *work-related* information is relevant and lawful to consider.
- Use social media screening as part of a comprehensive screening program, *not* as the only tool.

- Follow EEOC and FCRA guidelines just as you would for other types of publicly available information such as criminal records.
- Have a policy regarding how your hiring managers and others involved with hiring process will use social media carefully, legally, and as needed to screen. Make sure those folks are trained recruiters.

Post-Employment Postings: Strategies and Solutions

In today's social media-centric world, former employees often take to social media to air their discontent over the termination of their employment, share negative thoughts about their perception of various aspects of how their former employer conducts business and a plethora of other comments. Employers often have difficult decisions to make – do something to stop the rant or have it removed? Do nothing and hope the hubbub dies down? File for a restraining order to stop additional postings? Companies should carefully consider both their legal and quasi-legal options, as well as potential consequences of these options, prior to taking any action.

Employers may attempt to control negative, untrue, harassing or demotivating social media posts by current and former employees, customers or identifying anonymous posters so that appropriate action can be taken by:

Asserting violations of a site's "Terms of Use" to force removal of inappropriate posts.

A site's "Terms of Use" agreement or policy provides employers with some basis to challenge inappropriate posts. Simply by using a site, users agree to the terms, conditions, limitations and notices set forth in the site's "Terms of Use" agreement or policy. If you cannot find a "Terms of Use" agreement or policy on the site, look for its privacy policy. It will likely contain the same or similar terms.

Placing the site on notice that it may be violating the Telecommunications Harassment Act by permitting an offensive post to remain.

This Act may provide some relief to employers in attempting to remove posts that contain harassing, abusive or threatening content. The Act prohibits sites from knowingly permitting their site to be used for postings "with intent to annoy, abuse, threaten or harass any person." A site risks potential criminal exposure under the statute if it allows abusive, threatening or harassing posts to remain on its site after being put on notice that a particular post's content violates the Act. *See* 47 USC §§ 223(a)(1)(C) and (h)(1)(C).

Discovering the identity of the author of the anonymous post.

Employers benefit from having signed agreements that require employees to turn over laptops or other electronic devices for inspection and imaging at termination or upon request. Such agreements should include an employee's personal electronic devices if used for work. If an employer believes that a current employee is the author of the anonymous post, this type of agreement can assist the employer in confirming his or her identity through inspection or forensic examination of the device. Forensic examination may reveal the deleted emails or texts (or remnants of them), including the dates and times the device visited specific websites. If, for example, an employee created a Gmail

account from his device to send anonymous threats to his boss or coworker, a forensic examination of his device's internet history and email remnants can reveal that and establish the identity of the "anonymous" poster. Forensic examination of smart phones can be another means for employers to obtain the content of text messages, especially when the content of texts is next to impossible to obtain via subpoena or signed authorization. Because cellular service providers do not want to be in the business of producing text messages in employment or other civil disputes, they preserve the content of text messages for mere days or not at all.

Create a culture built on trust and responsiveness to internal complaints so use of social media is unnecessary.

Employees are less likely to engage in social media attacks if employers create a culture that demonstrates that they respect and promptly address employee concerns. Most employees are at-will and can be discharged at any time without notice. However, giving employees notice of their performance problems and an opportunity to correct them can help prevent disparaging posts. Even if the discharged employee does not accept the termination decision, most co-workers will recognize when a peer has been given a fair opportunity to fix performance issues. In such situations, employees are less likely to post negatively on social media or engage in protected concerted activity regarding the terms and conditions of their employment. Although it never hurts to remind employees of the company's internal complaint procedures, employers should be careful to not tell employees that they should complain internally rather than air their grievances online. The NLRB views such policies or directives to have the effect of inhibiting employees from engaging in protected concerted speech in violation of Section 7 of the NLRA. *See NLRB Operations-Management Memorandum ("OM")* 12-59, at 11 (May 30, 2012).

Social Media and Employee Speech

Either modifying existing policies or creating a policy about blogging and social networking offers a chance to minimize the risks for employers. A large number of those terminated for their postings have said that they were not aware of their employers' position on the use of social media. Putting that policy in writing and circulating it among the employees is an effective way to bridge that lack of communication. Additionally, it provides a reference point if it is necessary to take adverse action against someone for their online activity. Many companies have existing policies that are relevant and should be reviewed to make sure that it is clear that employee blogging would be covered. Among the possibilities:

- Employee handbooks
- Prohibitions on blog content that is libelous to the employer or discloses trade secret-type information
- E-media or other technology policies that deal with internet usage, email and instant messaging.

When preparing policies that impact employee speech, including on social media, employers should be cautious about not going "too far." The ubiquity of internet access and the carelessness with which information is launched into cyberspace means that more employers will face claims

based on allegations related to social media. Prudent employment practices must include limitations on electronic access and on the transmission of information obtained electronically. Employers also need to be vigilant about monitoring the degree to which their own confidential information is making its way through cyberspace. Many employers are adopting social media policies to increase efficiency, prevent security breaches, maintain goodwill and reputation, and protect confidential information and trade secrets. Whatever policies are developed, employers must be sure that any policy is not overbroad so as to stifle employees' NLRA Section 7 rights.

National Labor Relations Act

In Advice Memoranda, the NLRB has analyzed a variety of situations involving exchanges on social media to determine whether they were protected concerted activity or whether the employers' policy was overbroad. However, these are fact-sensitive inquiries and it is difficult to predict whether a particular situation will be held to be protected concerted activity.

Other issues regarding social media in the workplace

Lost productivity

The time employees spend on social media at work has been growing by leaps and bounds and severely impacts a company's bottom line. In fact, 24% of employers report that they've fired people for using the internet for non-work-related activity (such as shopping online or checking out Facebook, for example) during the workday and 17% have dismissed employees because of something they posted on social media, according to CareerBuilder.

Still, most employers see a complete ban of social media on the job as impractical as unenforceable. Plus, studies show employee use of social media is positive engagement, collaboration, learning and alleging information, saving time, and reducing stress. "To expect someone to maintain focus for eight hours straight is unreasonable," explained Suzana Flores, author of *Facehooked: How Facebook Affects Our Emotions, Relationships, and Lives*. "People need a break and, in today's world, that break includes social media access." To be fair, most employees would probably be doing something else equally unproductive if they weren't on Facebook.

Social media and liability for deceptive practices

Employers should be aware that some comments by employees about company products and services made on blogs, Facebook, message boards, and the like can expose the company to liability even when the comments are not authorized or sponsored by the company. For example, Federal Trade Commission regulations require that employees disclose "material connections" when making product endorsements. *See* 16 CFR Sec. 255. State consumer protection laws and attorneys general actions could also create risks of legal action. Employers should have policies in place that caution employees against making inappropriate statements that could be construed as false or misleading product endorsements. Enforcement of the policy is a key component of its effectiveness.

Whistleblowing Under SOX

The Sarbanes Oxley Act of 2002 protects employees of publicly traded companies when they report conduct by the employer that the employee reasonably believes violates a rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders. Some states have similar provisions. Generally, these laws require an employee to make a report to the government or the employer. Thus, a post alone usually will not qualify as a "report" triggering protection under these laws. On the other hand, posts may reveal that a "report" has been made, which could in turn trigger the protections of these whistleblower laws.

Conclusion

Social media may be, at one, a useful tool and dangerous sources of practical problems and legal liability. It is essential for both employers and employees to stay informed of new developments. They will continue to come frequently, will have a significant impact on the way employees are disciplined, and can often defy logic and common sense. The prudent employer will be vigilant so that surprises can be minimized and risks reduced. Employees will be vigilant if they want to keep their jobs. If employers (and employees) are aware of the risks, they may be able to successfully balance utility against danger.

Section Five

Employment Law
Retaliation Update

Presented by
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Section Five

Employment Law Retaliation Update…….Stephanie Jane Hahn

I. Federal Law Cases

A. Title VII - Race Discrimination and Retaliation

Groves v. South Bend Community School Corp., No. 21-3336 (7th Cir. 2022)

The School District includes four high schools. Groves, who is white, started at the District in 1991 as a teacher. In 2007 he became the Adams High School athletic director. In 2017 Groves applied to serve as Corporation Director of Athletics, a new, District-wide position. Superintendent Spells interviewed four applicants and recommended Gavin, who is Black, explaining that Gavin inspired confidence in his ability to repair the District's relationship with the Indiana High School Athletic Association. The employer contended that Groves interviewed poorly and seemed to boast of firing 24 coaches during his tenure. And noncompliance with Association regulations occurred under Groves's watch at Adams.

Groves sued under Title VII, noting that Spells is also Black. The District later eliminated the Corporation Director of Athletics position and created a hybrid Dean of Students/Athletics position at each of the four high schools. Groves, Gavin, and seven other candidates applied for the four new positions. The Riley High School position went to Gavin.

Groves added a claim of retaliation based on the elimination of his position.

The District Court granted summary judgment to Defendant.

The Seventh Circuit affirmed the summary rejection of Groves's claims. Groves was not substantially more qualified than Gavin. Both met the criteria that the District required for the position. The court rejected a claim of pretext. Although Gavin's criminal background came to light after the challenged hiring decisions, the District interpreted its background check policy as applying only to external hires, not existing employees moving to new positions.

Runkel v. City of Springfield, No. 21-2418 (7th Cir. 2022)

Ms. Runkel worked as the assistant purchasing agent for Springfield, Illinois. The purchasing agent announced that he planned to leave the position. Runkel, who is white, unsuccessfully sought a promotion to that job. The city promoted a Black candidate, Wilkin, who had worked under Runkel's supervision. Runkel was offered a $5,000 per year raise but nonetheless stated that she believed the hiring was discriminatory; she caused a disturbance in the office.

Runkel filed a race discrimination charge with the EEOC. Runkel was disciplined and the promised raise was revoked. She retired and filed suit under Title VII, 42 U.S.C. 2000e-2(a)(1), 2000e-3(a), and the Equal Protection Clause.

The district court granted the defendants summary judgment.

The Seventh Circuit reversed. The city told incompatible stories about how and why Wilkin was chosen for promotion and Runkel was not. One version relied explicitly upon race as a factor. Regarding Runkel's retaliation claim, the explanation for disciplining Runkel and taking away the promised raise also involves genuine questions of material fact. Her disruptive response to the denial of the promotion could warrant discipline, but giving Runkel the benefit of conflicts in the evidence and reasonable inferences from it, a reasonable jury could find that Springfield's stated nondiscriminatory justifications for the promotion decision are pretextual and that it retaliated against Runkel for claiming discrimination.

Downing v. Abbott Laboratories, No.21-2746 (7th Cir. 2022)

Downing, an African-American woman, had significant sales experience when she was hired in 2002 by Abbott. In 2009 she became one of four Regional Sales Managers. Abbott came under financial pressure in 2012 and reduced its workforce.

Downing's new director, Farmakis, included detailed criticisms in Downing's 2013 review. Downing and another employee reported to Abbott's Employee Relations Department that Farmakis was discriminating based on race

and gender. Farmakis was coached to improve his management style.

Throughout 2013, Abbott's business faltered, resulting in layoffs and realignment of its sales teams. Abbott placed Downing on a performance improvement plan, the last step before termination. Downing then retained counsel and gave notice that she intended to file discrimination claims. Abbott cut Downing's stock award in 2014. Downing filed a discrimination charge with the EEOC.

Abbott had another reduction in force in 2015. All four Regional Sales Manager lost their jobs when that position was eliminated. Farmakis was also terminated. Abbott invited Downing to apply for the position of Regional Commercial Director. Abbott did not select Downing or Farmakis and ultimately hired an African-American man.

Downing filed suit under Title VII and 42 U.S.C. 1981, alleging racial discrimination and retaliation.

The parties subsequently engaged in more than two years of discovery, after which Abbott filed a motion for summary judgment and Downing filed a motion to strike several of the exhibits Abbott submitted in support of its motion. Even considering most of the evidence Downing seeks to strike, a jury could reasonably infer that Farmakis discriminated and retaliated against Downing by giving her negative reviews and placing her on a coaching plan and PIP, and that this proximately caused Downing's ultimate separation from the company.

The district court largely denied Abbott's motion for summary judgment because it determined that "Downing has presented evidence that Farmakis treated the black managers less favorably than the white managers, made at least one racially charged comment, and relied on pretextual reasons for implementing performance management measures with respect to Downing.

After a two week trial the jury found for Abbott. Downing appealed.

The Seventh Circuit affirmed a judgment in favor of Abbot, rejecting challenges to evidentiary rulings, the exclusion of Downing's expert witness, the jury instructions, the testimony of her former manager, and the sufficiency of the

evidence for her disparate-impact claim.

Canada v. Samuel Grossi & Sons, Inc., No. 20-2747 (3rd. Cir. 2022)

Canada, a Black man, worked for Grossi for 10 years. Canada suffered from back problems and claims that Grossi prevented him from accessing Family Medical Leave Act (FMLA) forms and harassed him when he tried to use FMLA leave. Osorio, Grossi's director of human resources, testified that she "let [Canada] take his FMLA" leave.

Canada sued, alleging race discrimination, retaliation, and a hostile work environment under Title VII, 42 U.S.C. 1981, the Americans with Disabilities Act, and the FMLA.

Canada was terminated a month later. Grossi based the termination on text messages found on Canada's cell phone. Grossi claims that Canada was using a locker on the shop floor which was designated as a company tool locker. While Canada was on vacation, Grossi cut the padlock off of his locker because the lockers needed to be moved. Osorio testified that she believed that the phone might have been a company phone and guessed the phone's password. It was not a company phone. Osorio found text messages from a year earlier in which Canada appeared to have solicited prostitutes "while at work and clocked in."

The district court granted Grossi summary judgment.

The Third Circuit reversed, in part. Holding that an employer's motivation for investigating an employee can be relevant to pretext. There is a "'convincing mosaic' of circumstantial evidence," which, taken as a whole and viewed in a light favorable to Canada's case, could convince a reasonable jury that Canada was the victim of unlawful retaliation. There is also evidence that Grossi treated other employees more favorably.

The Third Circuit found the company's reasons for searching the phone to be "weak, implausible, contradictory, incoherent, and more likely motivated by retaliation." It questioned why the locker had to be opened in order to move it and why the cell phone had to be searched in order to determine if it was a company phone – there were easier ways to make that determination, such as checking

against the company's list of those who had cell phones and the serial numbers of the phones. Text messages would likely not establish whether the phone was owned by the company – let alone a year's worth of messages. The Third Circuit found the company's actions supportive of a finding that it was attempting "to dig up dirt" on the employee, which could be in retaliation for his protected actions.

Vesey v. Envoy Air, Inc., No. 20-1606 (7th Cir. 2021)

Ciara Vesey, an African American woman who began work in 2012 for Envoy Air, Inc. as a station agent at Quad Cities International Airport in Rock Island County, Illinois, was involved in several incidents during her four years of employment with Envoy. For example, in November 2014 she drove a jet bridge into an aircraft. She received a serious reprimand and signed a letter of commitment agreeing to comply with all company rules and regulations. This reprimand—the last step before termination —was to remain in effect for two years.

In 2016, Vesey and other Envoy employees also lodged workplace-related complaints against each other. Beginning in February and March, Vesey complained to the airline's human resources department of favoritism and bias. Envoy investigated and found her allegations unsubstantiated. But that August, Vesey reported that a coworker, Eric Masengarb, directed racist remarks and actions at her. Envoy found this complaint substantiated and fired Masengarb.

Vesey also said that in 2016, one of her lead agents, Carrie McMurray, and her general manager, Teresa White—who had defended Masengarb and sought to rehire him—undertook a campaign of retaliation and harassment against her. McMurray lodged a complaint, which was ultimately found unsubstantiated, that Vesey had posted racist content on Facebook. McMurray also told others she did not want to work with Vesey anymore. Both McMurray and White said they wanted Vesey fired. Vesey further claims that previously missing evidence, which she says is cause for reconsideration of the district court's decision on summary judgment— shows that White pressured Ashley Emerick, another employee, into filing an anonymous complaint alleging that Vesey abused her travel benefits.

Envoy's employment benefits included flying standby for free. As part of

her employment, Vesey signed Envoy's rules and regulations that specified "[a]buse of travel privileges will be grounds for dismissal." In September 2016, Emerick complained that Vesey was abusing Envoy's travel benefits. Envoy investigated and concluded that, numerous times throughout 2016, Vesey had abused those benefits and her access to the airline's booking system.

The company discovered that on two occasions, Vesey—although not intending to travel—had used her employee access to volunteer to receive a travel voucher in exchange for taking a later flight, which she would then cancel. The first time, other customers volunteered for the travel voucher before her, hampering Vesey's plan, so she used her employee access to the booking system to cancel her reservation five minutes before the flight was due to take off. The second time Vesey successfully collected a $500 voucher in exchange for postponing her reservation by one day. Never intending to take the trip, she then cancelled the new reservation.

On two other occasions, Envoy's investigators found that Vesey put herself on standby for flights for which she already held non-standby reservations. After successfully boarding the flight off the standby list, Vesey would cancel her non-standby reservation. This prevented the airline from selling a seat and improved her odds of flying standby for free. Envoy further discovered that Vesey had convinced another employee to check her in for a return flight via the airline's booking system when she had missed the departure flight on the same reservation. Passengers usually cannot fly only part of their reservation, so by having her co-worker manually check her in through the booking system, Vesey avoided the possibility of having to pay change fees. Envoy's investigators concluded that all of these actions by Vesey violated company policy.

Before the end of the investigation, Vesey again complained to human resources, claiming that McMurray was harassing and stalking her by looking at her travel history. Envoy found this complaint to be unsubstantiated, and that even if the allegations were true, they would not have amounted to improper conduct by McMurray.

Given the active reprimand for the jet bridge incident, and the finding that Vesey had abused her travel benefits, the investigator recommended the airline terminate her. A company committee agreed, and Vesey was terminated in October

2016.

Vesey sued Envoy, alleging among other things retaliation and a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 and the Illinois Human Rights Act. According to Vesey, Envoy's findings against her were pretextual, and the airline investigated and terminated her in retaliation for her reporting racist and retaliatory conduct by other Envoy employees. Vesey also alleged that she suffered a hostile work environment due to the conduct of Masengarb, McMurray, and White.

The Seventh Circuit affirmed summary judgment in favor of Envoy. The Seventh Circuit noted that Vesey did not allege retaliatory motives by Envoy's investigators who recommended her termination, or by the committee members who approved it. And it went to opine that the mere fact that an employee's wrongdoing was reported by a biased supervisor with a retaliatory or discriminatory motive does not establish liability. The Seventh Circuit also held that a reasonable jury could not have concluded that Vesey was terminated for any reason other than her abuse of travel benefits.

The Supreme Court refused Vesey's appeal of the Seventh Circuit's decision in this matter.

B. Title VII - Gender Discrimination and Retaliation

Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., No. 21-2524 (7th Cir. 2022)

After Plaintiff, a guidance counselor at Roncalli, a private catholic high school, informed Roncalli's leadership that she was in a same-sex union, she was given notice that her employment would not be renewed for the next school year because her conduct violated the terms of her contract.

The plaintiff had signed defendant's "Ministry Description and Ministry Contracts" that defendant alleged showed that defendant had considered plaintiff to be minister and entrusted her with religious duties.

Plaintiff filed suit, alleging several claims under Title VII and Title IX. Plaintiff alleged that defendant created hostile work environment, retaliated against her and discriminated against her by not renewing her employment contract after she told school that she was in same-sex union.

The trial court granted summary judgment based on the ministerial exception, grounded in the First Amendment's Religion Clauses, which bars interference with the selection and control of a religious organization's ministers.

The Seventh Circuit affirmed, holding that the Archdiocese was entitled to fire Plaintiff without regard to the substantive rules in Title VII of the Civil Rights Act. The fact that plaintiff claimed that she did not actually perform religious duties did not require a different result, where there job description required that she perform them.

Nigro v. Indiana University Health Care, No. 21-2759 (7th Cir. 2022)

In 2017 Nigro, a certified nurse anesthetist, began working at Riley Hospital. Division Director, Dr. Sadhasivam, recruited her and started implementing a new team-based care model. Within a year, an internal investigation revealed department-wide concern over the model's efficacy and impact on team dynamics. Some employees believed that Sadhasivam's leadership style resulted in a tense workplace.

In 2017-2019, Nigro was the subject of multiple complaints, mostly concerning her attitude and ability to work on a team. Coworkers described her as "rude, snappy and belittling," with management expressing concern that her behavior undermined the department's already delicate atmosphere of collegiality.

After investigating the complaints, hospital decision-makers issued a "coaching memorandum" to Nigro. A month later, it was determined that Nigro had engaged in timekeeping fraud by not working at times when she had been clocked in. As a result, Sadhasivam and three female administrators, agreed to terminate her for misconduct.

Nigro filed suit under Title VII, 42 U.S.C. 2000e-2(a)(1), alleging sex-based discrimination and retaliation because of a supportive affidavit she had signed in another employee's discrimination case.

The district court granted summary judgment for defendant. In ruling for defendant the district court found that Nigro could point to no "better-treated, similarly-situated comparator" and offered no facts refuting the hospital's contention that it fired her "because she continually demonstrated behavior that undermined the collaborative environment." The district court also rejected Nigro's retaliation claim on much the same reasoning. The court found Nigro failed to identify evidence showing the requisite causal connection between signing the affidavit in the other employee's case and her termination.

The Seventh Circuit affirmed summary judgment in favor of the defendants holding there was neither direct nor indirect evidence to support Nigro's Title VII claim.

Logan v. City of Chicago, No. 20-1669 (7th Cir. 2021)

Mr. Logan, an African American man, was a Chicago Aviation Security Officer. According to Logan, the problems began when he confronted his new supervisor—defendant Jeffrey Redding— about Redding's actions toward the woman Logan was dating at the time, Audrey Diamond. Redding became Deputy Commissioner of the Department in February 2016. Diamond worked for the United States Customs and Border Protection. Logan, Redding, and Diamond all worked at O'Hare Airport.

Sometime between February and April 2016, Logan testified that Diamond told him that she was having problems with Redding. Redding was coming to her office and flirting with her. Logan went to speak to Redding and told him that he wanted to talk about "a personal matter." Logan told Redding that Diamond was his girlfriend. When Redding asked why Logan was telling him that, he replied that Redding was making her feel uncomfortable and Logan wanted to let Redding know "out of guy code." When asked what he meant by "guy code," Logan testified "[g]uy code is a street lingo that you don't cross a certain line, or if you don't know something let someone know so they won't cross that line." When asked what line Redding crossed, Logan replied "it more or less was informative, letting him know that [Logan] was dating the young lady."

In 2015 applied for a promotion to become an Aviation Security Sergeant. He was not selected, but the Department placed him on a "Pre-Qualified Candidates" list ("PQC list") in the event of future vacancies during the following year. The PQC list was set to expire in September 2016, but the Department extended it another 12 months.

In March 2017—while the PQC list was still active—two sergeant positions became available. Logan was second on the list, so he completed the paperwork to fill one of the positions. Two days later, the City informed him that he was ineligible because he did not meet the promotional guidelines. The City had a policy under which internal candidates were ineligible for promotion if they had been suspended more than seven days in the previous 12 months. Because Logan had been suspended for more than seven days in the previous year, he was ineligible for either sergeant position. The City promoted two other candidates, a white man and woman. The city informed him that a city policy made internal candidates ineligible for promotion if they had been suspended for more than seven days in the previous 12 months.

Logan had been suspended for more than seven days in the previous year. Logan alleges that he was wrongfully singled out for discipline. After his suspension, Logan complained about being bullied at work and about “discrimination against black officers.” After he filed a grievance, an arbitrator concluded that while Logan committed misconduct sufficient to warrant discipline, the length of his suspension was excessive.

The arbitrator ordered Logan's promotion with back pay and benefits.

Logan then filed suit, alleging discrimination on the basis of his race and gender and retaliation under Title VII, 42 U.S.C. 2000e. The events surrounding Logan's suspensions formed the basis of his lawsuit. He did not challenge the City's policy; rather, he alleged that he was wrongfully singled out for discipline and as a result became ineligible for promotion.

Logan filed suit against the City and defendants Redding, May, Bates, Schmidt, and Rodriguez alleging the City unlawfully discriminated against him on the basis of his race and gender and retaliated against him, in violation of Title VII. He also alleged that the City and all individual defendants violated the Illinois Whistleblower Act, 740 Ill. Comp. Stat. § 174/1. All defendants moved for summary judgment, which the district court granted.

The district court granted summary judgment. Regarding Logan's Title VII discrimination claims, the district court concluded that Logan had failed to establish a prima facie case—and, even assuming he had, no reasonable jury could determine that the City's reasons for disciplining him were a pretext for discrimination. For Logan's retaliation claim, the district court determined that no reasonable jury could find that Logan subjectively believed he was opposing an unlawful practice when he spoke to Redding about Diamond. Furthermore, even if Logan subjectively believed he was engaging in Title VII protected activity, that belief was not objectively reasonable because Redding and Diamond had different employers and so Title VII did not apply to Redding's alleged conduct. Lastly, the district court concluded that Logan's whistleblower claim was time-barred. Logan appealed.

The Seventh Circuit affirmed summary judgment in favor of the defendants. The Seventh Circuit found that other than the fact that Logan was a member of a protected class, there was no evidence from which a reasonable juror could infer that his race caused him to be disciplined. Logan failed to show that his belief that he was opposing an unlawful employment practice was objectively reasonable.

C. Title VII and ADEA - Race and Age Discrimination and Retaliation

Chatman v. Board of Education of the City of Chicago, No. 20-2882 (7th Cir. 2021)

Mildred Chatman, an African-American, worked as an instructor assistant, 1988-1996. From 1997-2009, she worked as a school library assistant. In 2009, the Board of Education informed her that it was eliminating her position. Chatman learned that the Board had replaced Chatman (age 62) with a younger, non-African American employee in the same role. Chatman filed a charge of discrimination with the Illinois Department of Human Rights and the EEOC and then sued in Illinois state court.

The Board settled with Ms. Chatman in February of 2015. In addition to a monetary payment, the district was to arrange for interviews for open positions for which Chatman was qualified. Specifically, from the date of the settlement through December 31, 2015, "[Ms.] Chatman shall identify to [designated Board Talent Office employees] Chicago Public Schools positions that are vacant on the Board's … job bulletin system for which she would like to interview, for which she is qualified and for which the Board is currently accepting applications." The Board would then arrange interviews. Ms. Chatman began identifying available positions shortly following the settlement agreement. All told, Ms. Chatman interviewed for positions at five different schools. Bu she did not ultimately receive any job offer.

Her first interview was for a library assistant position at Beasley Academic Center in June 2015. On September 9, 2015, Ms. Chatman learned that the Board had filled that position with another candidate.

Ms. Chatman's second interview was for a teacher's assistant position at Earle Elementary. She stated in her deposition that she interviewed with the Earle principal on September 10, 2015, although she could not remember many details about the interview and could not explain why she thought the interview took place on that date. Ms. Chatman also submitted for the summary judgment record an email from Linda Hogan, one of the Board's Talent Office employees, to Ms. Chatman's counsel, dated September 10, 2015 (the same day that Ms. Chatman claims to have interviewed for the Earle position), stating that the Earle principal

would contact Ms. Chatman to set up an interview. The record contains no other communications about Earle. Later, when the EEOC sought information from the Board about the Earle position, the Board denied that there was an open teacher's assistant position at Earle during the time Ms. Chatman claims she interviewed.

Ms. Chatman's third interview was for a library assistant position at Mireles Academy. She interviewed for the position with Evelyn Randle-Robbins, the Mireles principal, in November 2015. During her deposition, Ms. Chatman claimed that Principal Randle-Robbins made some sort of reference to prior involvement in a lawsuit. Ms. Chatman could only vaguely describe Principal Randle-Robbins's question, but took it to be in reference to her prior EEOC charge against the Board. In the same deposition, however, Ms. Chatman confirmed that Principal Randle-Robbins never discussed the specifics of her prior discrimination case or the settlement agreement she reached with the Board. Ms. Chatman was not hired for the position. In response to the EEOC's inquiry, the Board claimed that the position for which Ms. Chatman interviewed at Mireles had been eliminated for budgetary reasons. The Board later disclosed that Principal Randle-Robbins had extended an offer to fill the position to another candidate, referred to in the record only by the initials K.D. K.D. accepted Principal Randle-Robbins's offer around November 30, 2015. Yet, K.D. never actually started working in the library assistant position before Principal Randle-Robbins eliminated the position for budgetary reasons in February 2016. K.D. was under the age of forty.

Ms. Chatman's fourth interview was with Principal Daniel Perry of McDade Elementary on December 2, 2015, for two open special education classroom assistant positions. Ms. Chatman was not hired for the positions. Instead, the Board hired an African American man who was under forty years old and an African American woman who was over forty years old. In an affidavit, Principal Perry explained that the younger man hired for one of the positions was a McDade graduate who had volunteered at the school and worked with the specific special education student whom the special education classroom assistant would assist.

Ms. Chatman's final interview was on December 17, 2015, with Principal Megan Thole of Ray Elementary for three open special education classroom assistant positions. Ms. Chatman was not hired for these positions either. Instead, the Board hired two African American women over the age of forty and a

non-African American woman under the age of forty. At the time of her interview, the non-African American woman under the age of forty did not possess the requisite paraprofessional license to fill the special education classroom assistant position. By the time she started in the position, however, she had obtained the license.

When Ms. Chatman did not receive a job offer during the interview period provided by the settlement, she filed a new charge with the EEOC, and later initiated this action. In her complaint, she alleged violations of Title VII's anti-discrimination and anti-retaliation provisions, as well as a violation of the anti-discrimination provision of the Age Discrimination in Employment Act ("ADEA"). After discovery closed, the Board moved for summary judgment. When Ms. Chatman responded to the Board's summary judgment motion, the Board moved to strike several exhibits that Ms. Chatman had cited in her response.

The district court granted summary judgment to the Board and Ms. Chatman appealed.

The Seventh Circuit affirmed summary judgment in favor of the Board, finding the claims concerning the Beasley and Earle positions were barred by the statute of limitations, and, regarding other positions, that Chatman could not establish that she was qualified for the positions, nor could she establish that the Board's nondiscriminatory reasons for not offering her the positions were pretextual for discrimination. Chatman could not establish that she was denied a job because of her prior protected activity.

D. Title VII and Section 1981 - Race, Religion, and National Origin Discrimination and Retaliation

Mahran v. Advocate Christ Medical Center, No. 19-2911 (7th Cir. 2021)

Mahran filed charges of discrimination and retaliation on the basis of race, religion, and national origin with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission. After the charges were dismissed, Mahran filed his discrimination suit against Advocate. He raised racial, religious, and national-origin discrimination in violation of Title VII, 42 U.S.C. §2000e-2(a); 42 U.S.C. § 1981; and the IHRA, 775 ILL. COMP. STAT. 5/2-102. 2

Mahran's allegations can be grouped into three general baskets. He claimed that Advocate (1) discriminated and retaliated against him by giving him negative performance evaluations, imposing discipline, and terminating his employment; (2) subjected him to a hostile work environment; and (3) failed to accommodate his religious practice as discussed below.

Mohammed Mahran is a native of Egypt and a practicing Muslim. Two decades after completing his pharmaceutical education in Egypt, he became a licensed pharmacist in Illinois. He joined Advocate in November 2013, initially hired as a "registry pharmacist" for a 90-day probationary period. Upon successful completion of his probationary employment, he was eligible for promotion to full-time pharmacist.

During Mahran's 90-day probationary period, Advocate hired Barbara Bukowski and Dearica Radic as full-time pharmacists without requiring them to first work as registry pharmacists. Mahran complained to Rolla Sweis, the Director of Pharmacy, that Bukowski and Radic had received preferential treatment because they weren't Muslims. He did not know, however, that Bukowski and Radic had prior hospital experience and thus were not required to work as registry pharmacists before being hired full time. Nonetheless, two days after Mahran complained to Sweis, Advocate removed the probationary qualifier and elevated him to full-time pharmacist.

Mahran's supervisor, Judith Brown-Scott, initially gave him "meets expectations" ratings in his performance re views. But his performance eventually

deteriorated. He received his first admonition (a Level 1 warning) for processing a discontinued order for a patient and failing to process the patient's next order. When questioned about the incident, Mahran did not take responsibility and instead blamed a coworker.

Soon after the admonition, Vincent Dorsey, one of Mahran's coworkers, complained that Mahran left numerous unfinished orders at the end of his shift for the next pharmacist to fill. When management investigated, Mahran responded that Dorsey was biased against Muslims and often talked down to him and another Muslim coworker named Mohammed Judeh. Neither Mahran nor Dorsey were disciplined.

Mahran's supervisor, Brown-Scott issued a final warning (a Level 3 warning) after Mahran failed to verify a complicated order. He had previously been warned about his habit of shirking work - specifically, his pattern of selectively verifying only simple orders and switching his schedule to avoid working busy shifts. Along with the warning, Brown-Scott issued a formal performance deficiency notice describing Mahran's performance problems, prescribing a corrective-action plan, and warning him that failure to comply with the plan could result in termination of his employment. Around this time Brown-Scott also reduced Mahran's performance rating to "approaching expectations."

Mahran complained to human resources that he was being disciplined in retaliation for reporting racial and religious discrimination. The human resources department then withdrew the Level 3 warning but left the reduced performance rating, performance- deficiency notice, and corrective-action plan in place.

A month later, Advocate gave Mahran another Level 3 final warning after he improperly left the pharmacy before his replacement arrived and did not hand off the work to her. Again, Mahran complained that this discipline was discriminatory. Before an arbitration panel could be convened to resolve Mahran's complaint, Advocate terminated his employment for failure to comply with the corrective action plan.

Mahran's hostile-environment claim centered on allegations about offensive comments related to his race and national origin. Mahran claimed that Sweis once

referred to his native country when she corrected the way he prioritized orders. She said: "This is how you do it in Egypt. Here it's completely different." Mahran complained to a human resources employee that Sweis was a racist. The employee simply replied, "[N]o, Rolla is good; she's fine; we trust our managers." Mahran also asserted that Judeh overheard another pharmacist say that he would not "go to [a] marriage of brown people." When he complained to Brown-Scott, she brushed it off by saying, "there is no racial discrimination here; you see I am African-American."

Mahran's religious-accommodation claim rested on his contention that Advocate denied prayer breaks to Muslims. During each shift, pharmacists were entitled to take two 15-minute breaks and one 30-minute meal break, but they had to stagger their breaks to ensure adequate coverage in the pharmacy. Muslim pharmacists used these breaks to say daily prayers. Mahran alleged that over time, Sweis became concerned that the prayer breaks were negatively impacting patient care and prohibited Muslims from praying during the two 15-minute breaks. He claimed that the clinical manager of the pharmacy department told another Muslim pharmacist to "pass the message" to all Muslim pharmacists that they were no longer permitted to use their breaks for prayers. Mahran also asserted that the evening supervisor once prevented him from taking a prayer break and told him he couldn't take prayer breaks anymore.

The district judge rejected all of the claims on summary judgment.

Mr. Mahran filed his appeal pro se. He requested that the Seventh Circuit appoint an attorney to represent him on appeal. His request was denied because he did not satisfy the requirements to proceed in forma pauperis. But the Seventh Circuit did appoint him a pro bono lawyer as amicus curiae to argue for reversal. Mahran did not file any other briefs in the matter.

Mahran's amicus challenges argued 1.) his accommodation claim should be reinstated because an employer's failure to accommodate an employee's religious practice is itself actionable, regardless of whether an adverse employment action resulted and 2.) that his hostile workplace claim should be reinstated because the judge considered only the alleged offensive comments instead of evaluating the totality of the evidence Mahran adduced.

The Seventh Circuit affirmed, rejecting arguments that the judge wrongly required Mahran to show that Advocate's failure to accommodate his prayer breaks resulted in an adverse employment action and that the judge failed to consider the totality of the evidence in evaluating his hostile-workplace claim. Mahran expressly agreed at trial that an adverse employment action is an element of a prima facie Title VII claim for failure to accommodate an employee's religious practice. The Seventh Circuit held that Mahran could not take the opposite position on appeal. And while the judge should have considered all the evidence Mahran adduced in support of his hostile workplace claim, there was not enough evidence for a jury to find that Advocate subjected him to a hostile work environment.

E. Title VII - Religious Discrimination and Retaliation

Huff v. Buttigieg, No. 21-1257 (7th Cir. 2022)

The plaintiff violated the FAA's alcohol and drug policy when she was arrested for an alcohol-related offense. By self-reporting her infraction, Plaintiff would have avoided disciplinary action if she completed a rehabilitation plan supervised by the FAA.

Plaintiff objected on religious reasons to the plan's requirement that she attend Alcoholics Anonymous meetings and complained of religious discrimination, even after the FAA approved her participation in an alternate recovery program.

The district court concluded that Plaintiff failed to establish a causal link between the formal complaint and her termination and granted summary judgment to the FAA.

The Seventh Circuit reversed the judgment of the district court granting summary judgment in favor of the Federal Aviation Administration (FAA) and dismissing Plaintiff's claims that the FAA violated Title VII by retaliating against her for filing a formal complaint of religious discrimination, holding that a reasonable juror could conclude that retaliatory animus influenced Defendant's decision-making and proximately caused Plaintiff's termination.

EEOC v. Walmart Stores East, L.P., No. 20-1419 (7th Cir. 2021)

In April 2016 Walmart offered Edward Hedican a job as one of eight full-time assistant managers. After receiving the offer, Hedican revealed that, as a Seventh-day Adventist, he cannot work between sundown Friday and sundown Saturday.

The Assistant Managers are assigned on a rotating schedule such that each works an average of 6 out of every 10 weekends. After being offered an Assistant Manager position, Hedican informed the employer that, as a Seventh Day Adventist, he could not work from sundown Friday to sundown Saturday.

Lori Ahern, the store's human resources manager, assessed whether Walmart could accommodate Hedican's religious practices. She concluded that doing so would require assigning the other seven assistant managers to additional Friday night and Saturday shifts, even though they prefer to have weekends off. With eight assistant managers available, any given assistant manager works (on average) six weekend shifts out of every ten weeks. (The historical range has been 48% to 82% of Saturdays, in particular.) If one of the assistant managers could not work from Friday sundown to Saturday sundown, six would rise to seven. And it would disrupt the work schedule. Six of the eight assistant managers work five days in a row, ten hours a day (for 50-hour weeks); the other two work four days in a row, 12 hours a day (for 48-hour weeks). That system could be preserved if, for example, Hedican were assigned permanently to one of the 4-day-12-hour slots, and his days never included weekends. But then other assistant managers would need to work even more weekend days, and the store's practice of rotating all eight assistant managers through all eight of the schedules would end. The store's manager believes that each assistant manager should have experience with all available schedules, which (because of how these were arranged) also requires each to work in all of the store's departments—for although the store is open all the time, many of its departments (including liquor and firearms) are closed some of the time. The manager thinks that each assistant manager should be able to handle every department, something that could be especially important if because of illness, vacation, resignation, or retirement the store has fewer than eight assistant managers available.

Ahern concluded that accommodating Hedican would leave the store short-handed at some times, or would require it to hire a ninth assistant manager, or would compel the other seven assistant managers to cover extra weekend shifts despite their preference to have weekends off. She therefore raised with Hedican the possibility that he apply for a lower paying hourly management position, which would not be subject to the rotation schedule for the eight assistant managers. Hedican did not do so. Instead he filed a charge with the Equal Employment Opportunity Commission, which decided to prosecute a failure-to-accommodate suit on its own behalf.

On motion for summary judgment, the district judge sided with Walmart. 2020 WL 247462, 2020 U.S. Dist. LEXIS 8596 (W.D. Wis. Jan. 16, 2020). The judge thought that an hourly management job would have been a reasonable

accommodation, even though the entry-level pay of that position is lower than the entry-level pay of an assistant manager. And the judge believed that interference with the store's rotation system would exceed a slight burden.

The Seventh Circuit upheld the trial court's decision. The Seventh Circuit relied on Walmart's uncontested assertion that it made an offer that could have put Hedican in a management job without working on the Sabbath, but that Hedican wanted to be an assistant manager and nothing less. As a result, the Seventh Circuit noted that unless Title VII entitles Hedican to that position, Walmart must prevail. The Seventh Circuit held that under Title VII, employers must reasonably accommodate an employee's religious needs absent an undue hardship. Unlike the Americans with Disabilities Act, which imposes a high standard for demonstrating an undue burden, any religious accommodation that requires an employer to bear more than a de minimis (i.e. slight) cost is an undue burden.

The Seventh Circuit went on to reject the EEOC's arguments that Walmart could have offered Hedican several accommodations that would have enabled plaintiff to be an assistant manager. The EEOC argued that one accommodation would have been to give Hedican that job and let him trade shifts with other assistant managers. The EEOC also argued that another reasonable accommodation would have been to assign Hedican permanently to the 4-day-12-hour shift and ensure that it never included Fridays or Saturdays. But neither of these accommodations would be by the employer, as Title VII contemplates. These proposals would thrust on other workers the need to accommodate Hedican's religious beliefs. The Seventh Circuit said that is not what the statute requires. The Seventh Circuit reminded the EEOC that the Supreme Court held that Title VII does not require an employer to offer an "accommodation" that comes at the expense of other workers.

The Seventh Circuit also found that all of the EEOC's other proposals would require Walmart to bear more than a slight burden when vacations, illnesses, and vacancies reduced the number of other assistant managers available.

Dissent by Easterbrook, Circuit Judge.

I respectfully part ways with my colleagues because I think there is a question of fact as to whether Walmart did enough to explore ways of

accommodating Hedican's religion. I would therefore reverse and remand for a trial.

Although Ahern considered whether it might be feasible to adjust other assistant managers' schedules in some manner (including voluntary shift-trades) so that Hedican would never have to work on a Friday night or Saturday, one thing she did not do is consult with the other managers in making her assessment. I agree with my colleagues that accommodating Hedican in this way posed a challenge, given the store's 24-hour schedule, busy weekends, and the demand among staff for time off on Fridays, Saturdays, and Sundays. Yet Hedican was available to work on Fridays, Saturday nights and Sundays, and if he were willing to disproportionately accept shift assignments during the 48 of 72 weekend hours outside of his observed Sabbath, then other managers might have been willing to pick up the slack on Friday nights and Saturdays. Ahern could not know for certain unless she asked, and yet she did not. See Walmart Br. at 48-49 n.5. I appreciate the store's need for predictability in scheduling, but had Ahern convened the managerial staff to discuss the possibilities, she might have discovered that it was in fact feasible to accommodate both Hedican and the other managers. Cf. Opuku-Boateng v. California, 95 F.3d 1461, 1471-72 (9th Cir. 1996) (flawed, informal poll of other workers insufficient to demonstrate that shift-trades were not a feasible means of accommodating plaintiff's inability to work on Sabbath).

Discussion of the difficulty of accommodating Hedican brings to mind the sorts of excuses employers long trotted out for why it was impractical to hire women of child-bearing age: that employers could not afford to waste resources training employees who would quit as soon as they were pregnant; that projects and deadlines could not accommodate the gaps of maternity leave and the vagaries of daycare and school schedules; that client needs could not be met on a nine to five, Monday through Friday schedule. Indeed, child-bearing and parenting did pose challenges for working women and their employers, but accommodations that were a long time in coming—flexible hours, remote work, job-sharing, family leave time—have shown why work and motherhood were never as incompatible as employers once thought.

That a business historically has been run in a certain way does not mean that is the only or best way in which it can be run. I grant that Walmart's scheduling

needs are genuine. But the duty to reasonably accommodate entails an obligation to look at matters with fresh eyes and to separate what is necessary from what, to date, has been customary. I think there is a jury question as to whether Walmart went far enough in considering whether Hedican's religious scheduling needs could be accommodated.

Ahern did suggest that Hedican might instead apply for an hourly supervisory position. Setting aside any differences between the two positions (including starting pay), I am not convinced that inviting Hedican to apply for a different position for which he was obviously qualified constitutes a meaningful accommodation. After all, the company had already offered Hedican an ostensibly superior job. Now it was treating him as a near-stranger who needed to start over. The company's counsel suggested at argument that application for an hourly position was simply a matter of paperwork, but its brief suggests otherwise,1 and in any case it does not appear that this was ever communicated to Hedican. It was not Hedican's responsibility to ferret this out.

The record shows that Walmart gave serious thought to whether it could accommodate Hedican and I commend the company for the efforts it did make. But a jury could nonetheless conclude that more was required to discharge its duty of reasonable accommodation. I respectfully dissent.

F. Title VII and Section 1983 - National Origin Discrimination and Retaliation 1983

Vega v. Chicago Park District, No. 20-3492 (7th Cir. 2021)

Lydia Vega, a Hispanic woman, began her employment with the Chicago Park District in 1987 and was promoted to the position of park supervisor in 2004—a position that she retained until she was fired in 2012 for allegedly violating the Park District's employment Code of Conduct.

In late September 2011, the Park District received an anonymous call, accusing Vega of "theft of time"—clocking in hours that she had not worked. In response to this accusation, an investigator for the Park District began surveilling Vega's car. A few days later, another anonymous caller again accused Vega of theft of time. At that point, another investigator began a separate and simultaneous investigation of Vega. Over the course of 56 days, Vega was surveilled over 252 times. On numerous occasions, the investigators interrupted Vega at work in front of her coworkers to ask her questions as a part of the investigation.

In March 2012, the investigators met with Vega and her union representative. The investigators had no interest in hearing Vega's side of the story; instead, Vega and her union representative found them to be "pretty dead set" on their conclusion that Vega had violated the Park District's Code of Conduct. By this point, the investigative process was causing Vega significant anxiety, and in late March, she took medical leave on the advice of her physician.

Between July and August 2012, Vega received two separate Corrective Action Meeting notices accusing her of the slightly different offense of timesheet falsification—not being present at her assigned location at the assigned time. After sending each notice, Mary Saieva, the Park District's Human Resources Manager, met with Vega and her union representative. Saieva, like the investigators, had little use for Vega's side of the story. At both meetings, Saieva refused to listen to Vega's explanations or review the documents that Vega had brought with her to dispute the allegations. After the meetings, Saieva called Elizabeth Millan, Vega's former supervisor, to discuss the discrepancy in Vega's timesheets. Millan told Saieva that she might have asked Vega to work from home on at least one of those occasions, which would explain one of the timesheet discrepancies. Saieva,

however, disbelieved Millan, who, like Vega, was Hispanic.

Convinced that Vega was guilty, Saieva recommended that Vega's employment be terminated. In violation of the Park District's commitments under its union agreement, Saieva neither consulted with Vega's then-supervisor nor recommended any progressive discipline. Instead, she told Michael Simpkins, the Park District's Director of Human Resources, that Vega should be fired.

Simpkins fired Vega after receiving Saieva's recommendation and briefly reviewing the investigative report. According to the final termination letter, Vega was not fired for theft of time; rather, she was fired for eleven timesheet falsifications and for being untruthful during her Corrective Action Meetings. In another violation of its union commitments, the Park District did not offer Vega's union a pre-disciplinary agreement. Vega appealed the termination decision to the Park District Personnel Board. At that point, an administrative officer held a hearing and subsequently concluded that Vega's employment was properly terminated. The Personnel Board adopted that decision.

Vega sued the Park District under Title VII and 42 U.S.C. § 1983, alleging discrimination on the basis of national origin. After the evidence was in, the Park District moved under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law on all of Vega's claims, but the district court denied the motion. It sent the case to the jury, which returned a verdict for Vega on both her Title VII and § 1983 claims and awarded her $750,000 in compensatory damages. As for Vega's retaliation claims, however, the jury found in favor of the Park District.

The Park District renewed its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and moved for a new trial under Federal Rule of Civil Procedure 59. In a separate Rule 59 motion, the Park District also asked the court to remit the jury's compensatory award. The district court granted the Park District's Rule 50(b) motion on Vega's § 1983 claim but denied it with respect to her Title VII claim. In light of that disposition, the district court remitted the jury's compensatory award to $300,000, which is the statutory maximum under Title VII.

The district court then conducted a bench trial on equitable remedies. It awarded Vega back pay ($154,707.50 in salary and $1,200 in lost bonuses) and

benefits ($9,255.42 in substitute health insurance premiums). It initially rejected Vega's request for a $30,531.27 tax-component award because it found that Vega had not adequately explained the calculation justifying that amount. But, after Vega submitted supplemental briefing on the issue, the district court awarded Vega a tax-component award of $55,924.90 without explaining how it reached that figure. Finally, as an equitable remedy, the district court ordered the Park District to reinstate Vega to her former position as a park supervisor.

The Park District appealed every ruling that it lost except for Vega's reinstatement. In her cross-appeal, Vega asks us to reverse the district court's judgment as a matter of law on her §1983 claim and to restore the jury's $750,000 compensatory damages award.

The Seventh Circuit affirmed except for the tax-component award, Vega submitted a fee petition totaling $1,073,901.25, with a 200-page document listing details. Vega's counsel submitted evidence to support her current hourly rate of $425 for general tasks and $450 for in-court work. The district court granted Vega's petition in the amount of $1,006,592, noting the District's "scorched-earth litigation approach." Vega filed a second fee petition totaling $254,635.69 for work following the first petition. The district court awarded $218,221.69 and granted Vega a tax-component award of $49,224.30. The Seventh Circuit affirmed, stating that the award was "rather high for the type of litigation and monetary and equitable relief that Vega achieved," but that the district court's analysis and reasoning demonstrate an appropriate exercise of its discretion.

G. Americans with Disabilities Act and Rehabilitation Act-Retaliation

Parker v. Brooks Life Science, Inc., No. 21-2415 (7th Cir. 2022)

Parker suffers from MS and sciatica and has received social security disability benefits for that diagnosis for several years. Brooks hired Parker in 2017. Parker worked as a receptionist 25 hours per week (usually mornings). Parker had different supervisors and received mixed feedback on her performance. Parker had to be "coached" concerning her use of paid time off (PTO).

In 2018, Parker requested time off to get treatment for pain. Her supervisor, Williams, learned that during Williams' absence, Parker had taken unapproved time off and made schedule changes. Williams approved the requests but warned that Parker was exceeding her PTO. Parker acknowledged that she needed to do a better job complying with the policy.

Williams understood Parker's statements to be admissions and emailed HR employees, recommending termination. After receiving their assent, Williams informed Parker that she was being terminated.

Brooks subsequently told the Indiana Department of Workforce Development that Parker had voluntarily quit to accept other employment. But in response to her EEOC complaint, Brooks stated that its reason for terminating Parker was repeated failure to follow established PTO policies.

Parker sued alleging that defendant terminated her on account of her multiple sclerosis and for terminating her two days after she had requested accommodation to alter her work schedule for pain treatment associated with her disability.

The district court granted summary judgment for defendant.

The Seventh Circuit affirmed summary judgment in favor of Brooks. It found that Parker did not produce evidence that would allow a reasonable juror to infer a link between her request for accommodation (time off for pain treatment) and her termination.

The Seventh Circuit acknowledged that while a two-day gap between protected activity and adverse act can establish required causal connection between accommodation request and adverse act. However, instant record did not support finding that plaintiff's termination was related to her accommodation request, where: (1) instant PTO policy required, among other things, that plaintiff seek approval for requests for planned time off; (2) in the months prior to plaintiff's accommodation request, plaintiff's supervisor coached plaintiff on such violations of PTO policy; and (3) other individuals informed plaintiff's supervisor after plaintiff had made accommodation request that plaintiff had violated PTO policy while supervisor was on vacation. And the plaintiff failed to present evidence that supervisor had actually tolerated violations of PTO policy.

Swain v. Wormuth, No. 21-2938 (7th Cir. 2022)

Swain was a civilian employee at an Army installation in Illinois. He alleged that defendant had failed to accommodate his disability by failing to timely install automatic door opener and by denying his request to install additional automatic door opener. Plaintiff also alleged that defendant discriminated against him on basis of his disability by failing to assign him overtime work. Swain brought his lawsuit against the Army, alleging failure to accommodate, disparate treatment, and retaliation under the Rehabilitation Act.

The record showed that defendant had previously granted plaintiff's several requests for accommodations that included transfer to different job and assignments to less physically demanding tasks. The record also showed that defendant granted plaintiff's other request for automatic door opener for different door, but denied instant request for door opener based on belief that door was light enough to meet plaintiff's restrictions.

The district court granted summary judgment for the Army.

The Seventh Circuit affirmed. The delay in installing one automatic door opener after decision was made to approve said installation was not actionable, where there was no evidence of bad faith on part of defendant. Moreover, defendant's decision not to grant plaintiff's request for another automatic door opener was reasonable, where plaintiff had failed to connect said door to essential

functions of his job. Also, plaintiff could not prevail on his disability discrimination claim, where defendant explained that defendant had assigned only one individual in defendant's job classification to overtime work, and where defendant believed that plaintiff could not perform his job without assistance from others.

McHale v. McDonough, No. 21-2838 (7th Cir. 2022)

McHale began employment at the VA Hospital in 2011 as a pharmacy technician. In 2014, side effects from McHale's diabetes medication impacted her attendance at work. Weeks later, McHale's supervisor, reduced McHale's performance rating due to her use of sick leave and imposed an official sick leave restriction. McHale filed a union grievance.

During the years that followed, McHale unsuccessfully applied for three other positions. McHale's second-level supervisor stated that he did not want to select McHale for one position due to her frequent sick leave and the sick leave restriction. In interviews with the agency's internal EEOC office, McHale never suggested that she had any disability. McHale filed a handwritten formal administrative complaint in 2015, alleging reprisal for the prior EEOC activity and unfair treatment in the form of the sick leave restrictions. The final agency decision concluded that it had not violated the law.

McHale sued under the Rehabilitation Act, 29 U.S.C. 791, alleging she was disabled due to complications with her diabetes and that the agency had failed to accommodate this disability; had discriminated against her because of her disability; had subjected her to a hostile work environment; and had retaliated against her.

The district court granted the motion on all claims, holding McHale's failure-to-accommodate and disability discrimination claims were not exhausted during the agency process, her hostile work environment claims lacked support, and her retaliation claims failed for want of comparators.

McHale appealed the district court's grant of summary judgment on the disability, accommodation, and retaliation claims but dropped the hostile work environment claims.

The Seventh Circuit affirmed summary judgment on the retaliation claims, but remand with instructions to dismiss McHale's disability claims without prejudice. The Seventh Circuit concluded McHale failed to exhaust her administrative remedies for the disability claims because she never complained of discrimination on the basis of disability to the agency. And for the same reason, concluded McHale could not establish retaliation.

See v. Illinois Gaming Board, No. 19-2393 (7th Cir. 2022)

See is a law-enforcement officer for the Illinois Gaming Board, which often hires State Police officers. As a union representative, See expressed concern that the Board's promotion policies gave State Police employees unfair advantages.

See then began to exhibit signs of paranoia. He complained to Board management that his supervisor was spreading malicious rumors about him to intimidate and scare him. He said that his wife was "seriously afraid" that the State Police would harm them. Management became concerned about his mental stability and placed him on administrative leave pending an examination of his fitness for duty. A few weeks later See passed the examination and returned to work.

See filed suit under 42 U.S.C. 1983 alleging retaliation for exercising his First Amendment rights and discrimination under the Americans with Disabilities Act (ADA), section 12112, by requiring him to undergo a medical examination without a job-related justification.

The district court granted summary judgment to the defendants.

The Seventh Circuit affirmed summary judgment for the defendants. Even if See established a prima facie case of retaliation, the defendants offered a legitimate, nonretaliatory reason for placing him on leave and requiring a fitness-for-duty examination: they were genuinely concerned about his mental health. See presented no evidence that this reason was pretextual. See is an armed law enforcement officer, so the possibility of mental instability posed a serious public-safety concern the examination was job-related and consistent with business necessity.

H. Family Medical Leave Act - Retaliation

Ziccarelli v. Dart, No. 19-3435 (7th Cir. 2022)

Mr. Ziccarelli began working as a corrections officer in 1989. He was previously fired and was reinstated after litigation. Ziccarelli developed serious health conditions for which he took 10-169 hours of annual leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601.

In July 2016 he sought treatment for work-related PTSD; by September he had used 304 hours of his allowable 480 hours of annual FMLA leave. To seek permanent disability benefits, he needed to exhaust all his sick leave. Ziccarelli planned to enroll in an eight-week PTSD treatment program. Based on his conversation with the Sheriff's Office's FMLA manager, Shinnawi (the contents of which are disputed), Ziccarelli decided to retire. Plaintiff alleged Shinnawi told plaintiff during conversation in which plaintiff asked to use more FMLA leave that plaintiff had already taken "serious FMLA" leave and to not take any more or else be disciplined for doing so.

Ziccarelli subsequently filed suit under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the FMLA.

The district court granted the Sheriff's Office summary judgment on all claims.

Ziccarelli appealed only his FMLA claims, arguing that a reasonable jury could find that the Sheriff's Office interfered with his FMLA rights during his conversation with Shinnawi by discouraging him from using leave and that the Sheriff's Office constructively discharged him to retaliate against him for calling Shinnawi.

The Seventh Circuit reversed in part. Ziccarelli presented sufficient evidence to defeat summary judgment on his claim of FMLA interference through alleged discouragement. The court held that plaintiff need not show actual denial of benefits in order to proceed on interference claim under 29 USC section 2615(1)(1), and the alleged threat of discipline if plaintiff used additional FMLA

leave qualified as interference with plaintiff's FMLA rights. Moreover, plaintiff sufficiently alleged that representative's alleged statements prejudiced him by affecting his decision about seeking FMLA leave.

But the Seventh Circuit affirmed the district court on plaintiff's retaliation claim. It ruled that it did not err in granting defendant's motion for summary judgment with respect to plaintiff's claim that defendant retaliated against him for discussing FMLA leave by constructively discharging him, where plaintiff could only speculate as to whether his termination was imminent at time of his resignation, where plaintiff had not formally requested FMLA leave, and where any potential discipline remained remote.

I. FIRST AMENDMENT - Discrimination and Retaliation

Kingman v. Frederickson, No. 22-1013 (7th Cir. 2022)

Kingman, Rhinelander Wisconsin's Director of Public Works, spoke at a City Council meeting with a declaration of no confidence in a colleague, the city administrator. Rhinelander investigated Kingman's contentions and found them without merit. In the process, however, third-party investigators discovered that Kingman himself had not only mistreated his employees but also had gone so far as to retaliate against those who had complained about the toxic work environment he created in his department. Kingman was fired.

He subsequently filed a lawsuit under 42 U.S.C. 1983, alleging that the termination reflected retaliation for exercising his First Amendment rights at the City Council meeting.

The district court granted the city's motion for summary judgment.

The Seventh Circuit affirmed summary judgment in favor of Rhinelander and individual defendants, concluding that no reasonable jury could find that the Council's vote to fire Kingman reflected unlawful retaliation.

The court noted that while the plaintiff's complaint against the City Administrator had potential for First Amendment coverage to extent that his complaint could be viewed as speech from private citizen about matter of concern to his fellow citizens, plaintiff failed to produce some evidence that his termination was motivated in part by his complaint against City Administrator, where:

(1) plaintiff's complaint was made three-month prior to his termination;
(2) investigation generated report that concluded that plaintiff had retaliated against others who publicly complained about toxic environment in plaintiff's department; and
(3) City council members testified that they thought report was credible, and that they terminated plaintiff based on findings in report.

Regardless of whether Kingman spoke to the council as a private citizen or

in connection with his employment, Kingman's behavior toward his subordinates is just the type of "significant intervening event" and seriously "inappropriate workplace behavior" that separates an employee's protected activity "from the adverse employment action he receives."

Kennedy v. Bremerton School District, 142 S. Ct. 2407 (June 27, 2022)

Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer.

Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him.

The District Court denied that motion, and the Ninth Circuit affirmed.

After the parties engaged in discovery, they filed cross-motions for summary judgment.

The District Court found that the " 'sole reason' " for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after three games in October 2015.

The District Court granted summary judgment to the District and the Ninth Circuit affirmed.

The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges.

Mr. Kennedy appealed to the U.S. Supreme Court.

Justice Neil Gorsuch wrote the majority opinion holding that the suspension violated Mr. Kennedy's rights under the Free Exercise and Free Speech Clauses. The Court explained that unlike earlier "school prayer" cases like Engel v. Vitale,

370 U.S. 421 (1962), and School District of Abington Township v. Schempp, 374 U.S. 203 (1963), "[t]he contested exercise here does not involve leading prayers with the team; the District disciplined Mr. Kennedy only for his decision to persist in praying quietly without his students after three games in October 2015." Mr. Kennedy's prayers "were not publicly broadcast or recited to a captive audience," students "were not required or expected to participate," and the prayers were made after the games ended, when Mr. Kennedy was no longer acting within the course and scope of his employment. In short, "[t]here is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension."

In the absence of such coercion, the school district went too far. As the majority put it, "[w]e are aware of no historically sound understanding of the Establishment Clause that begins to 'make it necessary for government to be hostile to religion' in this way." Erroneously relying on the "Lemon test," the district's actions "rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech." The Constitution, Justice Gorsuch concluded, "neither mandates nor tolerates that kind of discrimination."

Justices Clarence Thomas and Samuel Alito filed concurring opinions. Justice Sonia Sotomayor filed a dissenting opinion, in which Justices Stephen Breyer and Elena Kagan joined. The dissent criticized the majority for giving "almost exclusive attention" to the Free Exercise Clause's protection of individual religious exercise, while "giving short shrift" to the Establishment Clause's prohibition on state establishment of religion. The dissent also faulted the majority for "overrul[ing]" Lemon v. Kurtzman, which "calls into question decades of subsequent precedents."

J. USERRA - Uniformed Services Employee and Reemployment Rights Act

Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022)

Torres, a state trooper, was called to active duty in the Army Reserves and deployed to Iraq, where he was exposed to toxic burn pits. Torres, honorably discharged, returned home with constrictive bronchitis. Because of his constrictive bronchitis he could no longer work as a state trooper and he asked his former employer to accommodate his condition by transferring him to a different role within the Department of Public Safety. DPS refused and offered him a temporary position as a state trooper, stating that if he did not report to duty, his employment would be terminated. Torres resigned.

Torres sued DPS in state court for violating the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by not accommodating him.

DPS moved to dismiss the case, citing sovereign immunity from USERRA lawsuits.

The trial court denied the motion.

On appeal, the Texas Thirteenth District Court of Appeals granted DPS' motion.

Torres appealed the ruling to the U.S. Supreme Court.

The Supreme Court reversed and remanded. By ratifying the Constitution, the states agreed their sovereignty would yield to the national power to raise and support the Armed Forces. Congress may exercise this power to authorize private damages suits against nonconsenting states, as in USERRA.

The test for whether the structure of the original Constitution itself reflects a waiver of states' immunity is whether the federal power is "complete in itself, and the states consented to the exercise of that power—in its entirety—in the plan of the Convention." Congress' power to build and maintain the Armed Forces fits that test. Congress has long legislated regarding military forces at the expense of

state sovereignty. USERRA expressly "supersedes any State law . . . that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit."

Moss v. United Airlines, Inc., 20 F.4th 375 (7th Cir. 2021)

From April 1, 2005, to 2010, United Air Lines pilots, who also served in the reserve components of the Armed Forces of the United States and were called periodically to active duty, accrued sick time throughout their entire military leave. In contrast, Continental Pilots, who served the Country in the same capacity, accrued sick time only through the first thirty days of their military leave during the same period.

In 2010, these two airlines began a merger process. They first became wholly owned subsidiaries of United Continental Holdings. During this stage, the separate bargaining agreements of each legacy airline continued to govern for two years.

In March 2013, United and Continental merged into a single entity—United Airlines. Nevertheless, the policies of the two legacy airlines continued in effect until United Airlines standardized the sick-time policy in 2014. Under the new 2014 policy, United pilots only accrued sick time during the first 90 days of military leave.

Moss, a pilot and a Lieutenant Colonel in the Marine Corps Reserves, filed a class action suit, alleging violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, which requires employers to provide employees on military leave any seniority-based benefit the employee would have accrued but for the military leave.

Moss claimed that sick time is a seniority-based benefit that should have continuously accrued or sick-time accrual was available to pilots on comparable periods of leave.

The district court granted United's motion for summary judgment.

The Seventh Circuit affirmed holding that for a benefit to be seniority-based, the benefit must be a reward for length of service. Sick leave is not such a reward but is "a future-oriented longevity incentive." United's sick-time accrual policy contains a work requirement and is in the nature of compensation, not a reward for long service.

White v. United Airlines, Inc., No. 19-2546 (7th Cir. 2021)

In 1994, Congress passed the Uniformed Services Employee and Reemployment Rights Act (USERRA) with the goal of prohibiting civilian employers from discriminating against employees because of their military service.

White had been employed as a commercial airline pilot since 2005 and has also served in the U.S. Air Force since 2000, first on active duty and now on reserve duty. As a reservist, he is required to attend periodic military-training sessions. White had taken periods of short-term military leave, usually for a day or two at a time, during which he did not receive pay from United. Under United's collective bargaining agreement, pilots receive pay when they take other short-term leaves of absence, such as jury duty or sick leave. United also maintains a profit-sharing plan for its pilots that is based on the wages they earn; pilots who take paid sick leave or paid leave for jury duty earn credit toward their profit-sharing plan, while pilots who take short-term military leave do not.

White initiated a class action under the 1994 Uniformed Services Employee and Reemployment Rights Act (USERRA), which is intended to prevent civilian employers from discriminating against employees because of their military service, 38 U.S.C. 4301(a).

The district court dismissed White's complaint.

The Seventh Circuit reversed. It held that USERRA's mandate that military leave be given the same "rights and benefits" as comparable, nonmilitary leave requires an employer to provide paid military leave to the same extent that it provides paid leave for other absences. The Seventh Circuit opined that paid leave falls within the "rights and benefits" defined by the statute.

The Seventh Circuit reinstated the case and sent it back to the lower court for further proceedings, noting that White must show that any paid leave of absence provided by United is comparable to any given stretch of military leave. Factors to be considered in this analysis, the court said, are the duration and purpose of the leave as well as the ability of the employee to choose when to take the leave.

K. SHERMAN ACT and CLAYTON ACT

Vasquez v. Indiana University Health, Inc., No. 21-3109 (7th Cir. 2022)

Dr. Vasquez arrived in Bloomington in 2006, opened an independent vascular-surgery practice, and obtained admitting privileges at Bloomington Hospital, Monroe Hospital, and the Indiana Specialty Surgery Center. He performed more than 95% of his inpatient procedures at Bloomington Hospital.

In 2010, IU Health acquired Bloomington Hospital. In 2017, IU Health acquired Premier Healthcare, an independent physician group based in Bloomington. Vasquez alleges that, because of the acquisition, IU Health employs 97% of primary care providers (PCPs) in Bloomington and over 80% of PCPs in the region.

Vasquez alleged that IU Health launched "a systematic and targeted scheme" to ruin his reputation and practice because of Vasquez's commitment to independent practice. IU Health's employees cast aspersions on his reputation. IU Health revoked Vasquez's Bloomington admitting privileges.

Vasquez sued IU Health, claiming antitrust violations under the Sherman Act, 15 U.S.C. §§ 1-7, and the Clayton Act, id. §§ 12-27.

IU Health moved to dismiss, arguing that neither the Sherman Act nor the Clayton Act claims were premised on a plausible geographic market, and that the Clayton Act claims also were time-barred.

The district court agreed on both points and dismissed the suit.

Vasquez appealed and the Seventh Circuit reversed.

In reversing the district court, the Seventh Circuit noted that Bloomington, Indiana (population 90,000) is in a metropolitan statistical area with a population near 200,000. From Bloomington, one can drive an hour and ten minutes to Indianapolis (population 865,000); two hours to Evansville (population 120,000); two hours to Louisville (population 620,000); or two and a half hours to

Cincinnati, (population 300,000).

Vasquez's complaint needed to allege only one plausible geographic market to survive a motion to dismiss. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The court held that a rational jury could find that Bloomington is such a market, as we now explain.

The Seventh Circuit reversed the dismissal of his suit. Vasquez's accounts of how a hypothetical monopolist could dominate Bloomington's vascular-surgery market suffice for the pleading stage; the complaint presents a plausible account under which his suit is timely.

L. FEDERAL RAILROAD SAFETY ACT

Ziparo v. CSX Transportation, Inc., No. 20-1196 (2d Cir. 2021)

Plaintiff, Cody Ziparo, filed suit against his former employer, CSX, for unlawful retaliation under the Federal Railroad Safety Act (FRSA), alleging that he was terminated because he engaged in protected activity by "reporting, in good faith, a hazardous safety or security condition."

The United States District Court for the Northern District of New York granted summary judgment for CSX on the grounds that Ziparo's belief that the subject of his report — pressure from supervisors to make false entries in work reports causing employees undue stress and distraction from their duties — concerned a "hazardous safety or security condition" was objectively unreasonable, and that in any event only physical conditions subject to the railroad's control could constitute such a condition. Mr. Ziparo appealed.

The Second Circuit vacated the district court's grant of summary judgment in favor of CSX, concluding that the district court erred in determining that plaintiff's belief that the subject of his report – pressure from supervisors to make false entries in work reports causing employees undue stress and distraction from their duties – concerned a "hazardous safety or security condition" was objectively unreasonable.

Rather, the Second Circuit concluded that the FRSA's protection of reports made "in good faith" requires only that the reporting employee subjectively believe that the matter being reported constitutes a hazardous safety or security condition, regardless of whether that belief is objectively reasonable. The Second Circuit also held that the district court erred in determining that only physical conditions subject to the railroad's control could constitute such a condition. The court explained that the statutory text suggests no reason to confine the meaning of "hazardous safety or security condition" to encompass only physical conditions. Accordingly, the court remanded for further proceedings.

II. State Law Cases

A. Illinois

Cupi v. Carle Bromenn Medical Center, No. 1:21-cv-01286, 2022 WL 808209 (C.D. Ill. Mar. 16, 2022)

Plaintiff, Maria E. Cupi, was hired by Defendant in July 2019. On October 2, 2020, Plaintiff called in sick with a fever and reported she had been exposed to COVID-19. Defendant agreed Plaintiff could not work her scheduled shift that day and advised that her absence was covered by Defendant's COVID-19 policy.

The next day, Plaintiff tested negative for COVID-19. On October 5, Defendant informed Plaintiff she could return to work. She was scheduled to work the following day (October 6), and Plaintiff's supervisor asked her to arrive early to help move patients.

When Plaintiff arrived, she was called into her supervisor's office, where she was terminated for violating Defendant's attendance policy. The termination letter cited the October 2 absence as one of several alleged violations.

Plaintiff Maria E. Cupi filed suit against her former employer alleging her termination constituted a violation of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and Illinois public policy. She also alleged Defendant failed to pay wages due to her in violation of the Illinois Wage Payment and Collection Act and the United States Fair Labor Standards Act.

Defendant filed a Motion to Dismiss the ADA count and the count alleging Defendants violated Illinois public policy.

The district court granted the Defendant’s Motion to Dismiss with regard to the ADA count. But it dismissed the public policy count without prejudice and invited the Plaintiff to amend her complaint. In its order the court The court agreed with plaintiff that public policy would be frustrated if she was terminated for complying with her employer’s COVID-19 mitigation procedures, which included remaining at home if feverish, and which were mandated by OSHA.

B. Washington

Kingston v. Int'l Bus. Machs. Corp., W.D. Wash., No. 2:19-cv-01488, jury verdict 4/15/21.

At the end of the third sales quarter in 2017, IBM sales manager Scott Kingston noticed a stark discrepancy between the commissions of two of his subordinates: Jerome Beard, a black salesman, and Nick Donato, a white salesman. While Mr. Donato received more than $1 million in uncapped commissions for a closed deal with SAS Institute, Mr. Beard's commissions for a successful sale to HCL Technologies were slashed from more than $1 million to $205,000.

After 17 years working for IBM, Mr. Kingston understood that the company had a no-cap policy on commissions. In fact, as outlined in the plaintiff's trial brief, internal IBM documents revealed that the company specifically prohibited caps believing that this helped to motivate its sellers.

When Mr. Kingston raised his concerns with his superiors, he called the difference in treatment between Mr. Beard and Mr. Donato "racial discrimination."

Mr. Kingston recalled the conversation when he testified to the jury, saying, "'They were telling me it wasn't about money; it was some other reason. I flat out said, 'You are leaving no possibility for anybody to conclude another reason than racial discrimination. You are foreclosing any other possible conclusion. You are going to get us sued.'"

In April 2018, Mr. Kingston was fired for what IBM claimed was his poor judgement of approving Mr. Donato's seven-figure commission the year prior. The manager in between Mr. Kingston and Mr. Donato was also terminated. Mr. Kingston claimed he never received a written explanation for why he was terminated for simply following company policy.

The Seattle jury found that Mr. Kingston proved his claims for wrongful termination violated the Washington Law Against Discrimination, as well as public policies regarding race discrimination and the withholding of wages of Jerome Beard.

Their $11.1 million verdict included damages for past economic loss in the amount of $1,874,302.00, future economic loss in the amount of $3,097,624.00, unpaid sales commissions equaling $113,728.00 for the first quarter of 2018, and emotional harm in the amount of $6,000,000.00.

C. Indiana

Pack v. Middlebury Community Schools, No. 20-1912 (7th Cir.)

The School terminated Pack's employment as a teacher after less than a year and published a press release about Pack on its website, allegedly criticizing Pack, which remains available on the School's website.

Pack sued the School. The Elkhart Truth ran an article later that month under the headline: "Fired Northridge teacher, an atheist, sues Middlebury Community Schools for religious discrimination." Pack and the School settled that case.

The School agreed to maintain a level of confidentiality and agreed to tell Pack's prospective employers only limited information about him. The parties agreed that neither would disparage the other party. The settlement agreement did not mention the 2014 press release.

Pack then sued Elkhart Truth in state court, alleging defamation. School Superintendent Allen gave an affidavit supporting Truth's motion to dismiss. Pack later recruited two acquaintances to call the School and pose as prospective employers. During one call, Allen said that Pack's termination was "a matter of public record." During another, Allen said Pack was terminated "for cause."

Pack then sued for breach of the settlement agreement.

The district court granted summary judgment to the employer on all claims.

The Seventh Circuit affirmed summary judgment for the School on all claims. It held that the School had no contractual obligation to remove the pre-existing press release from its website, that it enjoys absolute privilege for the affidavit submitted in the Truth litigation, and that it did not disclose contractually forbidden information to "prospective employers" because the callers were not "prospective employers."

Section Six

2022 Indiana Continuing Legal Education Forum (ICLEF)

Recent Developments in Employment Law: Covenants Not to Compete

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Section Six

Recent Developments in Employment Law: Covenants Not to Compete……....David J. Carr

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Introduction

This article summarizes recent updates in employment law from current court opinions and legislation involving covenants not to compete between employers and employees. Section I of this article discusses covenants not to compete generally and the basic legal requirements to establish a valid non-compete provision and/or agreement under Indiana law. Sections II and III go a little deeper and discuss the court's ability to "blue pencil" an agreement and remedies available under the law. Lastly, Section VI analyzes recent case law from Indiana's state and federal courts regarding non-compete agreements and their legality depending on the circumstances and facts at issue. For example, the cases discuss the limitations to an employer's legitimate business interest in protecting itself against *unfair* competition and the meaning of a "protectable interest" as it applies to the geographical scope of an agreement.

I. Covenants Not to Compete Generally

An employer may offer a covenant not to compete to an employee either at the beginning of their employment, when a promotion or change in employment occurs, or during the term of employment (so long as the requirements noted herein are met). The purpose of a covenant not to compete is to protect an employer's business interest (or a "protectable interest") while still providing autonomy to the employee and their future endeavors. Noncompetition covenants in employment contracts are typically disfavored in Indiana and courts often construe the covenants strictly against the employer and will not enforce an "unreasonable" restriction. *See Cent. Indiana Podiatry, P.C v. Krueger*, 882 N.E.2d 723, 728–29 (Ind.2008).

Under Indiana common law, a covenant not to compete must be reasonable in order to be enforceable. What is reasonable differs, but courts typically consider the following when evaluating an agreement:

(1) The public's interest;

(2) The restraint's effect on the employee; and

(3) Whether the restraint is necessary to protect an employer's legitimate interests, including the protection of good will; trade secrets; and confidential information.

See Norlund v. Faust, 675 N.E. 2d 1142, 1154 (Ind. Ct. App. 1997); *see also Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 900 N.E.2d 786, 796 (Ind. Ct. App. 2009) ("In considering what is reasonable, regard must be paid to three factors: (1) whether the agreement is wider than necessary for the protection of the employer in some legitimate interest; (2) the effect of the agreement upon the employee; and (3) the effect of the agreement upon the public.").

A. What is a Protectable Interest?

The key question ultimately is this – is the non-compete agreement reasonable in terms of the "protectable interest(s)" it is aiming to protect? Like most things in the law – what is reasonable depends on the facts and circumstances of each case. For example, Indiana courts have held that "the advantageous familiarity and personal contact which employees derive from dealing with an employer's customers are elements of an employer's 'good will' and are a protectible interest which may justify a restraint...." *E.g., See Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 561 (Ind. 1983).Similarly, the covenant must be reasonable as it applies to the duration of the agreement; the geographical scope; and the types of conduct or activity that is prohibited. *See Licocci*, 445 N.E.2d at 561–62 (Ind.1983).Courts have found that various durations of time for agreements enforceable when necessary to protect the employer's interest. *See Licocci*, 445 N.E.2d at 558 (one year); *Cent.*, 882 N.E.2d at 729 (Ind. 2008) (two years); *Seach v. Richards, Dieterle & Co.*, 439

N.E.2d 208, 213 (Ind. Ct. App. 1982) (three years); *Rollins v. Am. State Bank*, 487 N.E.2D 842, 843-44 (Ind. Ct. App. 1986) (five years).

Whether a geographic scope is reasonable depends on the interest of the employer that the restriction serves. *See Slisz v. Munzenreider Corp*., 411 N.E.2d 700, 707–09 (Ind.Ct.App.1980) (know-how or "unique skills" derived from the employer may justify a wider scope); *Fumo v. Med. Grp. of Mich. City, Inc.,* 590 N.E.2d 1103, 1109 (Ind. Ct. App. 1992) (finding that a 25-mile restriction was reasonable). But courts will enforce broader geographic restrictions when the situation involves confidential information, trade secrets, and business sales. However, courts will not enforce statewide and nationwide limitations as they are overbroad and unnecessary to protect an employer's legitimate interests. *See Dicen v. New Sesco, Inc.,* 839 N.E.2d 684, 689 (Ind. 2005)).

A non-compete agreement must also be supported by sufficient consideration. Under Indiana law, sufficient consideration includes an offer of employment, continued employment and monetary consideration. *See Ackerman v. Kimball Int'l, Inc.,* 652 N.E.2d 507, 509 (Ind. 1995); *Leatherman v. Mgmt. Advisors, Inc.,* 448 N.E.2d 1048, 1050 (Ind. 1983).

B. Non-Competes in a Sale of Business are Liberally Construed

Time and time again Indiana courts have held that restrictive covenants are in restraint of trade and are disfavored by the law, courts generally construe such agreements "strictly against the employer and will not enforce an unreasonable restriction." *Cent.,* 882 N.E.2d at 728-29.

Courts, however, do tend to interpret restrictive covenants that arise out of the sale of a business more neutrally. *Dicen,* 839 N.E.2d at 687. "Because sales of businesses are more likely to be arms-length transactions between parties of relatively equal bargaining power than employment contracts, and because the seller–employee is more likely to be paid a premium for agreeing not to compete with the buyer, 'policy considerations' dictate that noncompetition

covenants arising out of the sale of a business be enforced more liberally than such covenants arising out of an employer–employee relationship.'" *AL-KO Axis, Inc. v. Revelino,* 2013 WL 12309288, *5 (N.D. Ind. 2013) (citing *Dicen*, 839 N.E.2d at 687).

Stated otherwise, "though both are reviewed under a 'reasonableness standard,' a restrictive covenant is more likely to be reasonable where it accompanies the sale of a business rather than only an employment agreement." *Id.* Still, employers cannot artificially interject an employment agreement non-compete into a sale of a business just to argue that the agreement should be liberally construed. *Id.*

The employer in *AL-KO* attempted to do just that but it was clear from the record that the employment agreement at issue was not connected to the sale of business and its "contents clearly illustrate the lack of equal bargaining power that justifies the strict review of employment agreements." *Id.* at *5. That illustrated the "difference in bargaining power between the seller of a company and a mere employee that justifies the different approaches to restrictive covenants." *Id.* As such, the employment agreement had to be tested under the reasonableness standard for restrictive covenants and was to not be liberally construed.

C. Non-Compete Agreements Between Employer and Physicians

It should also be noted that in 2020, the Indiana Legislature passed House Bill 1004 which governs noncompete agreement between employers and physicians. *See* I.C. 23-22.5-5.5. The statute requires noncompete agreements to include provisions that state: (1) the employer must provide a physician with a copy of any notices provided to the physician's patients in the preceding two years, relating to the physician's departure (but cannot disclose the patient's name or contact information); (2) the employer must, in good faith, provide the physician's last known contact information as requested by any patient treated by the physician in the preceding two years; (3) a

mechanism for physicians to obtain medical records of patients whom the physician treated in the preceding two years (with the patient's consent); (4) physicians have the option to purchase a complete and final release from the terms of a non-compete at a reasonable price; and (5) physicians may be prohibited from requesting patient medical records that materially differs from the format used to create or store the record. *Id.* Likewise, I.C. 25-22.5-17 includes the same requirements, minus the buy-out procedure, on any physician who leaves their place of employment on or after July 1, 2020.

II. Blue Penciling

In Indiana, employers have the burden of proving that a restrictive covenant is enforceable against the employee. To do so, the employer must demonstrate the provision or provisions are reasonable and necessary in light of the circumstances and protects a legitimate business interest (i.e. trade secrets). *See Hahn v. Dress, Perugini & Co.,* 581 N.E.2d 457, 459-60 (Ind. Ct. App.1991).

If a court does find certain provisions of a restrictive covenant to be unreasonable, then it may *blue pencil* (i.e. modify) the terms of the restrictions to make the restrictions more reasonable. Indiana's blue pencil doctrine allows a court to delete language but does not allow it to add or modify language. *Cent.,* 882 N.E.2d at 730-732. For blue penciling to work, the covenant must be clearly divisible into parts and the provision must remain enforceable after the unreasonable provisions are removed. *See Heraeus Med., LLC v. Zimmer, Inc.,* 135 N.E.3d 150, 155-56 (Ind. 2019)

Clark's Sales and Services, Inc. v. Smith involved a covenant not to compete which restricted an employee from working with any of the employer's customers he established or worked with over his 14-year career. 4 N.E.3d 772 (Ind. Ct. App. 2014). The employer's motion

for preliminary injunction hinged on whether it established by a preponderance of evidence its likelihood of success at trial. The motion was denied because the scope of activities and geographic restrictions in the noncompete agreement was overly broad and unreasonable. *Id.*

The employer then requested that the court "blue pencil" the agreement rather than render it completely unenforceable. The court denied the request because it would have required it to redact sentence fragments from each contested paragraph, which would have changed the entire meaning of each paragraph. In other words, it would have gone far beyond simple modifications to the agreement. *Id.* 784-86. After all, the employer "had a fair opportunity to draft a reasonable and enforceable restrictive covenant yet failed to do so." Thus, the court held that since the agreement was so overly broad and unenforceable, it could not blue pencil the agreement as that would subject the parties to terms to which they did not agree. *Id.* at 786; *see also Heraeus,* 135 N.E.3d at 155-56 ("Indiana's 'blue pencil doctrine' is really an eraser—providing that reviewing courts may delete, but not add, language to revise unreasonable restrictive covenants. And parties to noncompetition agreements cannot use a reformation clause to contract around this principle.").

III. Available Remedies

Once an employer establishes that the non-compete restrictions in an agreement are reasonable, the employer may then obtain certain remedies – (1) lost profits or loss in value of the business; (2) liquidated damages, so long as they are reasonably related to actual damages and not penal in nature; and (3) injunctive relief. *Hahn,* 581 N.E.2d at 463. An employee may seek both liquidated damages *and* injunctive relief, so long as the governing agreement does not limit liquidated damages as the exclusive remedy. *Pinnacle Healthcare, LLC v. Sheets*, 17 N.E.3d 947, 955 (Ind. Ct. App. 2014).

To receive an order for injunctive relief in state court, an employer must prove the following by a preponderance of the evidence:

- It does not have an adequate remedy at law and, therefore, will suffer irreparable harm as a result of the case;
- It has at least a reasonable likelihood of success on the merits at trial;
- The injury to the former employer from failure to issue the injunction outweighs the harm that the former employee would suffer from the injunction; and
- The public interest would be disserved.

Zimmer, Inc. v. Davis, 922 N.E.2d 68, 71 (Ind. Ct. App. 2010).

Federal courts simply require that employers demonstrate a reasonable likelihood of success on the merits of its claims at trial and that they will suffer imminent irreparable harm if the court does not issue the injunction. *Frontier Corp. v. Telco Commc'ns Grp., Inc.*, 965 F.Supp. 1200, 1207 (S.D. Ind. 1997). If elements are met, the court then must balance the threatened injury with the potential harm from the injunction to the former employer and consider whether the injunction is against public interest. *Id.*

IV. Recent Cases Analyzing Covenants Not to Compete

A. *Noncompete Agreements Must be Supported by a "Protectable Interest"*

In *Steak n Shake Enterprises, Inc. v. iFood, Inc.*, 2021 WL 3772012 (S.D. Ind. Aug. 21, 2021), the "protectable interest" at issue was the Plaintiff's option to choose the location in which it could "refranchise" in the future. There, the noncompete prohibited the defendants (franchisees) from competing or solicitating "within five (5) miles" of their former location even though plaintiff (the franchisor) did not have any locations in the specific geographic area at the time. *Id.* at *4-5. As such, the defendants argued that the geographic scope of the noncompete provision was

unreasonable and otherwise overly broad because it "functionally [barred] them from taking party in the restaurant industry". *Id.* at *5.

The court disagreed, holding that even if there were no "Steak and Shake" locations in the specific geographic region at the time, plaintiff could explore the opportunity in the future and "reestablish" locations that were once operated by defendants. *Id.* Furthermore, the five (5) mile restriction was reasonable under Indiana law and "reasonable with respect to the legitimate interests of the employer, restrictions on the employee and the public interest. *Id.* (citing *Washel v. Bryant*, 770 N.E.2d 902, 904 (Ind. Ct. App. 2002) (upholding a restrictive covenant with a 10-mile restriction for two (2) years); *Titus v. Rheitone, Inc.,* 758 N.E.2d 85, 88-89 (Ind. Ct. App. 2001) (upholding a restrictive covenant restricting activity in "all counties located in the State of Indiana.")).

The court also found that irreparable harm likely could have occurred if the defendants continued to operate its business in a manner that violated the noncompetition agreement because plaintiff's "ability to re-franchise the area" would have been compromised if the defendants were allowed to operate in the area under a different name. *Id.* at *7. Accordingly, the court granted a preliminary injunction in favor of plaintiffs based on these facts.

B. *Parol Evidence Always Plays a Role*

Indiana law is clear that "[u]nlike reasonableness in many other contexts, the reasonableness of a noncompetition agreement is a question of law." *Cent.,* 882 N.E.2 at 729. The reasonableness of an agreement is based on its terms. When a contract is *unambiguous*, courts do not need to go beyond the four corners of the contract to investigate meaning. *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 756 (Ind. 2018) (citing *Performance Servs., Inc. v. Hanover Ins. Co.*, 85 N.E.3d 655, 660 (Ind. Ct. App. 2017)). If there is an ambiguity, courts will consider

extrinsic (parol) evidence to resolve it. "[P]arol evidence may be considered if it is not being offered to vary the terms of the written contract but to show that fraud, intentional misrepresentation, or mistake entered into the formation of a contract." *Downs v. Radentz*, 132 N.E.3d 58, 64 (Ind. Ct. App. 2019). Parol evidence will also be considered to determine the subject matter and circumstances under which the parties entered into the written contract. *Id.*

Carroll v. Long Tail Corp., 167 N.E.3d 750 (Ind. Ct. App. 2021) involved a two (2) year restrictive covenant which prohibited a former contractor from contacting or solicitating or attempting to contact or solicit any "Customer" of the "Company" or proving products or services substantially similar to or in competition with the products or services sold by the "Company". 167 N.E.3d 750, 757 (Ind. Ct. App. 2021). There was ambiguity, however, as to the definition of the term "Company" and "Customer" in the non-solicitation provision. As such, parol evidence had to be considered – "[w]e find that parol evidence may be considered to resolve any ambiguity and apply the terms of the [agreement] to its subject matter." *Id.* at 760. The evidence reviewed by the court included: list of certain company names and customers from certain locations during the relevant period, invoice records of all customers who sent an invoice during the time the employee was responsible for contacting and maintaining certain client relationships, and a list of certain companies and persons that the employee downloaded certain items for during the relevant period.

Had the terms "Company" and "Customer" been properly defined in the agreement, the court would not have reviewed the extensive extrinsic evidence to determine the parties' intent. Upon review of that extrinsic evidence, the court determined that provisions applied to the employer's customers in New Zealand, Australia and India – an arguably far more expansive

viewpoint than on the face of the agreement. Ultimately, however, the provisions were reasonable based on the circumstances and therefore enforceable. *Id.* at 757-59.

The *Carroll* case was different than the notable case, *Seach v. Richards Dietrele & Co.,* where the court observed that there was "no limitation whatsoever regarding when the past clients with whom contact is prohibited may have been customers of the Firm" and that the contract unreasonably prohibited "contact with all past or prospective customers of the Firm, no matter how much time has elapsed since their patronage ceased or the contact was made." 439 N.E.2d 208, 214 (Ind. Ct. App. 1982). On the other hand, the non-solicitation provision in *Carroll* only applied to those "customers" with whom the contractor had direct involvement. Thus, the restriction in *Carroll* was more specific and, therefore, could not be said to be "vague and overly broad". *Id.* at 762-63.

C. *Indiana Law Prohibits "Unfair Competition" not <u>all</u> Competition*

As noted above, an employer bears the burden of showing that the covenant is reasonable and necessary given the circumstances. *Titus,* 758 N.E.2d at 91–92. In other words, "the employer must demonstrate that the employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a non-competition agreement." *Gleeson v. Preferred Sourcing, LLC,* 883 N.E.2d 164, 172 (Ind. Ct. App. 2008). To obtain a preliminary injunction, the employer must demonstrate a legitimate protectable interest – that is, "some reason why it would be unfair to allow the employee to compete with the former employer." *Coates v. Heat Wagons, Inc.,* 942 N.E.2d 905, 913 (Ind. Ct. App. 2011). Indiana law only protects against *unfair* competition – not all competition.

In *Custom Truck One Source, Inc. v. Norris,* 2022 WL 594142 (N.D. Ind. 2022), the noncompete provision restricted the former employee from: (1) acting in any official corporate

capacity of any business that was substantially the same business or in a business substantially competitive with his former employer within the "Territory" (as defined by the agreement) and (2) serving as an employee in a similar capacity as previously performed, in substantially the same business as his former employer, or in a business substantially competitive with his former employer within the "Territory". *Id.* at *5.

The restrictions of the agreement arguably applied "without regard to whether the business compete[d] solely outside the Territory." *Id.* at *5. Stated otherwise, the agreement prohibited the employee from *forming* a business inside the Territory (also where the employee was domiciled) even if he was not *competing* inside of the Territory as all his customers were located outside the Territory. The employee argued that the agreement was unenforceable because it was overbroad in that there was no "protectable interest merely in the place where a business establishes itself" but rather is "where the business competition occurs." *Id.* at *6. The employee further argued that there was no imposition on the employer's goodwill as he was not engaging in prohibited activity as identified in the agreement.

The questions before the court were: (1) what unfair competitive advantage did the employee receive from the place in which he conducts business activities (i.e. generates emails and calls) if the customers receiving the emails and calls are located outside the Territory? And (2) what is the competitive significance of the employee incorporating in the state where he resides if he's directing his competitive activities outside the Territory? *Id.* In response, the court said:

> These are serious questions in the global marketplace, and the Court must grapple with them to discern the enforceability and reasonableness of the non-competition provision here. Simply put, the Court fails to see how [the employee] is in a better competitive position by incorporating and making emails and phone calls that do not violate the non-solicitation provision and do not involve the Territory, than he would if he performed the same tasks anywhere else in the world. [Employer's] interest is in protecting against unfair competition; it has no right to protection from ordinary competition.

Id. (citing *Union Home Mortg. Corp. v. Jenkins*, 2021 WL 1979517, at *6 (N.D. Ohio May 18, 2021) ("[t]he purpose in allowing noncompetition agreements is to foster commercial ethics and to protect the employer's legitimate interests by preventing unfair competition-not ordinary competition."). As an aside, non-solicitation agreements must also be supported by a protectable interest of the employer and must be limited to the non-solicitation for those individuals who "have access to or possess any knowledge that would give a competitor an unfair advantage." *See Heraeus,* 135 N.E.3d at 155-56.

Thus, it is not enough to simply assert that the former employee's activities threatened or will threaten the employer's legitimate business interest if there are no facts to demonstrate *unfair* competition. Employers must be specific when drafting a restrictive covenant as to avoid this issue when it comes time for enforcement.

Conclusion

The world of non-competes presents an always evolving kaleidoscope of clashing interests between the employer's valuable information and relationships, and the employee's legitimate desire to maximize his or her market value, including use of whatever has been fairly gleaned from prior employers along the away. Don't expect this area of law to become dull any time soon.

4868-7925-7152.1

2022 INDIANA EMPLOYMENT NON- COMPETE LAW

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THE MAGIC WORD: *REASONABLE*

Under Indiana case law, a non-compete must be **reasonable**. To determine reasonableness, courts consider:

(1)Whether the restraints are necessary to protect an employer's legitimate interests, including the protection of:

- good will;
- trade secrets; and
- confidential information

(2)The restraint's effect on the employee.

(3)The public's interest.

Fogle v. Shah, 539 N.E.2d 500, 503 (Ind. Ct. App. 1989).

IT IS ALL GOOD WITHIN *REASON*

In considering what is reasonable, courts focus on three principles:

- (1) whether the agreement is wider than necessary for the protection of the employer in some legitimate interest;
- (2) the effect of the agreement upon the employee; and
- (3) the effect of the agreement upon the public.

See Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford, 900 N.E.2d 786, 796 (Ind. Ct. App. 2009).

IT IS ALL GOOD WITHIN *REASON (CONT'D)*

Indiana courts take those factors into consideration when looking at the:

(1) duration

(2) geographic extent and

(3) scope of activities restricted

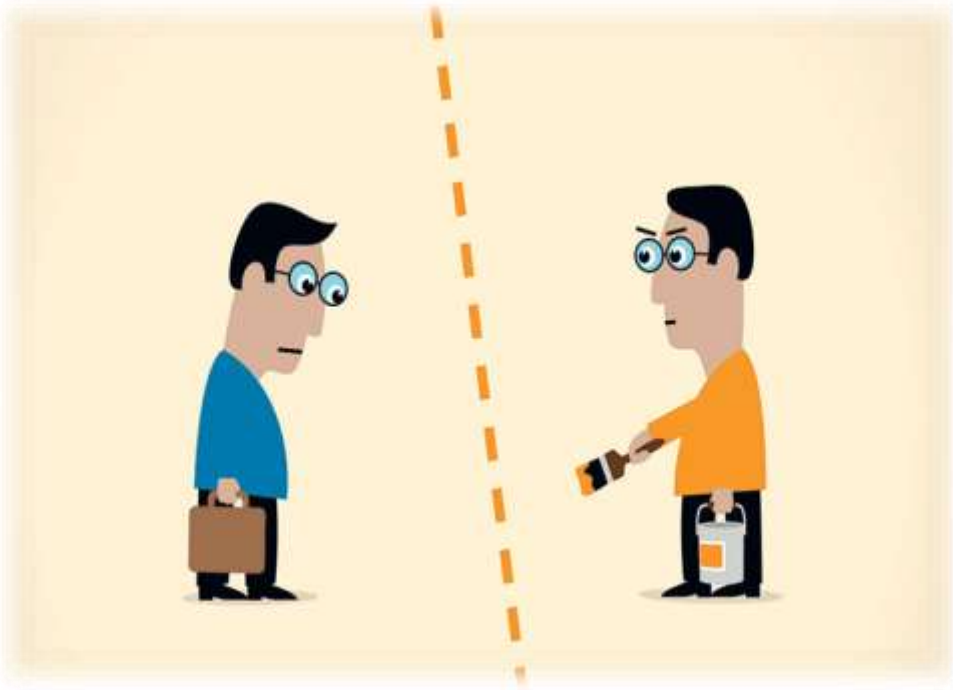
WHAT IS A REASONABLE DURATION?

Indiana courts have enforced restrictions of:

- **One year** (*see Licocci v. Cardinal Assocs., Inc.*, 445 N.E.2d 556, 558 (Ind. 1983)).
- **Two years** (*see Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 729 (Ind. 2008)).
- **Three years** (*see Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 213 (Ind. Ct. App. 1982)).
- **Five years**, when necessary to protect the employer's interest (*see Rollins v. Am. State Bank, 487 N.E.2d 842*, 843-44 (Ind. Ct. App. 1986)).

REASONABLE GEOGRAPHIC LIMITATION: HERE'S WHERE WE DRAW THE LINE

- Indiana courts tend to uphold geographical limitations covering the former employee's territory during their employment, since the restrictions are limited to the area in which the employee's activity is related to the good will of the employer's business



REASONABLE GEOGRAPHIC LIMITATION: HERE'S WHERE WE DRAW THE LINE (CONT'D)

Indiana courts have upheld:

- A covenant restricting a sales manager from engaging in any business substantially similar to the employer's heating and air conditioning business in the 19 states in which the employee had developed customer and vendor contacts since his employment. *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 915 (Ind. Ct. App. 2011).
- A 50-mile noncompetition covenant executed by physicians and an incorporated physicians' group. *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*, 900 N.E.2d 786, 796–97 (Ind. Ct. App. 2009).
- A franchise-context covenant under which a franchisee agreed not to open a competing child tutoring business in "the area of a circle having a diameter of two and one-half (2½) miles measured from the franchise center location, as the central point." *Tutor Time Learning Ctrs., LLC v. Larzak, Inc.*, No. 3:05-CV-322 RM, 2007 WL 2025214, at *12 (N.D. Ind. July 6, 2007).

REASONABLE GEOGRAPHIC LIMITATION: HERE'S WHERE WE CANNOT DRAW THE LINE

Indiana courts enforce non-competes without geographic limitation **IF** other means adequately limit the non-competes.

Courts have found the following geographic limitations unreasonable:

- An non-disclosure, non-circumvent agreement was found unreasonable and unenforceable given the absence of temporal or geographic limitations about the market being served. *Mid-American Salt, LLC v. D.J.'s Lawn Service*, 396 F. Supp. 3d 797, 810 (N.D. Ind. 2019).
- An insurance salesperson's covenant without any express geographical limitation and without any specific class of persons covered. *Commercial Bankers Life Ins. Co. v. Smith*, 515 N.E.2d 110, 114–15 (Ind. Ct. App. 1987).
- Noncompetition agreements purporting to restrict computer analysts from competing in Indiana, Ohio, and Kentucky (the area served by the branch in which they worked), because the area was broader than the geographic scope in which the employees, individually, actually worked. *Cap Gemini Am. v. Judd*, 597 N.E.2d 1272, 1288 (Ind. Ct. App. 1st Dist. 1992).

Scope of Activities

The scope of non-competes must be limited to preventing an employee from working for a competitor in a competitive capacity.

Indiana courts have found the following non-competes to be unreasonably broad:

- Restricting an employee from working for an employer's competitor in any capacity.
- Restricting an employee from working in portions of the business with which the employee was never associated.

MacGill v. Reid, 850 N.E.2d 926, 932 (Ind. Ct. App. 2006)

BLUE PENCIL DOCTRINE: THE POWER TO TAKEAWAY BUT NOT TO ADD

Indiana's blue pencil doctrine gives courts “an eraser” to delete unreasonable terms in a restrictive covenant.

It does **not**, however, permit adding or modifying language.

Judicial modifiability or reformation clauses cannot override the blue pencil doctrine’s strict excision approach.

THE NEW STUFF: ADDITIONAL CONSIDERATIONS FOR NON-COMPETE AGREEMENTS

Heraeus Med., LLC v. Zimmer, Inc

NEW TRAP FOR NON-COMPETE DRAFTERS

These tips are why you came!

- "Anti-Piracy" Provisions often overlooked
- In light of this case, every standard non-compete will need to be revised
- Protected employees must have a special status (nexus to trade secret or confidential info) --"any individual employed" overbroad and unenforceable
- Fall back: "raiding"

***Heraeus Med., LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 155-56 (Ind. 2019).**

NEW PHYSICIAN NON-COMPETE RESTRICTIONS—HEALTHCARE EMPLOYERS BEWARE

Pursuant to Ind. Code § 25-22.5-5.5-2 which came into effect July 1, 2020, to be enforceable, a physician non-compete agreement must:

(1) Provide the physician with a copy of any notice that:

- concerns the physician's departure from the employer; and
- was sent to any patient seen or treated by the physician during the 2 year period preceding the termination of the physician's employment or the expiration of the physician's contract. (Redacting any patient names and contact information).

Warning for employers: Defamation/tortious interference with business relations

NEW PHYSICIAN NON-COMPETE RESTRICTIONS—HEALTHCARE EMPLOYERS BEWARE (CONT'D)

(2) Employers are required, in good faith, to provide the physician's last known or current contact and location information to a patient who:

- requests updated contact and location information for the physician; and
- was seen or treated by the physician during the 2 year period before the physician's employment ended or the physician's contract expired.

Warning for employers: You cannot hide the doctor from patients

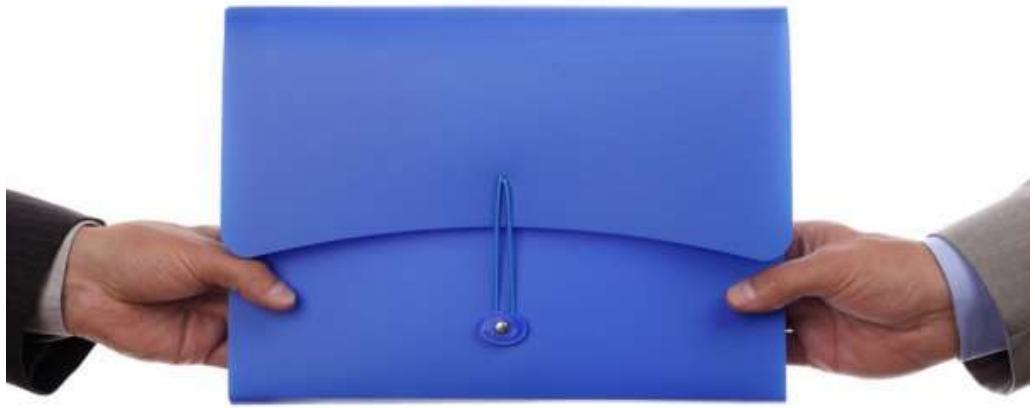
NEW PHYSICIAN NON-COMPETE RESTRICTIONS—HEALTHCARE EMPLOYERS BEWARE (CONT'D)

(3) Employers are required to provide the physician with:

(A) access to; or (B) copies of;

- a patient that was seen or treated by the physician during the 2 year period before the physician's employment ended or the physician's contract expired, on receipt of the patient's consent.

Warning for employers: Medical records access



NEW PHYSICIAN NON-COMPETE RESTRICTIONS—HEALTHCARE EMPLOYERS BEWARE (CONT'D)

(4) Employers are required to provide the physician with the option to purchase a complete and final release from the terms of the enforceable physician noncompete agreement at a reasonable price.

If the physician chooses **not** to exercise the option, the option may not be used in any manner to restrict, bar, or otherwise limit the employer's equitable remedies, including the employer's enforcement of the physician noncompete agreement.

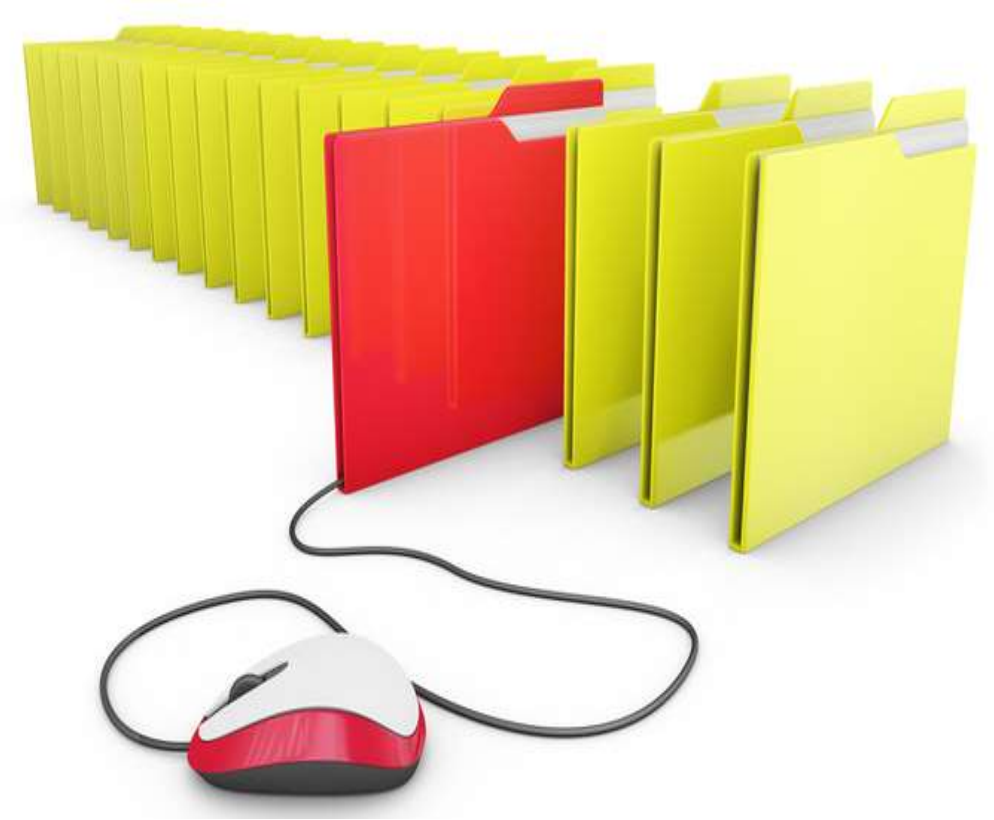
Warning for employers: Be strategic; How much detail on calculation? Use of an expert?

NEW PHYSICIAN NON-COMPETE RESTRICTIONS—HEALTHCARE EMPLOYERS BEWARE (CONT'D)

(5) Employers are prohibited from providing patient medical records in a format that materially differs from the format used to create or store the medical record during the routine or ordinary course of business, unless a different format is mutually agreed on by the parties.

Paper or portable document format copies of the medical records satisfy the formatting provisions of this law.

Warning for employers: no games concerning MD record production.



Damages

An employer in Indiana enforcing a non-compete may obtain:

- Liquidated damages, if they are reasonably related to actual damages and not penal in nature. ***American Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208, 211 (Ind. 2019).**
    - Liquidated damages provisions do not preclude injunctive relief unless the agreement provides that liquidated damages are the exclusive remedy. Otherwise, liquidated damages are merely an alternative to equitable relief. *Pinnacle Healthcare, LLC v. Sheets*, 17 N.E.3d 947, 955 (Ind. Ct. App. 2014).
- Injunctive relief
- Lost profits or loss in the value of the business

Damages

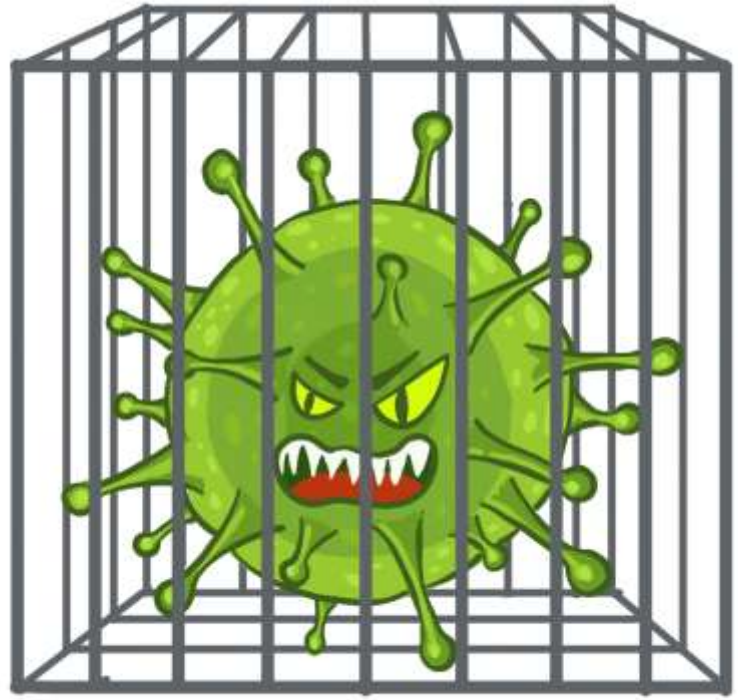
Attorney Fees and Dismissal

Staff Source, LLC v. Wallace, et al. 143 N.E. 3d 996 (Ind. Ct. App. March 30, 2020)

- Dismissal on eve of trial of non-compete case
- Plaintiff tagged for attorney fees under I.C. 34-52-1-1
- Caveat Emptor!

WHAT'S COVID GOT TO DO WITH IT?

CASE REVIEW



Facts: Employer, a limited liability company, brought breach of contract action against its former employee, vice president of operations and former member, alleging violations of covenants not to compete in both an operating agreement and an employment agreement.

Holdings: restrictions provision of operating agreement between employer and employee, employer's member, survived integration clause of subsequent purchase and sale agreement related to buyout of employer's members, and thus was enforceable;

liberal sale-of-a-business standard was proper standard of review for determining whether covenant not to compete provisions of employment and operating agreements were reasonable and thus enforceable;

employee's work for employer's competitor violated covenant not to compete provisions of employer's operating and employment agreements.

***Zollinger v. Wagner-Meinert Engineering LLC,* 146 N.E.3d 1060 (Ind. Ct. App. April 23, 2020)**.

Looking to the Future – What is a "Protectable Interest"

- When it comes to a "protectable interest" – location, or rather *future* locations, for employers may be protected.
- For example, a geographical limitation which prohibits competition in areas where a former employee once operated supports a "protectable interest". Indeed, an employer has the right to choose the locations it would like to operate in the future so long as there is a reasonable connection (i.e. attributable business interest) to the said location(s).
  - *Steak n Shake Enterprises, Inc. v. iFood, Inc.*, No. 1:21-cv-02131-TWP-MPB, 2021 WL 3772012 at *7 (S.D. Ind. Aug. 25, 2021) (finding irreparable harm in allowing a former franchisee to continue business operations that violate a noncompetition agreement because plaintiff's "ability to re-franchise the area will be compromised if a former franchisee is allowed to operate in the area under a different name.").

Looking to the Future – What is a "Protectable Interest"

- The noncompete in *Steak n Shake Enterprises, Inc. v. iFood, Inc.* prohibited the defendants (franchisees) from competing or solicitating "within five (5) miles" of their former location even though plaintiffs (the franchisor) did not have any locations in the specific geographic area at the time.
- The possibility of future endeavors in that location was enough to establish an interest worth protecting under Indiana's non-compete framework: "Plaintiffs clearly saw the potential for those restaurants in the area and may wish to reestablish locations there now that those operated by Defendants have closed." *Id.* at *5.

Don’t Forget About the Parol Evidence Rule

As with any contractual agreement – the parol evidence rule still applies: “But as with other contracts, if there is an **ambiguity**, we may consider extrinsic (parol) evidence to resolve it, with the aim of carrying out the parties’ likely intent.” *See* Downs v. Radentz, 132 N.E.3d 58, 64 (Ind. Ct. App. 2019).

Don’t Forget About the Parol Evidence Rule

In ***Carroll v. Long Tail Corp.,*** the agreement at issue was ambiguous as to the definition of the term “Company” and “Customer” in the non-solicitation provision. 167 N.E.3d 750, 757 (Ind. Ct. App. 2021). As such, parol evidence had to be considered – “[w]e find that parol evidence may be considered to resolve any ambiguity and apply the terms of the [agreement] to its subject matter.” *Id.* at 760.

The parol evidence reviewed (i.e. list of certain company names and customers from certain locations during the relevant period and invoice records) would not have been reviewed had the terms “Company” and “Customer” been properly defined in the agreement. Ultimately, that evidence helped the court determine that the provisions expansively applied to customers in other countries, including New Zealand, Australia and India. *Id.*

Warning: Employers and employees must be mindful of the impact parol evidence could have on certain terms of an agreement that are not properly defined.

Unfair Competition v. Regular Competition

- For a restrictive covenant to be valid – it must protect against *unfair* competition or an unfair advantage.
- An employer must demonstrate that the employee has gained a *unique* competitive advantage or ability to harm the employer before such employer is entitled to the protection of a non-competition agreement." *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 172 (Ind. Ct. App. 2008).

Unfair Competition v. Regular Competition

- In *Custom Truck One Source, Inc. v. Norris,* the ultimate question before the court - what unfair advantage was the restrictive covenant trying to protect? The law does not protect against regular competition. 2022 WL 594142 (N.D. Ind. 2022).
- In *Custom ,* the agreement prohibited the employee from *forming* a business where he lived and inside the restricted "Territory" (as defined within the agreement) even if he was not competing with his former employer inside the Territory as all his customers were located o*utside* the Territory.
- The employee argued that there was no "protectable interest" at issue since an employer's protectable interest should be "where the business competition occurs" rather than "the place where a business establishes itself".

Unfair Competition v. Regular Competition

- The court agreed with the employee, stating that "[t]hese are serious questions in the global marketplace, and the Court must grapple with them to discern the enforceability and reasonableness of the non-competition provision here" and that "[an employer's] interest is in protecting against unfair competition; it has no right to protection from ordinary competition."
- Since there was no *unfair* advantage by the employee conducting business was customers *outside* the Territory – the court found there was no reason to conclude that the employee had violated the terms of the agreement.

Questions?

Section Seven

Layoffs

Compliance With WARN, OWBPA & Wage Statutes

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Section Seven

Layoffs – Compliance With WARN, OWBPA & Wage Statutes……Hannesson I. Murphy

I. THE WORKER ADJUSTMENT & RETRAINING NOTIFICATION ACT

A. What Is Purpose Of WARN?

The Worker Adjustment and Retraining Notification Act (WARN) was enacted by Congress in 1988 to provide protection to affected employees, their families, and their communities by requiring employers to provide advance notification of plant closings and mass layoffs. Advance notice gives affected employees and their families time to adjust to the prospective loss of employment, to pursue and secure alternative jobs, and, if necessary, to enter skill training or retraining to allow the affected employees to successfully compete in the job market. The WARN Act also specifically requires notice to the state dislocated worker unit so that dislocated worker assistance can be provided promptly to affected employees.

B. Notice Requirement.

The notice requirement of WARN provides as follows:

> An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order
>
> (1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and
>
> (2) to the State or entity designated by the State to carry out rapid response activities . . . and the chief elected official of the unit of local government within which such closing or layoff is to occur. If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

29 U.S.C. § 2102(a).

C. Who Must Comply With WARN?

WARN coverage applies to any business enterprise that employs:

- 100 or more employees, excluding part-time employees or
- 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime hours.

29 U.S.C. § 2101(a)(1).

The number of employees is determined at a "snapshot" date – the snapshot typically being the date that notice is required to be given (in other words 60 days before the employment loss is scheduled to take place). *See* 20 C.F.R. § 639.5(a)(2). The number of employees also is calculated company-wide, even if the employer has facilities in different locations and in different parts of the country. *See* 20 C.F.R. § 639.3(a)(4).

D. Who Is Protected By WARN?

Under WARN, an "affected employee" is an employee "who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5). WARN includes all classes of employee from hourly to salaried and including management-level employees. *See* 20 C.F.R. § 639.3(a)(3); 20 C.F.R. § 639.3(c)(2).

The statute expressly excludes part-time employees from the calculation of whether an employer has a sufficient number to come within the statute (unless they work in the aggregate at least 4,000 hours a week). *See* 29 U.S.C. § 2101(a)(1). It also defines a "part-time employee" as someone who works an average of fewer than 20 hours per week *or* who has been employed for fewer than 6 of the 12 months preceding the date on which the notice is required, including workers who work full-time. 29 U.S.C. §2101(a)(8). In other words, "part-time" for purposes of WARN amounts to more than just employees who work limited shifts, but also extends to include recently hired *full-time* employees.

However, part-time status can set a trap for unwary employers. The exclusion of part-time employees from the calculation of whether a business is an "employer" does not mean that part-timers get no benefit from WARN's notice requirements if they are subject to a layoff. Indeed, the exclusion from the overhead count does not apply in the context of the individuals selected for a layoff: "the exclusion of part-time employees in some of the criteria under [the] WARN Act cannot be interpreted as excluding part-time employees as experiencing an employment loss when employment loss is specifically defined and such definition does not exclude part-time employees." *Shepherd v. ASI, Ltd.*, 295 F.R.D. 289, 295 (S.D. Ind. 2013), *quoting Roquet v. Arthur Anderson LLP*, 2002 WL 1900768, at *3 (N.D. Ill. Aug. 16, 2002) (holding that part-time employees should be included in proposed class action for WARN violations).

E. What Triggers The Applicability Of WARN?

In general, WARN is triggered by an "employment loss" that occurs during a "plant closing" or a "mass layoff." An "employment loss" is the termination of employment (other than a discharge for cause, voluntary departure, or retirement); a layoff exceeding six months; or a reduction in work hours of more than 50% during each month of any six month period. 29 U.S.C. §2101(a)(6).

Accordingly, if a layoff is less than six months, WARN will not apply. *See Leeper v. Hamilton Cnty. Coal, LLC*, 939 F.3d 866, 872 (7th Cir. 2019) (holding that employer did not violate WARN by failing to provide notice when layoff lasted less than six months). WARN also

does not apply where an employee is terminated for cause (such as insubordination, theft, etc.). Similarly, if an employee leaves voluntarily, this also would not normally be considered for WARN purposes. However, if the employee is prompted to leave *because* of the announcement of a plant closing or mass layoff, this may be considered as a constructive discharge and an event that should be included for purposes of WARN. *See Ellis v. DHL Exp. Inc. (USA),* 633 F.3d 522, 526–27 (7th Cir. 2011) ("a worker who, after the announcement of a plant closing or mass layoff, decides to leave early" has suffered an employment loss by virtue of having been constructively discharged or quitting involuntarily).

1. Plant Closing.

A "plant closing" is the permanent or temporary shutdown of a single "site of employment," or one or more "facilities or operating units" within a single site of employment, which results in an employment loss at the single site of employment during any 30-day period for 50 or more employees, excluding part-time employees. *See* 29 U.S.C. § 2101(a)(2); 20 C.F.R. § 639.3(b).

A "single site of employment" does not mean a particular building. It can include a campus or industrial park where buildings are adjacent to one another or located in a reasonable geographic proximity, or which are used for the same purpose and share the same staff and equipment. *See* 20 C.F.R. § 639.3(i). On the other hand, noncontiguous sites which do not share staff or operational purpose would not be considered a single site. *Id.*

A "facility" refers to a building or a collection of buildings. *See* 29 C.F.R. §639.3(j). The term "operating unit" refers to a product, operation, task or specific work function within or across facilities at a single site of employment. *Id.* For example, the shutdown of a company's parts department was sufficient to constitute an "operating unit" for purposes of WARN. *See Pavao v. Brown & Sharpe Mfg. Co.,* 844 F.Supp. 890 (D. R.I. 1994).

2. Mass Layoff.

A "mass layoff' is a reduction in force which is not the result of a plant closing and which results in an employment loss at a single site of employment during any 30-day period that affects 500 or more employees, or 50 employees which comprise 33% of the workforce (excluding part-time employees). 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3 (c)(1).

While the WARN Act applies to layoffs within "any 30-day period", this may balloon to a 90 day period if there are incremental layoffs: ". . . employment losses for two or more groups at a single site of employment, each of which is less than the minimum number of employees specified [for coverage] . . . but which in the aggregate exceed that minimum number, and which occur within any 90 day period shall be considered . . . a plant closing or layoff . . ." 29 U.S.C. § 2102(d). The purpose of this aggregation provision is to prevent avoidance of the Act by spreading out a "mass layoff" so as to avoid affecting 33% of the employees in any 30-day period.

The 90 day aggregation period is applied looking both backwards and forwards. From a practical standpoint, this requires an employer to look ahead 90 days and behind 90 days from any planned or previously implemented employment losses to determine whether the employment

losses, which separately would be too small to trigger WARN, could in the aggregate, reach the threshold for a mass layoff, thus triggering the notice requirement. What this means is that if the employer has several small layoffs occurring over a 90 day period that do not individually exceed 50 employees (or 33% of the workforce), the layoffs still may be aggregated into a "mass layoff" which does satisfy the statutory threshold. In other words, if an employer lays of 20 employees, then a month later lays off another 10, and several weeks later another 20, the layoffs collectively can come within WARN even though this did not occur over a 30-day time-frame and even though less than 50 employees were laid off at any one time.

F. WARN Notice Requirements.

1. Who Must Receive Notice?

Notices are required to be sent to representatives of the affected employees, the affected employees themselves, the state dislocated worker unit, and the chief elected official of a unit of local government. *See* 20 C.F.R. § 637(a)(4).

- Each Exclusive Bargaining Representative of the Affected Employees. This includes the chief elected officer of the Union and any local Union officers. Individual notice to each affected employee is not required where the employee is represented by an exclusive bargaining representative.

- Each Employee Who May Reasonably Be Expected To Experience An Employment Loss and Who Is Not Represented By A Union. This should include all employees who will likely lose their jobs. Part-time employees also are entitled to a notice.

- The State Dislocated Worker Unit Where the Employment Loss Will Occur. In Indiana this would be the Indiana Department of Workforce Development. *See* https://www.in.gov/dwd/warn-notices/.

- The Chief Elected Official of the Local Unit of Government Within Which the Closure or Layoff Is To Occur. If there is more than one such unit, the notice goes to the highest elected official of the local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made. *See* 20 C.F.R. § 639.6(c).

2. How And When Is The Notice Served?

WARN and its regulations do not specify any particular form of notice, other than it should be in writing. The employer had discretion to determine who should be the best person to send the notices to the required parties. *See* 20 C.F.R. § 639.4(a). Any reasonable method of delivery designed to insure receipt of notice at least 60 days before separation is acceptable.

3. What Must The Notice Contain?

The specific contents of WARN notices depends on the recipient. *See* 20 C.F.R. § 639.7. If a notice is conditioned upon the occurrence of an event (such as a plant not closing and the layoffs not occurring if some outside circumstance takes place), then the notice should clearly identify the condition and the relevant circumstances upon which it is based. Below are the specific contents of the notices required by WARN:

(a). Notice To Bargaining Representative Of The Affected Employees.

- The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information.
- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.
- The expected date of the first separation and the anticipated schedule for making separations.
- The job titles of positions to be affected and the names of the workers currently holding affected jobs.
- Additionally, information that is useful to the employees, such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, may be provided if known.

20 C.F.R. § 639.7(c).

(b). Notice To The Affected Employees.

- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated.
- An indication whether or not bumping rights exist.
- The name and telephone number of a company official to contact for further information.
- Additionally, information that is useful to the employees, such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, may be provided if known.

20 C.F.R. § 639.7(d).

(c) Notice To The State Dislocated Worker Unit.

- The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information.
- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.
- The expected date of the first separation, and the anticipated schedule for making separations.
- The job titles of positions to be affected, and the number of affected employees in each job classification.
- An indication as to whether or not bumping rights exist.
- The name of each union representing affected employees, and the name and address of the chief elected officer of each union.
- Additionally, information that is useful to the employees, such as information on whether the planned action is expected to be temporary, and if so, its expected duration.

20 C.F.R. § 639.7(e).

(**d). Notice To Chief Elected Official.**

- The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information.
- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.
- The expected date of the first separation, and the anticipated schedule for making separations.
- The job titles of positions to be affected, and the number of affected employees in each job classification.
- An indication as to whether or not bumping rights exist.
- The name of each union representing affected employees, and the name and address of the chief elected officer of each union.
- Additionally, information that is useful to the employees, such as information on whether the planned action is expected to be temporary, and if so, its expected duration.

Id. (these requirements are the same as for the notice to the state dislocated worker unit).

G. Enforcement And Penalties.

WARN allows civil actions to be brought in federal court by an aggrieved employee, an exclusive bargaining representative, or a unit of local government. Employers who violate the WARN notice requirements are subject to liability for damages to each aggrieved employee, along with civil penalties and reasonable attorney's fees and costs. An employer who violates the WARN Act is liable to each aggrieved employee for back pay for each day of the violation (up to 60 days) and for benefits under an employee benefit plan, including the costs of any medical expenses that the employee incurred which would otherwise have been covered (up to 60 days). *See* 29 U.S.C. § 2104(a)(1). An employer's liability for these damages may be reduced by (a) crediting the employee with defined benefit pension plan service for the period of the violation; (b) wages paid to the employee for the period of the violation; (c) any voluntary and unconditional payment to the employee that is not required by any legal obligation; and (d) payments such as insurance premiums or payments to a defined contribution pension plan. *See* 29 U.S.C. § 2104(a)(2).

In addition to the damages recoverable by employees, an employer who violates the notice requirements of WARN with respect to a unit of local government, is subject to a civil penalty of up to than $500 for each day of such violation. *See* 29 U.S.C. § 2104(a)(3). However, an employer can avoid this penalty if it agrees to pay to each aggrieved employee the amount for which the employer is liable within three weeks from the date the shutdown or layoff is ordered. *Id*.

H. WARN And The Sale Of A Business.

In the case of a sale of part or all of an employer's business, the seller normally is responsible for providing notice for any plant closing or mass layoffs up to and including the day of the sale. *See* 23 U.S.C. §2101(b)(1). After the sale is completed, the purchaser becomes responsible for providing notice to the employees for any plant closings or mass layoffs. *Id.* On the effective date of sale, all employees of the seller are considered as becoming employees of the purchaser for purposes of WARN. *Id.* Unless the purchaser refuses to retain the employees or lays them off as a result of the sale, there is no employment loss and therefore, no duty to provide of advance notice under WARN. *See, e.g., Int'l Oil, Chemical & Atomic Workers v. Uno-Ven Co.*,170 F.3d 779, 783-84 (7th Cir. 1999). If the seller becomes aware that the purchaser has definite plans to effect a closure or mass layoff within 60 days of the sale, the seller should give notice to the affected employees. 20 C.F.R. § 639.4. However, this does not absolve the purchaser of responsibility for providing the required notice. *Id.*

I. Emergencies.

The WARN Act has delineated certain circumstances where notice is not required or the notification period is reduced from 60 days. *See* 20 C.F.R. § 639.9. These exceptions apply in situations when there is a "faltering company," when there are "unforeseeable business circumstances," and in the case of "natural disasters." Even in these circumstances, however, employers are nonetheless encouraged to give as much notice as practicable, in addition to some statement of the reasons for the reduced notification period.

(a). Faltering Company.

A full 60 days advance notice is not required where, at the time the notice would have been required, the employer was actively seeking capital to avoid or postpone a shutdown, and the employer reasonably and in good faith believed that giving the required notice would preclude the employer from obtaining the needed capital. *See* 29 U.S.C. § 2102(b)(1).

(b). Unforeseeable Circumstances.

A full 60 days advance notice also is not required where the closing or mass layoff is caused by business circumstances not reasonably foreseeable at the time notice is required. *See* 29 U.S.C. §2102(b)(2)(A). Such circumstances should involve a sudden, dramatic, and unexpected action or condition that was outside the employer's control. *See* 20 C.F.R. §639.9(b)(1). This could be caused by the sudden an unexpected termination of a major contract, a strike, or an unanticipated and dramatic major economic downturn (such as a recession). *See, e.g., Jurcev v. Central Community Hospital*, 7 F.3d 618, 625-27 (7th Cir. 1993) (affirming summary judgment for employer where the withdrawal of funding from hospital foundation was not reasonably foreseeable to the hospital board, thereby permitting the hospital to forgo providing 60 days' notice). This does not require the employee to become a soothsayer: the employer is only required to exercise commercially reasonable business judgment in predicting the demand of its particular market, not that it be required to accurately predict general economic conditions. In evaluating the employer's conduct, courts assess whether a similarly situated employer exercising reasonable business judgment could have foreseen the circumstances that caused the layoff. *See, e.g., Roquet v. Arthur Anderson, LLP*, 398 F.3d 585, 588 (7th Cir. 2005) (holding that the Arthur Anderson collapse was not foreseeable prior to indictment being made public, and thereby excused the failure to provide notice).

(c). Natural Disasters.

Additionally, the full 60 day advance notice is not required if the closing or mass layoff is the direct result of "any form of a natural disaster such as a flood, earthquake . . . or drought." 29 U.S.C. § 2102(b)(2)(B). The regulations have expounded on these calamities to include tidal waves, tsunamis and "similar effects of nature." 20 C.F.R. § 639.9(c).

Diseases likely do not constitute "natural disasters." One employer in a case out of Texas tried to argue that COVID-19 constituted a natural disaster in order to get around not providing a WARN notice, however this was rejected by the Fifth Circuit which did not view COVID-19 as a "natural disaster." *See Easom v. US Well Services, Inc.*, 37 F.4th 238, 242 (5th Cir. 2022). Perhaps a better option for an employer in these circumstances, particularly when the government orders a lockdown, may be the "unforeseeable circumstances" exception seen above. Nevertheless, even in this circumstance, the employer should provide as much advance notice as it reasonably can under the circumstances.

II. OLDER WORKERS BENEFITS PROTECTION ACT

Regardless of whether an employment loss affecting a group of employees constitutes a WARN related event, if the employer intends to require that affected employees execute a waiver of claims in favor of the employer, this could implicate the requirements of the Older Workers Benefit Protection Act (OWBPA). *See* 29 U.S.C. §§ 626(f)(1)(B), (F), (G). Congress passed OWBPA in 1990 as an amendment to the Age Discrimination in Employment Act (ADEA). The ADEA prohibits discrimination in any aspect of the employment relationship on the basis of an individual being age 40 or older. *See* 29 U.S.C. § 631. OWBPA, in turn, prohibits the waiver of rights or claims – both from individual employees and a group or class of employees – that arise from the execution of an ADEA waiver. 29 C.F.R. § 1625.22(c)(2).

Employers who ignore or downplay the requirements of OWBPA do so at their own peril. For example, an employer can negotiate a settlement with an employee and pay the employee the settlement proceeds, only to have the employee file an age discrimination claim against the employer. *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 424 (1998) (holding that release giving employee only 14 days to consider it did not comply with OWBPA's requirements and could not bar the plaintiff's age discrimination claim); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 685 (7th Cir. 1993) (holding that severance agreement failed to comply OWBPA, and did not preclude age discrimination claims; but settlement amounts could be deducted from any discrimination award).

A. Knowing And Voluntary Waiver.

OWPBA requires that for an agreement waiving or releasing an ADEA claim to be valid, the waiver must be "knowing and voluntary." OWBPA outlines several standards for a "knowing and voluntary" waiver. *See* 29 U.S.C. §§ 626(f)(1)(F); 29 C.F.R. § 1625.22(b)(1)-(7). These include the following requirements:

- The entire waiver agreement must be in writing.

- Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

- The waiver agreement must not eliminate rights or claims that arise after the date the waiver is executed.

- The individual can only waive rights or claims in exchange for consideration that is in addition to anything of value to which the individual already is entitled. In other words, if an employee already has been promised severance pursuant to a pre-existing agreement, this may not be sufficient to cover the ADEA waiver.

- The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

- If an exit incentive or other employment termination program is offered to a group or class of employees, the information must be conveyed in writing and in a manner calculated to be understood by the average participant.

- The waiver agreement must refer to the ADEA by name in connection with the waiver.

- The individual who is asked to sign the waiver must be advised in writing to consult with an attorney prior to executing the agreement.

B. Minimum Time-Periods.

Employers must provide employees who are over 40 years of age a review period of 21 days to consider the agreement. *See* 29 U.S.C. §§ 626(f)(1)(F). If the waiver is provided in connection with an exit incentive or other employment termination program offered to a group or class of employees, then it must provide those employees who are over 40 years of age a review period of 45 days to consider the agreement. *Id*. Additionally, irrespective of the applicable review period (21 or 45 days), OWPBA requires that the agreement include a period of at least seven days following the execution of the agreement for the employee to revoke it. *See* 29 U.S.C. §§ 626(f)(1)(G). In that regard, the agreement shall not become effective or enforceable until the revocation period has expired. *Id.*

The 21-day or 45-day periods run from the date that the waiver is presented to the employee. *See* 29 C.F.R. § 1625.22(e)(4). However, an employee does not have to wait for the entire 21-day or 45-day review period to be complete and instead, can sign right away. Once the employee does so, this will trigger the start of the seven day revocation period. *See* 29 C.F.R. § 1625.22(e)(6). On the other hand, if there are material changes to the offer, this will restart the running of the 21-day or 45-day time-periods. *Id*. The seven day revocation period, however, may not be shortened by the parties – even by agreement. *See* 29 C.F.R. § 1625.22(e)(5).

C. Group Terminations.

OWBPA requires that employers provide additional information when workers who are over 40 years of age are offered a waiver in connection with an exit incentive or other employment termination program which affects a group of employees. Significantly, a "group" for purposes of OWBPA can be as small as "two or more employees." 29 C.F.R. § 1625.22(f)(1)(iii)(B). In other words, a 45-day release may be required even outside of the typical reduction-in-force scenario and simply in a situation involving the separation of just two people.

Nevertheless, even in a situation where the layoff involves a small number of employees, they still must belong to the same "decisional unit:"

> Regardless of the type of program, the scope of the terms "class," "unit," "group," "job classification," and "organizational unit" is determined by examining the "decisional unit" at issue.

* * * * *

> A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver.

29 C.F.R. §§ 1625.22(f)(1)(iii)(C), 1625.22(f)(3)(B).

In other words, when a termination event occurs that affects more than just a single employee, the employer must evaluate whether or not the exit incentive or group termination rules apply. If the employees are in the same decisional unit, then the employer must provide a 45-day time-period for the employees to evaluate their release or waiver agreements *and also provide* the additional information required by OWBPA for those individuals.

With respect to the additional information that must be provided in connection with group terminations, OWBPA requires that the employer provide in writing and in a manner calculated to be understood by the average individual eligible to participate, the following information:

- The class, unit, or group of individuals covered by the program.
- The eligibility factors for the program.
- The time limits applicable to the program; and
- The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C. § 626(h).

In situations where an employer engages in "incremental" separations taking place over a period of time (such as where an employer spreads out terminations in a decisional unit over a few months), special rules apply. *See* 29 C.F.R. §1625.22(f)(4)(vi). Specifically, the information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided the ages and job titles or categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. *Id*. Employers, however, have no duty to supplement information given to earlier terminees, as long as the information that was given to those individuals complied with the regulations at the time it was furnished. *Id*.

III. WAGE STATUTE CONSIDERATIONS

A. Indiana Wage Statutes.

The Indiana Wage Payment Statute covers the timing of payments made to employees during their employment and upon their voluntary separation from employment. I.C. § 22-2-5-1; *See St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 704 (Ind. 2002); *Perry v. Bath & Body Works, LLC*, 993 F.Supp.2d 883 (N.D. Ind. 2014). Indiana employees who are involuntarily separated or who already have left a company – which would be the case for

individuals subject to a layoff – must proceed with any wage disputes under the Indiana Wage Claims Statute. I.C. § 22-2-9.

The Wage Claims Statute, unlike the Wage Payment Statute, procedurally requires that any claims first be submitted to the Indiana Department of Labor. *See St. Vincent Hosp.*, 766 N.E.2d at 705. The Wage Claims Statute states in material part:

> (a) Whenever any employer separates any employee from the pay-roll, the unpaid wages or compensation of such employee shall become due and payable at regular pay day for pay period in which separation occurred: Provided, however, that this provision shall not apply to railroads in the payment by them to their employees.
>
> (b) In the event of the suspension of work, as the result of an industrial dispute, the wages and compensation earned and unpaid at the time of such suspension shall become due and payable at the next regular pay day, including, without abatement or reduction, all amounts due all persons whose work has been suspended as a result of such industrial dispute.

I.C. § 22-2-9-2.

The Commissioner of the Indiana Department of Labor is responsible for enforcing compliance with Wage Claims Statute and pursuing any actions for penalties and forfeitures. I.C. § 22-2-9-4. The Commissioner "has the power to work with the parties to try to resolve the claims, refer the matter to the attorney general to pursue a civil action, or provide the employee with a recommendation to pursue the matter in the appropriate court." *Bragg v. Kittle's Home Furnishings, Inc.*, 52 N.E.3d 918 (Ind. Ct. App. 2016).

Wage claims must be brought within two years of the date the employee first learns they have not been paid their alleged "wage." Thus, where a claimant files a wage claim in court rather than in the Department of Labor, the claimant risks having the claim be dismissed on procedural grounds if it is more than two years old. *See, e.g.*, *Mayfield v. Continental Rehab. Hosp.*, 690 N.E.2d 738 (Ind. Ct. App. 1998).

B. What Constitutes "Wages."

1. Definition of Wages.

The Wage Claims Statute defines "wages" as "all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount." I.C. § 22-2-9-1(b). An amount will be considered a "wage" if "it is compensation for time worked and is not linked to a contingency such as the financial success of the company." *Highhouse v. Midwest Orthopedic Inst., P.C.*, 807 N.E.2d 737, 739 (Ind. 2004). A "wage" must be connected to the time that an employee works. *See Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065, 1072 (Ind. Ct. App. 2007) ("[I]f compensation is not linked to the amount of work done by the employee or if the compensation is based on the financial success of the employer, it is not a 'wage.'").

2. Post-Termination Commissions.

Many cases involving departing employees concern whether they are entitled to commissions for sales made or work performed during their employment. Commissions generally are regarded as "wages" under the Wage Claims Statute. *See Licocci v. Cardinal Assoc.'s, Inc.*, 492 N.E.2d 48 (Ind. Ct. App. 1986). When a commissioned employee separates, the general rule is that the employer must pay them the commissions that were earned up to the date of the employee's separation from employment. *See Robinson v. Century Personnel, Inc*., 678 N.E.2d 1268, 1270 (Ind. Ct. App. 1997). However, "[t]his general rule may be altered by a written agreement which clearly demonstrates a different compensation scheme." *Id.*

Additionally, Indiana courts have long held that a person employed on a commission basis is entitled to post-termination commissions on business they secured while employed, even though the payments associated with those commissions may not be received by the employer until a later date. *See, e.g., Valadez v. R.T. Enterprises, Inc.*, 647 N.E.2d 331 (Ind. Ct. App. 1995); *Vector Engineering & Mfg. Corp. v. Pequet*, 431 N.E.2d 503 (Ind. Ct. App. 1982). For example, *J Squared, Inc. v. Herndon,* 822 N.E.2d 633 (Ind. Ct. App. 2005), involved a former employee who sought to recover commissions based on sales that were pending shipment at the time that the employee was fired. The Indiana Court of Appeals held that the commissions were vested because they were based on work performed while the employee still was employed, and there was no written agreement or conduct of the parties showing that the former employer had a policy of not paying vested but pending commissions at the time of termination. Accordingly, to the extent an employer wants to eliminate an employee's right to recover post-termination commissions, it must do so through a written contract or through evidence that the company consistently does not pay such commissions following an employee's separation. *Helmuth v. Distance Learning Sys. Indiana,* 837 N.E.2d 1085 (Ind. Ct. App. 2005) (holding that parties can alter the general rule to pay post-termination commissions if the parties (1) agree to do so in writing or (2) there is the conduct clearly demonstrating that they intended to pay post-termination commissions, and finding no such contract or practice).

3. Accrued Vacation.

Indiana employers are not required to provide vacation benefits. However, if an employer chooses to provide such benefits, it will be held accountable for the terms of its policy. Accrued vacation pay generally is considered to be wages within the meaning of the Indiana Wage Claims Statute. *See Hickman v. State*, 895 N.E.2d 353, 356 (Ind. Ct. App. 2008). Nevertheless, an employee's right to vacation pay is not absolute; rather, an employee is entitled to accrued vacation pay at termination only if no agreement or published policy exists to the contrary. *See Die & Mold, Inc. v. Western*, 448 N.E.2d 44, 48 (Ind. Ct. App. 1983). *See also Indiana Heart Associates, P.C. v. Bahamonde*, 714 N.E.2d 309, 311-12 (Ind. Ct. App. 1999); *Mathews v. Bronger Masonry, Inc.*, 772 F.Supp.2d 1004, 1015 (S.D. Ind. 2011). Accordingly, if an employer has a policy that entirely eliminates eligibility to accrued vacation upon termination, it may be enforced. *See, e.g., Williams v. Riverside Community Corrections Corp.*, 846 N.E.2d 738, 748 (Ind. Ct. App. 2006) (rejecting wage claim and enforcing policy prohibiting payment of accrued vacation to involuntarily terminated employee).

C. Deductions.

Any deductions or amounts that are withheld from an employee's wages in Indiana must comply with the Indiana Wage Deductions Statute. This statute only permits wage deductions or assignment by an employee under the following circumstances:

(1). The assignment is in writing and is signed by the employee;

(2). The assignment can be revoked at any time by the employee;

(3). A copy is given to the employer ten days after it is signed; and

(4). The assignment is to pay for:

- Insurance premiums.
- Charitable or nonprofit contributions.
- Guaranteed US bonds or securities.
- Shares of company stock.
- Union dues.
- Merchandise, goods or food for the employee's benefit, use, or consumption, at the written request of the employee.
- A loan.
- Medical expenses.
- Credit union fees.
- Deposits to a UCC account.
- Mutual funds.
- Judgments (if made pursuant to an agreement between the employee and the creditor and this is not a garnishment).
- Uniforms and equipment necessary to fulfill the duties of employment (as long as this does not exceed $2,500 per year; or 5% of the employee's weekly disposable earnings.
- Reimbursement for education or employee skills training.

I.C. § 22-2-6-2.

Pursuant to this statute, if an employer withdraws money from an employee's pay without an authorization, or if an employer deducts money that does not come within the cited reasons, the employer may subject itself to a wage claim. *See, e.g., Duvall v. Heart of CarDon, LLC,* 2020 WL 1274992 (S.D. Ind. Mar. 17, 2020). Accordingly, to the extent an employer believes that an

employee owes it money, it should address that with the employee before the individual is separated and ideally, have the individual enter into a valid wage assignment.

BARNES & THORNBURG LLP

LAYOFFS
Compliance with WARN, OWBPA & Wage Statutes

Hannesson I. Murphy

Overview of WARN

Worker **A**djustment and **R**etraining **N**otification Act

- Intended to provide protections to employees, their families and communities by requiring employers to provide **advance notice** of an employment loss.

- Requires covered employers to provide written notice 60 calendar days in advance of ***plant closings*** or of ***mass layoffs*** lasting more than six (6) months.

- Penalties for failure to provide timely notice.

What Is A Covered "Employer?"

- Any business that employs 100 or more employees, *excluding* part-time employees, or
- Any business with 100 or more employees (*including* part-time) who in the aggregate work at least 4,000 hours per week, exclusive of overtime.
  - *All hands on deck*: the employee count applies company-wide, not just the location affected.
  - *Snapshot*: the number of employees is determined at a "snapshot" date which is the date the notice should be given (60 days before the layoffs would start).

What Is A Covered "Employer?"
(Part-Timers)

- A "part-time employee" for purposes of WARN means more than just someone who is not "full-time."
  - An employee averaging less than 20 hrs/wk. during their employment or last 90 days (whichever period is shorter), or
  - An employee who has been employed for less than 6 of the 12 months preceding the date on which notice is required (even if they are "full-time").

What Is A Covered "Employer?"

(Employees on Temporary Layoff)

- Do workers already on temporary layoff or on leave count toward the 100 employee total?
  - Yes but only if they have a "reasonable expectation of recall."
    - Applies where the employee is given notice, or there is an industry practice the employee will be recalled to the same or similar job following a temporary interruption in work.
    - If so, they should be included in the WARN Act employee count.

What Is A Covered "Employer?"
(Independent Contractors / Subsidiaries)

- Do independent contractors or workers with other related corporate entities (*e.g.*, subsidiaries) count toward the 100 employee total?
  - No, but only if they truly are distinct from the business undergoing the reduction in force.
  - Key issue: independence and control
    - Is there common ownership between the two entities?
    - Is there common management?
    - Is there *de facto* exercise of control?
    - Is there unity of personnel policies from a common source?
    - Are the operations dependent between the two entities?

What Is An Employment Loss?

- A termination, other than a discharge for cause, voluntary departure or retirement;
- A layoff exceeding 6 months; or
- A reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

What Is A Plant Closing?

- The permanent or temporary shutdown of a “single site of employment,” or one or more facilities or “operating units” within a single site of employment, if
- the shutdown results in an “employment loss” for 50 or more employees (excluding part-time) during any 30-day period.

What Is A Plant Closing?
(Single Site of Employment)

- A “single site of employment,” can apply to the closure of a single location or a group of contiguous locations.
- Buildings on a campus can be a “single site of employment.”

What Is A Plant Closing?
(Facility/Operating Unit)

- A “facility” refers to a building or buildings.
- An “operating unit” refers to a specific product, operation, task or work function within or across facilities at a single site of employment.
  - Example: auto manufacturing plant line assembly line with one group putting on bumpers and another group putting on doors. The “operating unit” is the assembly line itself, not the different groups of workers.

What Is A Mass Layoff?

- A reduction in force (other than a plant closing), which results in an "employment loss" at a "single site of employment" during any 30-day period for:
  - 500 or more employees, or
  - At least 33% of the active workforce (excluding part-time), but not less than 50 individuals.

What Is A Mass Layoff?
(Aggregation)

- Small layoffs that independently are under the limit collectively can trigger WARN.
- Employment losses for 2 or more groups at a single site of employment, each of which is below the minimum (less than 50 people or 33%), can be subject to WARN, if in the aggregate over a 90-day period they would come within the scope of the statute.

What Is A Mass Layoff?
(Aggregation)

- The 90-day period looks both backwards and forwards from the snapshot date.
  - This means WARN effectively applies a continuously rolling 90-day window in which layoffs will be aggregated and if the number consists of 33% of the covered workforce (comprising at least 50 people), a notice should be provided.
- The employer bears the burden of proving that employment separations in the 90-day window were separate and distinct events and not to evade WARN (for example – for cause termination).

WARN Notice Requirements

- Written notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff.
- Notice must be sent to-
  - Union representatives for the affected employees.
  - Each employee not represented by a union.
  - State dislocated worker unit (IDWD).
  - Chief elected official of local unit of government (where the employer pays the highest taxes).

WARN Notice Requirements

- Contents of the notice depend on the recipient.
- Categories include-
  - Name/address of employment site and company official.
  - Statement on whether the planned action is permanent or temporary and if plant is closing.
  - Whether or not bumping rights exist.
  - Expected first date of separations and anticipated schedule.
  - Job titles of positions affected and names of workers in those jobs.

Mergers and Acquisitions

- Depends on the closing date:

➢ Seller has responsibility to provide WARN notice **prior** to and **including** the date and time of the sale.

➢ Buyer has responsibility to provide WARN notice **after** date and time of sale.

Exceptions to 60-Day Notice Requirement

- Transfers – Notice is not required in certain circumstances involving transfers to other employer locations (no employment loss).

- Faltering Company (only applies to Plant Closings)
  - Employer is actively seeking capital at the time the 60-day notice would have been required.
  - If obtained, the capital would avoid or postpone shutdown.
  - Employer reasonably and in good faith believes that giving WARN notice would preclude its ability to obtain the capital.

Exceptions to 60-Day Notice Requirement

- Unforeseeable Business Circumstance – Caused by a sudden, dramatic and unexpected action or condition outside the employer's control that was not reasonably foreseeable when the notice would have been required.
  - Gov. ordered closing of an employment site (COVID).
  - Termination of major contract by customer.

- Natural Disaster
  - Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature.
  - Must be the direct results of a natural disaster. If indirect, then unforeseeable business circumstance.

Exceptions to 60-Day Notice Requirement

- The employer bears the burden of proving that one of the exceptions is satisfied.
- Regardless, the employer ***still*** must give as much notice as possible – even if after the fact.

- The shortened notice must explicitly provide:
  - Reason(s) why the employer is giving less than the required 60-day notice.
  - All of the other elements required for WARN notices.

Penalties For Violating WARN Notice Requirement

- Violators potentially are liable to each employee who suffers an employment loss:
  - Back pay *for each day of the violation* up to a maximum of 60 days, calculated at the higher of the employee's average regular rate over the last 3 years or their final regular rate;
  - Benefits, including the cost of medical expenses incurred during the employment loss which would have been covered if the employment loss had not occurred; and
  - Costs and reasonable attorney's fees.

- A civil penalty of $500 per day for violating local government notice requirement.

OWBPA

Older **W**orkers **B**enefits **P**rotection **A**ct.

- Amendment to the Age Discrimination in Employment Act (ADEA).
- Provides protections for workers over 40 years of age when requested to execute a waiver of ADEA rights.
- Specifies conditions that must be included in an agreement to validly waive an ADEA claim.
- Prohibits the waiver of rights following the execution of a waiver.
- OWBPA itself does not create a separate cause of action for a violation.
  - BUT: An employee who signs a release that violates OWBPA can pursue an ADEA claim.

OWBPA
(Waiver Requirements - Single Employee)

- Must be in writing.
- Must be in exchange for valuable consideration beyond benefits the employee already was entitled to receive.
- Must be written in plain language understandable by the average individual eligible to participate.
- Must specifically refer to ADEA claims.
- Must not cover prospective (future) rights.
- Must advise the employee to consult with an attorney.
- Must provide the employee 21 days to consider the agreement, and 7 days to revoke it after signing.

OWBPA

(Waiver Requirements – Group or Class of Employees)

- All previous conditions must be met.
- Employees have 45 days (instead of 21) to consider the information.
- Revocation still is the same (7 days after signing).
- Employer also must provide employees in the group or class of employees that is being presented the waiver additional information about the exit incentive or termination program.

OWBPA
(Waiver Requirements – Group or Class of Employees)

- The employer must inform the affected employees about the following:
- The class, unit or group of eligible individuals.
- The specific eligibility requirements.
- Time limits on participation.
- Job titles and ages of all employees selected for the program, and ages of all employees in the same job classification or organization who are not eligible or selected for the program.

OWBPA
(Waiver Requirements – Group or Class of Employees)

- Applies to employment termination programs that are offered to 2 or more employees in a group or class.
- The scope of the class or group is determined by examining the "decisional unit" at issue - that portion of the employer's organizational structure from which the employer chose the persons who would be (and would not be) offered consideration for signing the waiver.

Indiana Wage Statutes
(Wage Claims Statute)

- Final Pay. When an employer separates an employee from the payroll, "the unpaid wages or compensation of such employee shall become due and payable at regular pay day for pay period in which separation occurred . . ." I.C. § 22-2-9-2(a).

- Wages. Include "all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or in any other method of calculating such amount." I.C. § 22-2-9-1(b).

Indiana Wage Statutes
(Wage Claims Statute)

- An amount is a "wage" if it is compensation for time worked and not linked to a contingency such as the financial success of the company.
  - Includes present compensation which vests upon performance of labor.
  - Also includes deferred compensation which vests upon some requirement in addition to labor, like the passage of time or another variable spelled out by the parties.
    - Deferred comp. that accrues during employment is a "wage."

Indiana Wage Statutes
(Wage Claims Statute)

- Accrued vacation benefits (or other accrued benefits like PTO) generally are considered "wages" and must be paid following separation.
  - (*Unless expressly excluded by contract/policy*).
- Accrued commissions constitute wages for sales made or work performed during employment.
  - Even if payments associated with work done to generate commission does not come in until after employment.
  - (*Unless expressly excluded by contract/policy*).
- A bonus also can be a wage (if not linked to a contingency like company performance).

Indiana Wage Statutes
(Wage Claims Statute)

- Procedure. Involuntarily separated employees first must proceed through the IDOL and not court.
  - Actions must be brought within 2 years of the date the employee first learns they have not been paid a wage.
- Damages. Employees can recover-
  - Unpaid wages.
  - Attorney's fees and costs.
  - Liquidated damages equal to 2 times the amount of wages due – *if the employer was not acting in good faith.*

Wage Assignments / Deductions
(I.C. § 22-2-6-2)

Indiana law requires that agreements to deduct wages must be:

- In writing;
- Signed by the employee personally;
- Revocable by the employee upon written notice to the employer;
- Agreed to in writing by the employer;
- Delivered to the employer within 10 days of its execution by the employee; and
- For a legally valid purpose.

Wage Assignments/ Deductions – Valid Purposes

Indiana law permits wage assignments for the purpose of paying any of the following:

- Insurance premiums.
- Charitable or nonprofit contributions.
- Guaranteed US bonds or securities.
- Shares of company stock.
- Union dues.
- Merchandise, goods or food for the employee's benefit, use, or consumption, at the written request of the employee.
- A loan.
- Medical expenses.
- Credit union fees.
- Deposits to a UCC account.
- Mutual funds.
- Judgments (if made pursuant to an agreement between the employee and the creditor and this is not a garnishment).
- Uniforms and equipment necessary to fulfill the duties of employment (as long as this does not exceed $2,500 per year; or 5% of the employee's weekly disposable earnings.
- Reimbursement for education or employee skills training.

END OF PRESENTATION

Thanks

Section Eight

Wage & Hour Update

Kathleen M. Anderson
Barnes & Thornburg LLP
Fort Wayne, Indiana

Section Eight

Wage & Hour Update…….... Kathleen M. Anderson

PowerPoint Presentation

Wage & Hour Update

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December 20, 2022

BARNES & THORNBURG LLP

TODAY'S AGENDA

- U.S. Supreme Court
  - Overtime
- U.S. Department of Labor
  - Proposed Independent Contractor Regulations
  - Potential Revisions to Overtime Exemptions
  - Wage & Hour Issues Come to the Dinner Table
- Indiana Wage & Hour
- Wage & Hour Litigation

Helix Energy Solutions Group, Inc. v. Hewitt, U.S. Supreme Court, Argued 10/12/22

- Michael J. Hewitt worked on an offshore oil rig managing other employees
- Helix Energy Solutions paid Hewitt based on a daily rate, often working over 40/hrs per week
- Hewitt sued Helix for overtime pay
- Helix argued it was not required to pay Hewitt overtime because Hewitt was a "highly compensated employee" exempt from overtime pay
- Hewitt argued that because his pay was calculated on a daily rate, he was not paid on a salary basis and thus was entitled to overtime pay regardless of the dollar amount he was paid
- District court ruled for Helix, and the U.S. Court of Appeals for the 5th Circuit reversed.

Question

Is a supervisor who makes over $200,000 annually, calculated on a daily basis, entitled to overtime pay, despite a regulation that carves out an exception for highly paid executives?

Proposed DOL Independent Contractor Regulations

- Long history of trying to do away with independent contractors
  - Less tax revenues
  - Employment laws (DOL, Title VII, FLSA, etc.) don't apply to independent contractors
- Historical test is difficult to apply
- Various standards
  - 18 or 20 factors
  - "economic realities"
  - "ABC" test

Proposed DOL Independent Contractor Regulations

- 10/13/22: DOL published a Notice of Proposed Rulemaking (NPRM) to revise guidance on how to determine employee v. independent contractor under the FLSA.
- The initial deadline for interested parties to submit comments on the NPRM was 11/28/22, but it was extended by 15 days

DOL Proposed Rule on Independent Contractors

- Rejects the "ABC" test enacted in California and elsewhere
- Adopts a six factor test

(1) *Opportunity for profit or loss depending on managerial skill.*

(2) *Investments by the worker and the employer.*

(3) *Degree of permanence of the work relationship.*

(4) *Nature and degree of control.*

(5) *Extent to which the work performed is an integral part of the employer's business.*

(6) *Skill and initiative.*

DOL – Potential Revisions to Overtime Exemptions

- White Collar Exemption - Threshold Issue
- DOL is looking to increasing it from its current annualized rate of $35,568.
- $47,476 annualized amount that was enjoined by a court in 2016.
- Advocates are seeking even higher levels, from $62,000 to over $80,000 per year.

Salary Basis Test

- Creation of an automatic annual or periodic increase to the salary level by indexing it to the consumer price index or another economic indicator;
- Amount would increase without the DOL having to undertake formal rulemaking

Duties Test

- Second Threshold Question
- Modify Duties Test?
- Conforming the federal rules to more closely reflect the California standards?
- The California standards require that more than 50 percent of the employee's time be spent solely on performing exempt duties in order to be classified as exempt.
- Administrative and Executive Exemptions would be changed.

Significance of Increase

- These types of changes would also disqualify many currently exempt employees from their current exempt status.
- If any of these issues make their way into new regulations in any significant way, litigation is assured.
- Waiting to see the proposal

DOL on Tip Credit

- DOL's October 2021 tip credit regulations state an employer can take a tip credit only when the tipped employee is:
  - Performing tip-producing work (i.e., any work performed by a tipped employee that provides service to customers for which the tipped employee receives tips); OR
  - Performing work that directly supports tip-producing work (i.e., work performed by at tipped employee in preparation of or to otherwise assist tip-producing customer service work, such as, depending on the occupation, rolling silverware, making drink mixes, and stocking the busser station) so long as the tipped employee does not spend a "substantial amount of time" doing tip-supporting work.

Substantial Amount of Time

- The directly supporting work exceeds a 20% workweek tolerance, calculated by determining 20% of the hours in a workweek for which the employer has taken a tip credit (time for which an employer does not take a tip credit is excluded in calculating the 20% tolerance); OR
- The directly supporting work exceeds 30 continuous minutes (time in excess of the 30 continuous minutes, for which an employer may not take a tip credit, is excluded in calculating the 20% tolerance).

Tip Credit

- Per regulation, an employer cannot take a tip credit against a tipped employee for the time the tipped employee performed non-tip producing duties if such duties exceed 20% of their entire work week, or, in the alternative, if the employee performs non-tip producing duties for more than 30 continuous minutes.

Non-Tip Producing Duties

- Bartender slices and pits fruit for drinks and otherwise gets the station set up.
- Attends pre-shift meeting.

Tip Pooling

- An employer cannot keep employees' tips managers & supervisors also may not keep tips received by employees, including through tip pools
- An employer that pays the full minimum wage & takes no tip credit may allow employees who are not tipped employees (for example, cooks & dishwashers) to participate in the tip pool
- an employer that collects tips to facilitate a mandatory tip pool generally must fully redistribute the tips within the pay period; and,
- employers that do not take a tip credit, but collect employees' tips to operate a mandatory tip pool, must maintain payroll or other records containing information on each employee who receive tips & the weekly or monthly amount reported by the employee, to the employer, of tips received.

Indiana Wage & Hour Law

Indiana Wage Overpayments

- Employers may deduct for wage overpayments without employee written authorization
- However, employers:
  - Must give the employee 2 weeks' notice before the deduction
  - Cannot deduct an amount in dispute
  - May only deduct, at most, the lesser of:
    - 25% of the employee's disposable earnings for that week; or
    - the amount where the employee's disposable earnings are greater than 30 times the minimum wage
  - May immediately deduct a wage overpayment if the overpayment is 10x the employee's gross wages because of a misplaced decimal point

IND. CODE § 22-2-6-4

Indiana Wage-Related Requirements

- Indiana Minimum Wage Law: IND. CODE § 22-2-2-1 et seq.
- Child Labor: IND. CODE § 22-2-18-1 et seq.
- Wage Assignments
  - The employee provides signed written authorization.
  - The employer agrees to the deduction in writing.
  - The authorization is given to the employer within 10 days of execution.
  - Revocable at any time (in writing)
  - Specific categories

    IND. CODE § 22-2-6 et seq.

Payment Following Termination

- An employer must pay a terminated employee wages by the next regular payday
  - IND. CODE §§ 22-2-9-2 to -3
- No penalty for not paying the wages of an employee who voluntarily terminated if the employer does not have the employee's address or know where the employee may be reached. Employers are not subject to penalties unless either:
  - 10 business days have elapsed since the employee's wage request
  - The employee gave the employer an address where wages are to be sent

  IND. CODE § § 22-2-5-1(b) & 22-2-9-2

Indiana Wage Payment Statute

IND. CODE 2-2-5-2 Failure to pay; damages; actions for recovery

- Every such person, firm, corporation, limited liability company, or association who shall fail to make payment of wages … shall be liable to the employee for the amount of unpaid wages, & the amount may be recovered in any court having jurisdiction of a suit to recover the amount due to the employee.
- The court shall order as costs in the case a reasonable fee for the plaintiff's attorney & court costs.
- In addition, if the court in any such suit determines that the person, firm, corporation, limited liability company, or association that failed to pay the employee … was not acting in good faith, the court shall order, as liquidated damages for the failure to pay wages, that the employee be paid an amount equal to two (2) times the amount of wages due the employee.

Timing of Payment

- Payment Following Pay Period
- Regular wage payments must include all wages earned at most 10 business days before the payment

IND. CODE § 22-2-5-1(a)

Franciscan Alliance v. Metzman, M.D. (Ind. App. 2022)

Background:

Employee (physician) sued employer, alleging employment agreement breach & violation of Indiana Wage Payment Statute due to nonpayment of base compensation, medical-director compensation, & performance-based compensation.

The Set-Up:

Trial court granted SJ in favor of employee as to base-compensation, granted SJ in favor of employer as to performance-based compensation, determined after a trial that employee was owed medical-director compensation but not entitled to liquidated damages, & awarded attorney fees to employee.

Both parties appealed.

Franciscan Alliance, cont.

Holding:

- Employer
  - breached employment agreement by reducing employee's base compensation for use of unpaid leave;
  - violated Wage Payment Statute when it reduced employee's base compensation;
- Employee
  - was not entitled to performance-based compensation;
  - was not entitled to liquidated damages; and
- Circuit Court acted within its discretion in awarding full attorney fees.

THE CURRENT WAGE & HOUR LITIGATION ENVIRONMENT

Wage & Hour Litigation Trends

- Bonuses & Regular Rate of Pay
- Unreimbursed Expenses
- "Off the clock" Pre-Shift & Post-Shift Work
  - Small amounts of time can add up for all hourly employees over a 2 or 3-year period (or more, depending on state limitations period)
  - For example: Donning/doffing, security checks, temperature checks, travel time, clock-in/clock-out
- Misclassification: Exempt v. Non-Exempt
- Unpaid overtime

Summary Judgment Practice: Not Just For Defendants

Cassandra Buckley, individually and on behalf of those similarly situated, Plaintiff/Counter-Defendant v. S.W.O.R.N. Protection LLC and Michael DeLong, Defendants/Counter-Plaintiffs (N.D. Ind. Sept. 30, 2022)

- Plaintiff sued her former employers claiming Defendants violated the FLSA by failing to properly compensate her for overtime hours worked and failing to keep proper records
- Plaintiff filed a motion for summary judgment
- Court found that Defendants committed violations of the FLSA and undisputed facts established the Plaintiff's damages
- Summary judgment also granted to Plaintiff on the Defendants' counterclaims under state law for conversion and replevin

Getting FLSA Settlement Approved

- Courts look at the details
- May send parties back to the drawing board

Examples:

- Scott v. Freeland Enterpr. (N.D. Ind. 9/19/22)
- Rizwan v. Steak N Shake, Inc. (N.D. Ind. 7/13/22)

CONCLUDING COMMENTS

BARNES & THORNBURG LLP

THANK YOU

Section Nine

Responding to the EEOC and State Agency Charges

Bianca V. Black
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Indianapolis, Indiana

Section Nine

Responding to the EEOC and State Agency Charges…… Bianca V. Black

Responding to the EEOC and State Agency Charges

The EEOC is an administrative agency enforcing the federal laws (e.g. Title VII, the Age Discrimination in Employment Act ("ADEA"), the Equal Pay Act ("EPA")[1][2], the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA")) which prohibit employment discrimination on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information. The EEOC is headquartered in Washington, DC and has various district offices throughout the country.

The EEOC's authority is triggered by charge, either by an individual or by the EEOC's Commissioner filed against private sector employers, employment agencies, labor unions, and state and local governments. The EEOC receives the charge, investigates, and makes a determination as to whether or not there is adequate evidence of discrimination. The EEOC will either find Cause or issue a Notice of Right to Sue after a "no cause" finding. The key areas the EEOC is currently focused includes hiring practices as it relates to artificial intelligence and algorithmic fairness, employing disabled workers and ensuring workplaces are free from discrimination, with a focus on race and color discrimination.

State and local administrative agencies[3], also known as "Fair Employment Practices Agencies" (FEPA), have their own laws prohibiting discrimination and authority to enforce those laws. The laws enforced by these agencies are identical or very similar to those enforced by the

[1] Because no charge is necessary for an ADEA or EPA investigation, the EEOC can expand on those investigations at any time for any reason.

[2] Under the EPA, an employee is not required to exhaust his or her administrative remedies, unless the pay claim is based upon discrimination of a protected class.

[3] Local agencies include counties, cities, and towns. There may be several local agencies within a State. For example, the state of Indiana heads the Indiana Civil Rights Commission and there are several local commissions throughout the State such as the Fort Wayne Metropolitan Human Rights Commission.

EEOC. In some cases, these agencies enforce laws that offer greater protection to workers, such as protection from discrimination because of your marital status, you have children or because of your sexual orientation.

Claims handling is similar for both the EEOC and FEPA agencies; however, when responding to each agency, be sure to become familiar with the agency rules, requirements policies and or procedures. Investigation of claims will differ based upon the nature of the claim and the agency investigating the claim. Nevertheless, an employer should understand the general administrative process and develop a method of investigating all Charges of Discrimination. A comprehensive checklist is included as an Appendix for general guidance on Responding to A Charge of Discrimination.

A. The EEOC's General Process and Procedures

A former or current employee, or a customer, of an organization subject to federal and state discrimination and retaliation laws may file a Charge of Discrimination ("Charge") with the EEOC or a FEPA agency. The filer is referred to as the Charging Party and the employer or organization is referred to as the Respondent. The EEOC utilizes an electronic system and should notify the employer within 10 days of the filing of the Charge. (https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed). The notification will provide a URL for the Respondent to log into the EEOC's Respondent Portal to access the charge and receive messages about the charge investigation. *Id.* The EEOC maintains s "Respondent Portal User's Guide for Phase I of EEOC's Digital Charge System" and "Questions and Answers on Phase I of EEOC's Digital Charge System" to assist in navigating the electronic system.

An investigator is assigned to evaluate the case. In most cases, the EEOC will provide an option for mediation at the outset. Mediation and settlement are voluntary resolutions which neither Charging

Party or Respondent are obligated to participate in. However, resolution is generally strongly encouraged, particularly in matters where there is some level of risk exposure.

During the EEOC's investigation Charging Party and Respondent are expected to provide information. The Respondent may be asked to submit a position statement, respond to a Request for Information, participate in an on-site visit and make employees available for witness interviews during any part of the process. The EEOC ordinarily requires submission of a position statement at the very least.

The EEOC makes a determination as to whether there is reasonable cause to believe discrimination occurred based upon the information it receives from the parties. Id. If there is reasonable cause to believe that discrimination occurred, the charging party will be issued a notice called a Dismissal and Notice of Rights. Id. This notice informs the charging party of their right to file a lawsuit in federal court within 90 days from the date of its receipt. The employer will also receive a copy of this notice. Id. If there is reasonable cause to believe discrimination has occurred, both parties will be issued a Letter of Determination stating that there is reason to believe that discrimination occurred and inviting the parties to join the agency in seeking to resolve the charge through an informal process known as conciliation. Id. When conciliation does not succeed in resolving the charge, EEOC has the authority to enforce violations of its statutes by filing a lawsuit in federal court. If the EEOC decides not to litigate, the charging party will receive a Notice of Right to Sue and may file a lawsuit in federal court within 90 days. Id.

B. Evaluating A Charge of Discrimination

When evaluating a Charge there are few factors to consider on the forefront, including but not limited to: (1) the Statute of Limitations (2) the basis of the underlying claim and (3) the prima facie elements of the claim.

1. The Statute of Limitations

To proceed with a claim of discrimination in State or Federal Court, an employee[4] must exhaust his or her administrative remedies. To exhaust administrative remedies, the employee must: (1) timely file a Charge of Discrimination with an administrative agency "setting forth the facts and nature of the charge" and (2) receive notice of the right to sue. Roiger v. Veterans Affairs Health Care Sys., 2019 U.S. Dist. LEXIS 22601, *15, 2019 WL 572655. If an employee fails to timely file a charge, the federal claim will be deemed administratively unexhausted.

Federal anti-discrimination statutes require an employee to file a charge within 180 days from the day the alleged "discriminatory act" took place. This deadline is extended to 300 days if a state or local agency enforces a similar law which prohibits discrimination. An employee's failure to timely file a Charge can result in dismissal of the claim early on; therefore, determining when the last discriminatory act took place is crucial.

The statute of limitations starts to run upon the "discovery of the original act of discrimination, not future confirmation of the injury or determination that the injury is unlawful." Castelino v. Rose-Hulman Inst. of Tech, 999 F.3d 1031, 1038, (7th Cir. 2021); see also Delaware State College v. Ricks, 449 U.S. 250 (1980) (the claim began to run when the employee was denied tenure, not when fired, because termination was the inevitable result of the denied tenure). Generally speaking, if more than one discriminatory event took place, each discrete discriminatory act starts a new clock for filing charges alleging that act. Raneri v. McCarey, 712 F. Supp. 2d 271, 274 (S.D.NY. 2010). Only the discrete acts of alleged discrimination which fall within the statute of limitations can go forward. Id. Where a plaintiff alleges more than one discriminatory act, the mere occurrence of one discrete act within the statutory time frame does not make any other

[4] The employee is referred to as the "Complainant" or "Charging Party" by the administrative agency.

discrete act that occurred beyond the time period timely, unless you have a continuous violation. Id.

Although there may be no recovery on untimely claims, discrete acts falling outside of the Statute of Limitations can become evidence at trial to show that discrimination was taking place. Title VII also creates an exception for events contributing to a "continuous violation." Title VII's "continuing violations" doctrine permits employees to recover for discriminatory acts that fall outside the limitations period, as long as at least one act falls within the 300-day period. If a Title VII Plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone. The decisionmaker must determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period. Thayer v. Vaughan, 798 N.E.2d 249, 251 (Ind. Ct. App. 2003). Thus, the continuing violation theory cannot save a claim when there is not an anchor allegation within the applicable limitation period. Id.

Hostile work environment claims should be analyzed under the continuing violations doctrine. Because hostile work environment claims occur over a series of days, or perhaps years, you must consider the entire scope of the claim, including behavior alleged outside the statutory time period, for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period. Id. If there are a string of acts contributing to alleged harassment, the question is whether the acts should be considered "discrete acts" or acts constituting a "pattern of continued harassment."

In 2017, the EEOC honed in on the continuing violation doctrine in pattern or practice lawsuits - the most recent decision limiting participating Claimants. In United States EEOC v.

Discovering Hidden Haw. Tours, Inc., the issue before the Court was whether, when the EEOC brings a Section 706 pattern-or-practice hostile environment claim on behalf of a class of aggrieved employees, it may extend liability to included employees who suffered the same type of harassment outside of the 300-day limitation period. 2017 U.S. Dist. LEXIS 154576, *1, 2017 WL 4202156. The EEOC relied upon the continuing violation doctrine to argue the statute of limitations did not apply as to individual claimants because the hostile work environment affected all claimants. Id. The Court concluded that continuing violation doctrine did not cover individuals who did not themselves suffer any unlawful employment practice within the 300-day limitation period. This ruling plays a significant role in limiting the scope and Claimant pool of pattern or practice claims.

2. Identifying the Claim

Once a Charge has been received, the employer should first identify the anti-discrimination statute applicable to the employee's claims. The allegations of a claim fall within the protections of a few federally recognized anti-discrimination laws. A Charge may be defeated by simply arguing that an employee has not alleged sufficient facts to establish a *prima facie case* under any anti-discrimination statute. The following is a short description of the elements necessary to establish a *prima facie case* under core anti-discrimination statutes.

a. Title VII Civil Rights Act of 1964 ("Title VII")

Title VII prohibits discrimination on the basis of race, color, religion, sex and national origin.[5] Title VII also allows for actions alleging retaliation for participating in an investigation of a discrimination or harassment claim or by exercising their own rights under the anti-discrimination laws. To establish a *prima facie case* for a Title VII claim the employee must show:

[5] Protections for physical or mental disability and sexual orientation have recently been added.

1. The employee is in a protected class.

2.The employee was meeting the employer's legitimate expectations.

3. The employee was subjected to an adverse action.

4. An employee outside of the protected class received better treatment or replaced the employee.

In regard to discrimination based upon sexual orientation under Title VII, the EEOC has recently taken the position that an employee may establish protected activity under Title VII's anti-retaliation provision based on opposition to sexual orientation discrimination, including discrimination based on heterosexual orientation. See O'Daniel v. Industrial Service Solutions, 922 F.3d 299, 301 (5th Cir. 2019) (amicus brief No. 18-30136). In an amicus brief, the en banc Second Circuit overruled its precedent and held in a landmark opinion that Title VII prohibits sexual orientation discrimination as a form of sex discrimination. Zarda v. Altitude Express, Inc. (2d Cir. No. 15-3775) (amicus brief filed June 23, 2017). In June 2020, Supreme Court affirmed judgment for Zarda in Bostock v. Clayton County, 140 S. Ct. 1731 (2020), holding that Title VII prohibits discrimination on the basis of sexual orientation.

b. The American's with Disabilities Act ("ADA")

The ADA prohibits discrimination on the basis of a disability and requires the employer to make reasonable accommodations to assist employees with disabilities in completing their jobs. To establish a *prima facie case* for an ADA claim the employee must show:

1. The employee has a disability as defined by the ADA.

2. The employee informed the employer of his or her condition and requested an accommodation.

3. There was an accommodation available that would have been effective and would not have posed an undue hardship to the employer.

4. The employer failed to provide an accommodation.

Since 2011, the EEOC has filed more than 200 lawsuits involving claims of discrimination based on disability under the Americans with Disabilities Act of 1990 and the ADA Amendments Act of 2008 and has recovered approximately $52,000,000 through jury verdicts, appellate court victories, court-entered consent decrees, and other litigation-related resolutions.[6] The alleged discrimination has included failure to provide reasonable accommodation (including, the failure to provide appropriate leave for disability-related needs or treatment); asking prohibited disability-related questions of applicants and employees; refusing to hire qualified applicants based on myths, fears, or stereotypes concerning certain impairments, and discharging qualified workers on the basis of disability. Id.

In EEOC v. United Airlines, the EEOC claimed United violated the ADA by refusing to place workers with disabilities in vacant positions for which they were qualified and which they needed in order to continue working. 693 F.3d 760 (7th Cir. 2012). The district court dismissed the Commission's suit, applying then-existing precedent holding that the ADA does not compel companies to non-competitively reassign qualified disabled employees as a reasonable accommodation. Id. However, the U.S. Court of Appeals for the Seventh Circuit reversed the lower court's decision and overturned its own precedent, agreeing with the EEOC's argument that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to the employer." Id.

[6] https://www.eeoc.gov/fact-sheet-recent-eeoc-litigation-related-developments-under-americans-disabilities-act-including

c. The Age Discrimination in Employment Act ("ADEA")

The ADEA prohibits discrimination on the basis of age for employees 40 years or older. To establish a *prima facie case* under the ADEA an employee must show:

1. The employee is in a protected class (age).

2. The employee was qualified for the position.

3. The employee was terminated or rejected for the position.

4. The employer filled the position with a younger employee.

d. The Equal Pay Act ("EPA")

To establish a *prima facie case* for discrimination under the Equal Pay Act an employee must show the employer paid employees of opposite sexes different wages for substantially equal work in jobs that require substantially equal skill, effort, and responsibility and that are performed under similar working conditions. If an employee provides evidence of such, the burden shifts to the employer to prove the pay disparity is justified under one of four affirmative defenses: (1) a seniority system; (2) a merit system; (3) a pay system based on quantity or quality of output; or (4) any factor other than sex. This concept also applies to pay disparity claims under Title VII.

Regarding a Complaint brought by the EEOC, the Ninth Circuit recently concluded an employer cannot rely on evidence that it used an employee's prior pay to determine starting salary, even in combination with other factors, to counter an EPA claim. Rizo v. Yovino, 950 F.3d 1217 (9th Cir. 2020) (en banc). The court agreed with EEOC's argument that because Congress sought "to eliminate deeply rooted pay discrimination between male and female employees who perform the same work," through the EPA, it would be counterproductive to allow employers to rely on prior pay to justify wage disparities. Id.

3. Defending the Prima Facie Elements of a Claim

The best way to defend a claim of discrimination is to defeat one of the elements outlined above in "Identifying the Claim." Addressing all of the possible allegations that can arise or the potential responses to each would be impossible as the analysis will largely be based upon the underlying facts of the claim. However, as an example, see below an employee's allegations and an employer's potential responses to a Title VII race discrimination claim:

Element (1): The employee is in a protected class.

- Allegation: I am African American.
- RESPONSE: Many employers know and acknowledge an employee's race. However, stating that "the decision-makers involved in the termination were unaware of the employee's racial demographic" is an acceptable rebuttal.

Element (2): The employee was meeting the employer's legitimate expectations.

- Allegation: The employee received excellent performance reviews for three consecutive years.
- RESPONSE: Producing a sub-par performance review would be the best defense; however, the employer could also point to other areas the employee has failed to meet the employer's expectations. In addition, developing policies for corrective action and following through to termination strengthens the employers' argument. To that end, employers should document policy violations consistently and thoroughly. Excessive absences, insubordination on the job and/or violating any of the employer's codes of conduct are just a few examples an employer can point to that "the employee has failed to meet the employer's legitimate expectations."

Element (3): The employee was subjected to an adverse action.

- Allegation: The employee was terminated.
- RESPONSE: In this particular situation, it would be difficult to argue against termination if the employee was in fact terminated by its employer. However, many employers utilize this element to articulate the basis for the termination and re-iterate where the employee has failed to meet the employer's legitimate expectations. In situations where the employee remains employed and is claiming other adverse actions, the employer may defeat by arguing "the alleged action didn't rise to the level of an 'adverse action' under Title VII." See Tomanovich v. City of Indianapolis, 457 F.3d 656, 660 (7th Cir. 2006).

Element (4): An employee outside of the protected class received better treatment and/or replaced the employee.

- Allegation: During the course of employment, Caucasian employees were treated better, were not disciplined for attendance violations and kept their job.
- RESPONSE: This is an element where documentation could become particularly important. For example, data showing Caucasian employees received discipline for attendance violations in accordance with Company policy or employees outside of the protected class were being terminated for attendance violations.

C. Charge Investigation Best Practices

1. Administrative Agencies' Focal Points

Charges of discrimination can become so voluminous that it has forced the EEOC to focus energy on specific areas of discrimination. Determining whether your claim is one of the EEOC's focal points will play a role in how you address each claim. The employer should aggressively investigate claims that the EEOC focuses on. The EEOC's 2017-2021 Strategic Enforcement Plan

(SEP) for 2017-2021 focused on (1) Eliminating Barriers in Recruitment; (2) Protecting Immigrant Migrant and Other Vulnerable Workers; (3) Emerging and Developing Issues including certain ADA issues, accommodating pregnancy limitations, LGBT coverage, and clarifying application of civil rights protection based on increased complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships and on-demand workers; (4) Enforcing Equal Pay Protections for all Workers; (5) Preserving Access to the Legal System; and Preventing Systemic Harassment involving race, ethnicity, religion and age. In addition, the EEOC is actively collaborating with the Department of Labor ("DOL") and National Relations Labor Board ("NLRB") to combat claims of retaliation

The SEP has not yet been updated. As of November 4, 2022, the EEOC was seeking public input on a draft of a 2022-2026 Strategic Enforcement Plan. The 2022-2026 SEP contains three strategic goals outlined in detail: (1) Combat and prevent employment discrimination through the strategic application of the EEOC's law enforcement authorities; (2) Prevent employment discrimination and advance equal employment opportunities through education and outreach; and (3) Strive for organizational excellence through our people, practices, and technology.

2. Understanding the Time and Scope of Investigative Process

Employers should familiarize themselves with the EEOC, state and local agency rules as they investigate Charges because deadlines and requirements vary from agency to agency. Generally speaking, the agency is vested with authority to investigate as soon as a Charge has been filed. An investigator is assigned to the case to conduct a neutral fact investigation into the underlying facts of the Charge. The EEOC guidelines require that the employer should receive Notice of the Charge within 10 days of the filing. All agencies require a notice of some sort to the

employer. The employer should begin its investigation as soon as it receives Notice of the Charge.[7] The timing of the investigation process will largely depend upon the type of claim being brought, the appointed investigator's normal practice; and the administrative agency's claim load at the time of filing.[8]

The permissible scope of an investigation varies and the agencies have considerable flexibility in determining the extent of their investigation depending upon the nature of the Charge as Courts tend to have a general deference to administrative agency investigations. For example, the EEOC may be permitted to expand the scope of its investigation beyond the individual charge to address systemic issues. See EEOC v. Dolgencorp, LLC, 249 F. Supp. 3d 890 (N.D. Ill. 2017); citing EEOC v. Autozone, Inc., 141 F. Supp. 3d 912 (N.D. Ill. 2015). Further, the agency has the right to obtain any information of "relevance" or "any material that might cast light on the allegations against the employer."

3. Considering Mediation, Settlement and Conciliation

Administrative agencies utilize mediation, settlement and conciliation to resolve Charges. These methods are efficient, effective and inexpensive ways to resolve discrimination Charges prior to formal litigation.

Mediation prior to extensive investigation may be helpful in cases where there is legitimate evidence to support the employee's allegations.[9] Mediation not only avoids lengthy and unnecessary litigation, it also halts the investigation, which could reveal bad witnesses or

[7] Many times the employee has complained prior to filing the Charge and the employer has already opened an investigation surrounding the allegations.

[8] Other factors could arise, for example, the government shutdown in 2018 for approximately three months and the pandemic hit in 2020. New and existing EEOC claims were not being actively investigated due to the shutdowns which caused a significant delay in resolving claims.

[9] The EEOC's typical protocol is to do an initial review of the Charge and determine whether mediation is appropriate. Notably, this process could vary with the local agencies. For example, the employer may be required to submit a Position Statement or participate in the investigation process prior to any attempts at mediation.

documentation that would support the employee's allegation of discrimination. Supporting evidence has the potential to drive up the settlement value of the case as it proceeds through litigation. To that end, the employer should consider the strength and weaknesses of their defense and determine whether mediation is most appropriate and cost effective. In some instances, depending up on the nature of the Charge, the EEOC will not offer mediation. In those situations, the EEOC typically has found some merit in the Charge and will likely be thoroughly investigating the underlying claims.

Settlement is typically reached during the mediation process; however, the employee and employer may come to an agreement regarding Settlement at any point during the investigation process. Settlement agreements are enforceable and do not constitute an admission of liability. The administrative agencies usually have standard settlement agreements. Given the fact both the EEOC and state agencies usually welcome pre-investigation settlement, consider having a separate settlement agreement in addition to the standard agency settlement agreement. Notably, settlement with the Charging Party does not bar the EEOC's continued investigation. In some instances, the EEOC has the legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit have been dismissed on the merits. See EEOC v. Union Pac. R. R., 867 F.3d 843 (7th Cir. 2017).[10]

The EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion" prior to suing the employer in Federal or State Court. 42 U.S.C. 2000e-5(b). In a case where cause is found, the EEOC issues a letter to both parties to partake in conciliation discussions. During this process, the parties attempt to come up with an appropriate remedy for the discrimination. This is the parties' final opportunity

[10] Circuits are split in this regard. The 5th Circuit has held that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter. EEOC v. Hearst, 103 F.3d 462 (5th Cir. 1997).

to resolve the Charge informally as neither party is forced to accept any particular term. Conciliation differs from mediation in that the parties are usually in need of restoring or repairing a personal or business relationship and this is the last opportunity to do so prior to formal litigation.

4. *Responding to RFI's* and *preparing for On-site Interviews*

Often times an investigator will send a formal letter to the employer requesting a variety of documentation, and/or a written response to relevant inquiry, within a certain period of time. This is called a "Request for Information" (RFI). The employer should pay careful attention to the information being requested and how that information could potentially affect the claim and the defenses to the claim. For example, investigators often request personnel files of other employees not a party to the case. Employers must review the personnel files prior to production to ensure that the requested information is relevant to the case. The employer has the right to object to providing the documentation. Keep in mind, the EEOC and State agencies alike have the power to subpoena the documents and there is a general deference to the EEOC in Subpoena enforcement actions.[11] Unless completely irrelevant to the subject matter or "burdensome" for the employer to gather, the employer will more than likely be forced to hand the documents over at a later date, or at the very least a redacted version of the documents.[12]

In some instances, the investigator will also request an "on-site investigation" where he or she will go to the employer's facility to review documents and interview witnesses that may have information related to the claims. The EEOC rarely conducts on-sites; however, there are some

[11] There are some exceptions to this rule. The Court may deny subpoena actions or limit the scope. For example, in EEOC v. VF Jeanswear LP, the Court limited a nationwide subpoena to computer data and concluded the scope of production should not encompass "searches of files or people's memories." See 2017 U.S. Dist. LEXIS 103487 (D. Ariz. July 5, 2017).

[12] The Sixth Circuit upheld subpoena of company-wide evidence of how medical information is stored and disclosed where the employer had not shown any material undue burden and had admitted that information could be transmitted electronically. See EEOC v. UPS, 859 F. 3d 375 (6th Cir. 2017); also see EEOC v. Centura Health, 2017 U.S. Dist. LEXIS 141469 (D. Colo. Sept. 1, 2017) (viewed much of employer argument as speculative - shows risk of arguing burdensomeness based on mere conclusory arguments).

agencies, such as the Fort Wayne Metropolitan Human Relations Commission, who conduct on-sites as a matter of course. If there is a request for interviews, the company can request that a management or legal representative attend those interviews. It is likely that the Agency will refuse to allow employer participation in hourly employee interviews, but they are obligated to allow management or legal representatives to be present if any executive, manager or supervisor is interviewed.

An employer should be sure to prepare its witnesses prior to the on-site. How much preparation needed is dependent upon the Charge itself and the witnesses' involvement in, and knowledge of, the underlying facts. The on-site preparation is another opportunity to gather additional information about the claim through witnesses that you may not have identified upon receipt of the Charge.

D. Document and Computer Evidence Retention

Preserving physical documentation and computer evidence early on is imperative. The Notice of the Charge issued by the EEOC is also accompanied with a preservation letter. The preservation letter lays out expectations for preserving evidence including an instruction NOT to "destroy or conceal evidence." Failing to preserve information relevant to the Charge at the administrative level could potentially create issues regarding spoliation and lead to sanctions by the Court during formal litigation.[13] The best course of action is to issue a litigation hold once the Charge has been received to preserve all data that may relate to the Charge. This includes physical and electronically stored documentation. As a general rule of thumb, be sure to save all physical documentation (i.e. notes and personnel files) related to the employee and the underlying allegations in a secure place where it may not be inadvertently discarded or misplaced and be sure

[13] Spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a legal proceeding.

to identify and preserve all relevant computer evidence (i.e. computer servers, hard-drives, cloud storage and email boxes) related to the employee and the underlying allegations.

Employers should consider general data retention for its employees not only for incoming Charges but also in accordance with reporting requirements of various federal statutes. For example, the Department of Labor ("DOL") has recently updated its wage and hour requirements and the employer must collect pay data and submit it to the DOL on an annual basis. If an employee brings an EPA claim, the employer should already have pay records that it can produce upon request. There are various reasons why an employer may want to preserve documents and computer evidence as a general practice. For example, documentation supporting proof of a disability and requests for accommodations are required by the ADA.

E. Position Statements as Potential Evidence in Litigation

1. EEOC Litigation

In most cases, the EEOC requires the employer to prepare a Position Statement in response to the Charge.[14] Once the Position Statement is submitted and the EEOC investigator has gathered information and interviewed witnesses, the investigator will submit the findings to the agency's committee. The Committee then makes a determination as to whether discrimination occurred based upon the documentation provided and summaries of witness interviews, if any. The agency can either:

(a) dismiss the charge if there is no evidence of discrimination by issuing a "no cause determination" and a "right to sue" letter that allows the individual to file the claim in court or to request arbitration within 90 days; or

[14] The position statement requirement may be delayed or eliminated by mediation, if the issue is already being investigated, if the Charging Party's intent is to immediately litigate and if the employer has a valid threshold or jurisdictional defense.

(b) make a cause determination and invite the employer to conciliate. If the parties cannot come to agreement, the EEOC has the right to file suit against the employer or issue a Notice of Right to Sue for the employee to file suit.

Courts have concluded that, while prior administrative determinations are not binding, they are admissible evidence. See Plummer v. Western Int'l Hotel Co., 656 F.2d 502 (9th Cir. 1981); Coleman v. Quaker Oats, 232 F.2d 1271 (9th Cir. 2000). No Cause Findings are uncertain at trial. The arguments pertain to FRE 403—confusion, undue prejudice to employer—the jury knows the EEOC investigated but does not know the result.

The Position Statement may be utilized as evidence throughout the course of formal litigation. Therefore, the employer should do a post-position statement investigation and follow up on the Charge even after the claim has been resolved with EEOC. If there are, for example, changes to a witnesses' testimony you want to identify them, and correct if necessary, as soon as possible.

2. Utilizing the Position Statement in Formal Litigation

The position statement is utilized as evidence to support the employer's position and is helpful for several reasons. It gives the employer the opportunity to:

- Correct factual misstatements
- Supply additional factual information
- Focus the investigation
- Refute unfounded allegations
- Build trust
- Persuade the investigator
- Discourage plaintiff's counsel

The Position Statement does a lot to assist the employer in laying out its case and setting up its defense along with evidence. It is the first opportunity to simply create a theory for the case. That said, it makes for a great piece of evidence to include in the record at litigation if it is prepared properly. It is important to take into careful consideration who will be preparing the Statement, the witnesses that will be included in the Statement, and the documentation that will be submitted to support the Position Statement. A well drafted position statement can help the EEOC accelerate the investigation and limit requests for additional information.

There is no set format to respond; however, most responses are either in story format or answers each allegation directly in paragraphs. Prepare the Statement as if it will be used as a persuasive document for the Court. How detailed your position statement should be will depend on up the facts, the overall litigation strategy and the employer's goals. Regardless of the format, the writer should be sure the content is authoritative, comprehensive, reader friendly, consistent and focused.

The employer should also be cautioned when deciding on a theory and what facts and witnesses to include in the Statement. The reality is the administrative agency process is early and the employer will learn much more information along the way; even still, the Statement may follow the employer throughout the course of the litigation. It is optimal for the employer to develop a solid theory and create a Position Statement that will remain consistent, that can be utilized throughout formal litigation, and gives some subjective and objective support to the truthfulness of the employer's actions. In formal litigation, the same witnesses identified will likely be deposed and the same documentation produced at trial. Notably, highlighting a relatively minor misstatement in an EEOC position statement or a disagreement among defense witnesses about an irrelevant detail cannot establish pretext. Monroe v. Ind. DOT, 871 F.3d 495, 507 (7th Cir. 2017).

Below is an example of the structure of a detailed Position Statement that would be helpful later in formal litigation:

- Introductory Paragraphs
    - Identify document
    - If prepared by counsel, explain representative status
    - Short summary of Response to/denial of charge allegations
    - Short summary of why no merit
    - No waiver of right to submit more information
    - Request desired outcome
- Factual Recitation
    - Compelling, not conclusory
    - Evidence to support facts. Witnesses? Documentation (include as Exhibit)?
    - Organization and Presentation including subsections outlining significant points of employment
- Legal Framework
    - See EEOC Compliance Manual - Provides a "roadmap" concerning the procedures relied upon by the EEOC in conducting investigations.
    - Consider including statutory framework
- Application of Fact to Law
    - Correlate facts to defenses directly related to prima facie elements
- Credibility Issues
- Closing

F. The EEOC Today and Ongoing Pandemic Considerations

On Thursday, October 28, 2021, the U.S. Equal Employment Opportunity Commission announced the launch of an initiative aimed at ensuring that the use of artificial intelligence (AI) and other technology-driven tools utilized in hiring and other employment decisions complies with anti-discrimination laws. EEOC Chair Charlotte A. Burrows noted, "the EEOC is keenly aware that these tools may mask and perpetuate bias or create new discriminatory barriers to jobs. We must work to ensure that these new technologies do not become a high-tech pathway to discrimination." According to the EEOC's press release, the initiative is focused on, "how technology is fundamentally changing the way employment decisions are made." The EEOC's initiative seeks to guide stakeholders, including employers and vendors, in making sure emerging decision-making tools are being employed fairly and consistent with anti-discrimination laws. In 2016, the EEOC held a public hearing on the equal employment opportunity implications of big data in the workplace, and the EEOC intends to build on that work.

In December 2021, the EEOC announced that it updated its COVID-19 Technical Assistance Questions and Answers adding a new section -- N. COVID-10 and the Definition of "Disability" Under the ADA/Rehabilitation Act. The EEOC intended to clarify under what circumstances COVID-19 may be considered a disability under the ADA and the Rehabilitation Act. The EEOC's new fact sheet focuses broadly on COVID-19 and the definition of "disability" under Title I of the ADA and Section 501 of the Rehabilitation Act, which both address employment discrimination. "The updates also provide examples illustrating how an individual diagnosed with COVID-19 or a post-COVID condition could be considered to have a disability under the laws the EEOC enforces."

The following is a ***Comprehensive Checklist*** to utilize when evaluating and responding to a Charge:

- Read the Charge carefully.
- Check the date of the alleged discriminatory action and compare to the date the Charge was filed.[15]
- Determine if the employer is covered by the relevant law. Certain statutes require a certain number of individuals be employed before an obligation to comply with the statute. The claim is invalid if the employer is not subjected to the statute.
- Check the allegations for establishment of a prima facie case.[16]
- Outline information and documentation needed to defend the Charge
    - Who needs to be interviewed? Interviewing Charging Party's identified witnesses is an ideal place to start as those witnesses can lead to other relevant witnesses and/or documentation.
    - What documents are needed?
    - Would any additional witnesses, documents or data, not mentioned in the Charge be helpful?
- Check portal to determine whether investigator has been assigned and gauge familiarity.
- Consider whether early mediation or settlement would be appropriate.[17] This determination can be made at all stages of the investigation process.
- Obtain Information:
    - Interview managers or supervisors involved in the decision.

[15] Refer to "A. Evaluating the Claim" section "1. Statute of Limitations."
[16] Refer to "A. Evaluating the Claim" section "2. Identifying the Claim"
[17] Refer to "Charge Investigation Best Practices" section "3. Considering Mediation, Settlement and Conciliation."

- Interview employees when appropriate.
- Gather and preserve relevant documentation from the employer. [18]

- Develop the Employer's Defense to the Charge based upon the information gathered:[19]
  - Consider whether the employer had knowledge of the employee's protected class and how, if at all, the employee's protected status played a part in the employer's actions.
  - Does the employer have legitimate business reasons for each of its actions?
  - Can the employer establish that persons of a different race, national origin, gender, etc. were treated in a similar fashion?
- Prepare Your Position Statement. Considering both factual and legal components of the claim:
  - Prepare a thorough explanation of what happened. Example questions to consider when preparing the Response:
    - Does the company have written documentation relating to the alleged discriminatory incidents?
    - Are there company policies which are applicable?
    - Was the complaining employee treated in accordance with those policies?
    - Are there instances where employees have been treated differently?
    - Does statistical data support the company's position?
    - Is there evidence of conduct or comments which may indicate bias?
    - Was subjective criteria used in making any decisions?

[18] Refer to "C. Document and Computer Evidence Retention."
[19] Refer to "A. Evaluating the Claim" section "3. Defending the Claim."

- Attach any relevant or helpful documents.[20]
- Consider obtaining an extension of time to respond if additional time is needed to investigate the claim, gather documentation or any other reason.[21]

- The employer may have to respond to a request for additional information or an "RFI." The employer may also be subjected to "on-site interviews." [22]
- The administrative agency makes its determinations.[23]

[20] Understand that you do not have to provide everything that the EEOC or state agency requests. You can place limits on what you provide if you do not want to provide all information requested, as the request for information is not equivalent to a subpoena or other legal order. However, if the agency issues a subpoena the employer will more than likely have to produce the information.
[21] Agencies frequently will grant additional time for an employer to respond to the Charge.
[22] Refer to "Charge Investigation Best Practices" section "4. Responding to RFI's and preparing for On-site Interviews."
[23] Refer to "Position Statements as Potential Evidence in Litigation" section "1. EEOC Litigation."

Section Ten

A Helpful But Admittedly Incomplete List of Cases Addressing the Efficacy of Workplace Investigations and Other Remedial Actions

Catherine F. Duclos
Duclos Legal LLC

Section Ten

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A Helpful But Admittedly Incomplete List of Cases Addressing the Efficacy of Workplace Investigations and Other Remedial Actions

Revised December 7, 2022

I. Faragher/Ellerth Affirmative Defense to Harassment by Supervisor

A. Employer Established Faragher/Ellerth Affirmative Defense

- *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624 (7th Cir. 2019). Summary judgment for employer affirmed. Employer established Faragher/Ellerth affirmative defense by showing it promptly investigated and addressed employee's complaint. Employer was entitled to summary judgment even though employer was on notice of prior complaints about the same supervisor.
- *McPherson v. City of Waukegan*, 379 F.3d 430 (7th Cir. 2004). Summary judgment for employer affirmed. Employer not liable for offensive sexual misconduct by a supervisor where it responded reasonably to employee's complaint by promptly meeting with the supervisor and offering him the options of suspension during investigation or resigning immediately. Supervisor resigned, which effectively ended the harassing conduct.
- *Hill v. Am. Gen. Finance, Inc.*, 218 F.3d 639 (7th Cir. 2000). Summary judgment for employer affirmed. Employer took immediate corrective action, which included investigating employee's complaint, telling her who to call if she experienced further issues, transferring complainant and alleged harasser to different offices, and reducing alleged harasser's salary.
- *Casiano v. AT&T Corp.,* 213 F.3d 278 (5th Cir. 2000). Summary judgment for employer affirmed. Employer established Faragher/Ellerth defense where: (1) employer dispatched two "E.O. specialists" to conduct in-depth investigation; (2) investigators interviewed the plaintiff, the accused, and nine other employees; (3) conclusions of the investigators were well-substantiated by the information they were able to ferret out; and (4) employer suspended alleged harasser even though investigators were unable to corroborate plaintiff's allegations.
- *Savino v. C.P. Hall Co.,* 199 F.3d 925, 933 (7th Cir. 1999). There was sufficient evidence to support jury verdict for employer. District court did not err instructing jury on the Faragher/Ellerth defense. There was evidence for jury to find that employer reasonably attempted to correct and prevent sexual harassment when it promptly investigated employee's allegations, reprimanded supervisor even though it was unable to corroborate employee's allegations, moved supervisor to another floor, and suspended him after he admitted to using derogatory term to refer to plaintiff.

B. Employer Failed to Establish Faragher/Ellerth Affirmative Defense

- *Gray v. Koch Foods, Inc.*, 580 F.Supp.3d 1087 (M.D. Ala. 2022). Summary judgment for employer denied where employer failed to carry its burden to establish Faragher-Ellerth defense. Employee established that employer knew or should have known about the harassment

because "the harassers were not just co-workers, or even just supervisors, they were two managers tasked by [employer] to police against and stop the very harassment that [employee] alleges." Thus, their knowledge was imputed to employer. Further, even if the supervisor's observation and participation had not imputed constructive knowledge to employer, employee presented triable issue of fact as to whether her complaint to the shift supervisor, a person designated to receive such complaints, constituted actual notice to employer that should have triggered, at a minimum, an investigation. The shift supervisor failed, however, to take any action as he did not believe the employee was "complaining" but rather that they were "just talking."

- *Johnson v. PRIDE Indus. Inc.,* No. 19-50173 (5th Cir. Aug. 6, 2021). Summary judgment for employer reversed on employee's hostile work environment claim. Court had "no trouble" concluding there was a genuine dispute of fact as to whether employer's response was prompt, appropriate, and reasonably calculated to stop the harassment. Employer identified no action it took to investigate or respond to employee's allegations other than interviewing alleged harasser one time and accepting his denial.
- *Hall v. City of Chicago*, 713 F.3d 325 (7th Cir. 2013). Summary judgment for employer reversed. While the City took prompt action after the plaintiff submitted a formal report, the record showed she first raised concerns years earlier but her complaints were dismissed and she was labeled a troublemaker.
- *EEOC v. Management Hospitality of Racine, Inc.,* 666 F.3d 422 (7th Cir. 2012). Jury verdict for EEOC and punitive damages upheld. A rational jury could have found employer's policy and complaint mechanism were not reasonably effective in practice because managerial employees did not perform their duties under the policy, often ignored employee complaints, delayed investigations for months, and were themselves possibly engaged in harassing behavior.
- *Clegg v. Falcon Plastics, Inc.*, 174 Fed. Appx. 18 (3d Cir. 2006). Summary judgment for employer reversed. There were questions of fact regarding employer's diligence where plaintiff asserted employer acted only at her repeated insistence and manager appeared annoyed with the situation, would go the other way when he saw her coming, cussed at her when she raised a new issue, questioned her job performance, and stated that both she and the accused harasser should be fired.
- *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001). Summary judgment for employer reversed where a rational jury could reject the Faragher affirmative defense. Despite employer's promulgation of complaint procedures, "the company unreasonably failed to correct [the harassing supervisor's] behavior by neglecting to enforce the policy." When the plaintiff attempted to report a claim of racial harassment in accordance with the procedures, he was met with dismissive, meager attempts at corrective measures. As a result, the racial harassment "continued unabated until [the employee] departed."
- *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000). Summary judgment for employer reversed. Employer's investigation was inadequate where investigator had never before conducted a sexual harassment investigation, focused on the alleged harasser's management style rather than complaints of harassment, and did not discuss the harassment allegations with the accused harasser.
- *Cadena v. Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000) Verdict for employee affirmed where employer's investigation was "inadequate, if not a complete sham." Investigator conceded that she: (1) did not speak with the complainant, alleged harasser or any other potential witnesses concerning the matter; (2) did not know the identities of complainant or the alleged

harasser during the investigation; and (3) was unsure if she had been told the nature or specifics of the complaint.

II. Employer Negligence For Failing to Remedy Harassment by Non-Supervisors (Including Non-Employees)

A. Employee Failed to Demonstrate Genuine Issue of Fact Regarding Employer Negligence

- *Paschall v. Tube Processing Corp.*, 28 F.4th 805 (7th Cir. 2022). Summary judgment for employer affirmed. Plaintiff failed to raise a triable issue with regard to a basis for the employer's liability. With regard to each of the employee's complaints of inappropriate conduct, the record showed employer took prompt and effective remedial action. In each situation, the employer disciplined the employee and its actions effectively ended the inappropriate behavior.
- *Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422 (5th Cir. 2022). Summary judgment for employer affirmed. Although plaintiff presented evidence of reprehensible comments by coworkers, he did not submit evidence that offensive racist comments and conduct continued after employer's investigation and instruction to employees to maintain a professional working environment. Even though plaintiff alleged that harassment continued, there was no evidence that employer remained aware of any continued harassment but failed to take prompt remedial action.
- *Forsythe v. Wayfair Inc.*, 27 F.4th 67 (1st Cir. 2022). Summary judgment for employer affirmed. Plaintiff failed to present evidence that the employer's investigation was so deficient that employer could not reasonably rely on it to support a finding that the plaintiff's allegations were substantiated. The investigation was not deficient merely because the investigator failed to ask if there was anyone outside the workplace who could corroborate the plaintiff's allegations since the investigator asked about corroborating witnesses, interviewed the witness plaintiff identified, and never gave plaintiff reason to believe she could not volunteer the name of an outside witness.
- *Doe v. City of Detroit*, 3 F.4th 294 (7th Cir. 2021). Summary judgment for employer affirmed. Employer's prompt investigation of initial incidents of harassment was reasonable even though it failed to identify the perpetrator. Plaintiff's dissatisfaction with the thoroughness of investigation does not render it unreasonable. Employer's action of transferring suspected harasser ended harassment and was, therefore, sufficient to overcome inadequate investigation.
- *Lopez v. Whirlpool Corp.,* 989 F.3d 656 (8th Cir. 2021). Summary judgment for employer affirmed. Plaintiff deprived employer of reasonable opportunity to investigate and respond to her allegation of harassment where she resigned four days after making a complaint.
- *Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. 2011), *aff'd* on other grounds 570 U.S. 421 (2013). Employer satisfied its obligation under Title VII by promptly investigating each of the plaintiff's complaints and taking disciplinary action as it deemed appropriate even though its actions did not stop harassing behavior. If the evidence reflected an investigation approach where "all ties went to the discriminator," the court would have been inclined to send the matter to a jury. The record, however, reflected that the employer: (1) investigated and issued written warning to alleged harasser following employee's initial complaint; (2) investigated

each of employee's subsequent complaints but was unable to corroborate the allegations; (3) did not stop at a denial from the accused perpetrator; (4) calibrated its responses depending on the situation; (5) warned alleged wrongdoers and, when unsure who was at fault, counseled both employees.

- *Porter v. Erie Foods Int'l, Inc.*, 576 F.3d 629 (7th Cir. 2009). Summary judgment for employer affirmed. Supervisors instituted investigation and spoke with other shift leaders in an effort to identify who hung a noose in the plaintiff's work area. Plaintiff refused to provide name of employee who hung noose and his failure to cooperate was relevant to reasonableness of employer's actions.
- *Lapka v. Chertoff*, 517 F.3d 974 (7th Cir. 2008). Summary judgment for employer affirmed. When employee informed employer about alleged rape, it immediately called in an internal investigator and the local police. The police took statements from employee and the individual accused of assaulting her. The internal investigators obtained the police report and included it with their report. Since the police determined there was insufficient evidence to prosecute the alleged rapist, it was reasonable for the public employer to believe that it, too, had insufficient evidence to proceed against him. While the plaintiff would have preferred a different result, the emphasis of Title VII in this context is not on redress but on the prevention of future harm. So "the question is not whether the punishment was proportionate to [the] offense but whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring."
- *Cooper-Schut v. Visteon Auto. Systems*, 361 F.3d 421 (7th Cir. 2004). Summary judgment for employer affirmed. Employer promptly began investigations of employee's complaints, interviewed employees in complainant's department, and hired handwriting expert in effort to identify perpetrator. Employee's failure to provide writeup of incident hampered investigation and disciplinary action and was relevant to the reasonableness of employer's actions.
- *Williams v. Waste Management* (7th Cir. 2004). Summary judgment for employer affirmed. Upon receiving the plaintiff's complaint, manager called the accused employees into a meeting. Although they denied the allegations, the manager delivered a warning and threatened termination if they were found to be lying. The manager reiterated that neither he nor the company would tolerate harassment. Plaintiff experienced no further harassment. By suggesting the plaintiff take his breaks in another area, management separated the parties, which the court had previously found to be an appropriate remedy in harassment cases. Plaintiff failed to show that he was adversely affected by being required to take his breaks away from harassers.
- *Tutman v. WBBM-TV Inc.*, 209 F.3d 1044, 1049 (7th Cir. 2000). Summary judgment for employer affirmed. Employer's actions were reasonable where it began investigation on the day of the incident in question, interviewed the complainant and accused the next day, and completed investigation within two weeks. Employer took corrective action by issuing reprimand to accused harasser and requiring him to attend training and apologize to complainant. When complainant refused to return to work, employer offered to arrange his and accused harasser's schedules so they would have no contact with each other at work. The court rejected plaintiff's argument that employer's response was insufficiently punitive. The question is not whether the punishment was proportionate to the offense but whether the employer responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring. By punishing the harasser and promising to segregate him from plaintiff at work, employer made it improbable that harasser would

further harass plaintiff. The employer's response would have been inadequate, however, if separating the employees disadvantaged the plaintiff because remedial action that makes the victim worse off is ineffective per se.

B. Employee Demonstrated Genuine Issue of Fact Regarding Employer Negligence

- *Abbt v. City of Houston*, 28 F.4th 601 (5th Cir. 2022). Summary judgement for employer reversed. Plaintiff, a former firefighter, presented sufficient evidence to create a genuine dispute as to whether unauthorized and repeated viewing by coworker and District Chief of a sexually explicit video involving plaintiff and her husband constituted severe or pervasive conduct. Plaintiff also presented sufficient evidence that employer knew or should have known about the harassment. The District Chief's knowledge of the coworker viewing the video was imputed to the employer where the employer's own policy placed an affirmative duty on him to pass such information up the chain of command and he could have directed the coworker to cease the harassing conduct.
- *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F.Supp.3d 154 (D. Md. 2022). Summary judgment for school district denied on transgender employee's harassment claims. Evidence showed the plaintiff employee made repeated complaints about harassment, hostile comments, and misgendering by coworkers, students, and parents but her reports resulted in little to no discipline or remedial measures. Rather than addressing the harassment, school administrators focused on restricting the plaintiff's clothing, footwear, and make-up choices, demanded she present as male, and told her that a note from her therapist was "garbage." When the employee attempted to complain about misgendering by coworkers, the Assistant Principal told her to grow a "thicker skin." Administrators were unable to point to specific action undertaken in response to plaintiff's complaints of harassment by students or parents.
- *McCracken v. State,* No 1:19-cv-02290-JRS-MG (S.D. Ind. September 29, 2021). Summary judgment for employer denied. Merely asking and accepting alleged perpetrator's denial is not reasonable corrective action. Further, investigator had practice of finding complaints unfounded unless a third party witnessed the incident or the accused harasser had previous complaints against him or her.
- *May v. Chrysler Group, LLC,* 716 F.3d 963 (7th Cir. 2013). Jury verdict for employee affirmed. The jury was presented ample evidence from which to conclude employer did not promptly and adequately respond to racist, xenophobic, homophobic, and anti-Semitic harassment. Employer did not interview a single witness on plaintiff's list. "When an employee has been subjected to repeated threats over many months and the employer has a list of names, the employer's investigator should talk to some of those people - or at least a jury would not be irrational to think so."
- *Erickson v. Wisconsin Dept. of Corrections,* 469 F.3d 600 (7th Cir. 2006). Jury verdict for employee upheld. Employer had obligation to investigate employee's complaint about inmate's inappropriate behavior despite limited information she provided. Employer failed to meet its duty to take reasonable steps to discover and rectify acts of sexual harassment, which culminated with employee being raped by inmate about whom she had previously complained. Employer did not take any action in response to the plaintiff's earlier complaint, including asking follow-up questions or questioning the inmate about the encounter.
- *Hostetler v. Quality Dining, Inc.,* 218 F.3d 798 (7th Cir. 2000). Summary judgment for employer reversed. Plaintiff presented evidence that employer responded to her complaint by

transferring her to another location. Even though the transfer stopped the harassment, a remedial measure that leaves a complainant worse off is ineffective per se and an employer is liable for harm it inflicted on a complainant as a result of its inappropriate response. The harassment might cease as a result of these measures, but the plaintiff is effectively made to bear the costs.

III. Pretext and Employer's Articulated Basis for Adverse Action

A. Investigation Fails to Support Basis for Employee Termination

- *Canada v. Samuel Grossi & Sons*, __ F.4th __ (3rd Cir. September 15, 2022)(Precedential). Summary judgment for employer reversed on retaliation claims under Title VII, the ADA, and the FMLA. An employer's motivation for initiating an investigation is relevant to pretext. Even though employer's investigation found misconduct to justify the plaintiff's termination, plaintiff presented evidence that the investigation was initiated to find grounds for termination in retaliation for plaintiff's previous complaints of discrimination. The court expressly declined to adopt a rule that would incentivize employers to dig up reasons to terminate employees who engaged in protected activity and then immunize them from suit based on a fortuitous discovery of grounds for termination.
- *Hairston v. Wormuch*, 6 F.4th 834 (8th Cir. 2021). Summary judgment for employer reversed on employee's retaliation claim. The plaintiff complained of harassment and misconduct by coworker. During employer's investigation, the coworker made allegations about the plaintiff. Evidence that the investigator treated the allegations unevenly raised doubt about the legitimacy of the employer's stated motive for terminating the plaintiff. The investigator gathered information from the coworker that eventually led to plaintiff's termination while not pursuing a comparable investigation into the plaintiff's allegations.
- *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019). District Court's dismissal of employee's complaint vacated. Male coach sufficiently pleaded case of sex discrimination. The plaintiff pled that there were procedural irregularities in employer's investigation of a student's sexual harassment allegations and this was sufficient to raise an inference of bias against him because of his sex. Among other irregularities, the plaintiff alleged the employer failed to interview relevant witnesses he identified, disregarded the investigative process in its written harassment policy, and failed to provide him a report based on the investigation.
- *Hobgood v. Illinois Gaming Bd.* 731 F.3d 635 (7th Cir. 2013). Summary judgment for employer reversed on employee's retaliation claims. The initiation and scope of the employer's investigation of employee was suspicious and supported inference that the investigation was pretextual and motivated by defendants' desire to construct a case for termination after they learned plaintiff was helping a coworker with a discrimination lawsuit.
- *Sassaman v. Gamache*, 566 F.3d 307 (2nd Cir. 2009). Summary judgment for employer reversed on employee's sex discrimination claim. Although the male employee resigned under pressure due to allegations of sexual harassment, a jury could infer discrimination based on sex stereotyping in light of evidence that plaintiff's supervisor expressed belief that men had a propensity to commit sexual harassment and employer failed to properly investigate the allegations against the plaintiff.
- *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596 (W.D. Tex. 1988). An employee accused of sexual harassment alleged that his discharge was discriminatory on the basis of his national

origin. The trial court found in favor of the employee after finding his discharge was pretextual. The court based its finding, in part, on a conclusion that the employer's investigation was quickly and poorly conducted by a manager with a material interest in the outcome.

B. Investigation Supports Employer's Basis for Adverse Action

- *Crosbie v. Highmark Inc.,* __ F.4th ___No. 21-1641 (3rd Cir. August 26, 2022 (Precedential). Summary judgment for employer affirmed. Employer terminated the plaintiff after investigating a coworker's allegation that plaintiff harassed her. Plaintiff, who had previously reported fraud to the employer, sued under the False Claims Act alleging the investigation was flawed and, therefore, could not support his termination. The plaintiff failed to show, however, that the investigation was so flawed that a jury could find it unbelievable. Further, flaws in an investigation or suspicious timing of an investigation can support an inference of pretext only if those running the investigation know of the protected activity. Since investigators did not know about the employee's reports of alleged fraud, plaintiff could not show that the investigation was pretextual.
- *VanHook v. The Cooper Health System*, No. 21-2213 (3rd Cir. March 31, 2022) (Nonprecedential). Summary judgment for employer affirmed on employee's claims of FMLA retaliation and discrimination under the ADA. Employer had good faith belief in its stated reason for plaintiff's termination based on conclusions of outside investigator who found plaintiff went shopping and engaged in other personal activities rather than care for her son during FMLA leave.

IV. Employer Failure to Respond to Employee Complaint Supports Constructive Discharge

- *Stamey v. Forest River, Inc.,* 37 F.4th 1220 (7th Cir. 2022). Summary judgment for employer reversed on employee's age discrimination claim. Plaintiff presented evidence of constructive discharge due to employer's failure to address age-related harassment. Employee was not required to give employer more time to remedy harassment before quitting because employee reasonably believed it would have been futile. He had complained to supervisors and human resources, who failed to act. A jury could find that the employer's minimal response was unlikely to change the environment.

V. Independent Investigation Overcomes Cat's Paw

- *Vesey v. Envoy Air, Inc.* 999 F. 3d 456, 462-3 (7th Cir. 2021). Summary judgment for employer affirmed on employee's retaliation claim. The fact that the plaintiff's wrongdoing was reported by biased supervisor with a retaliatory or discriminatory motive is insufficient to establish liability under a cat's paw theory where employer's independent investigation confirmed employee's misconduct and employee did not allege retaliatory motive by investigators.
- *Sinha v. Bradley Univ.* 995 F.3d 563 (7th Cir. 2021). Summary judgment for employer affirmed on employee's age discrimination claim. The employee's cat's paw theory failed because he could not demonstrate that allegedly biased supervisor proximately caused his removal as

department chair. The evidence showed the decisionmaker removed the employee based on an independent investigation and faculty grievance committee report.

VI. Evidentiary Issues

- *Brown v. Town of Front Royal* No. 5:21-cv-00001 (W.D. Va. May 3, 2022). Magistrate's order compelling production of employer's communications with its attorney was not clearly erroneous. Employer must disclose all communications with its outside counsel about its investigation of plaintiff's harassment allegations and remedial measures taken in response to those allegation. The employer put the attorney's advice at issue in the case and waived the attorney-client privilege because the attorney was retained to ensure the investigation was done properly and work in conjunction with the investigator even though she did not conduct the investigation, question witnesses, or make factual findings.
- *Castelluccio v. Inter. Bus. Machines Corp.,* 2013 WL 6842895 (D. Conn. Dec. 23, 2013). Employee's motion to exclude employer's internal investigation report, notes, and findings granted. The report was unduly prejudicial because it was one-sided, failed to include evidence favorable to the plaintiff, and appeared to have been created more for the purpose of exonerating the employer than to determine whether the plaintiff was treated fairly.
- *Cahill v. Nike, Inc.,* No. 3:18-cv-1477-JR (D. Or. Oct. 9, 2020). Employee's motion to compel production of employer's compensation investigation and analysis denied. The attorney-client privilege and work product doctrine protected the investigation and analysis from disclosure where the employer followed privilege protocols, sought legal advice to address potential legal liabilities, and did not assert reliance on the investigation or advice of counsel to escape liability.
- *Williams v. United States Environmental Services, LLC*, No. 15-168, 2016 WL 617447, at *5 (M.D. La. Feb. 16, 2016) Employee's motion to compel production of investigation report and underlying documents granted. Employer waived any applicable privilege with respect to investigation report and all underlying documents by raising Faragher/Ellerth affirmative defense and citing investigation to show that it exercised reasonable care to promptly correct harassing behavior.
- *Angelone v. Xerox Corp.*, No. 09-6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011) Employee's motion to compel production of investigation report and underlying documents granted. Employer waived applicable privileges by claiming it used reasonable care to prevent and promptly correct harassment and discrimination. Employer could not rely on the thoroughness and competency of its investigation and then shield discovery of documents underlying the investigation by asserting attorney-client privilege or work product protections. Employer must disclose any document or communication considered, prepared, reviewed, or relied on in creating or issuing the investigation report.
- *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892–93 (M.D. Tenn. 2010) Employee's motion to compel production of investigation report and underlying documents granted. Employer cannot use the investigation report as a sword by premising its Faragher–Ellerth defense on the report but then shield discovery of documents underlying the report by asserting privilege or work-product protection.
- *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 317–18 (N.D. Ill. 2010). Employee's motion to compel production of investigation report and underlying documents granted. "Even assuming, arguendo, that the documents are attorney-client privileged or

protected work product, any such protection for these particular documents was waived by [the defendant's] assertion of its Faragher/Ellerth defense."

- *E.E.O.C. v. Outback Steakhouse of Fla., Inc.*, 251 F.R.D. 603, 611 (D. Colo. 2008). Employee's motion to compel production of investigation report and underlying documents granted. "Courts have interpreted an assertion of the Faragher/ Ellerth affirmative defense as waiving the protection of the work product doctrine and attorney-client privilege in relation to investigations and remedial efforts in response to employee complaints of discrimination because doing so brings the employer's investigations into issue."
- *Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005). Employee's motion to compel production of investigation report and underlying documents granted. "If Defendants assert as an affirmative defense the adequacy of their pre-litigation investigation into [the plaintiff's] claims of discrimination, then they waive the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation. Where a party puts the adequacy of its pre-litigation investigation at issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privileged."

VII. Punitive Damages

- *May v. Chrysler Group LLC*, 716 F.3d 963 (7th Cir. 2013) District court's decision to vacate jury award of punitive damages affirmed. While there was sufficient evidence for the jury to find employer's efforts to protect employee were inadequate, the evidence was insufficient to support a finding that employer acted with malice or reckless indifference to employee's federally protected rights where it had a written anti-harassment policy and undertook efforts to investigate employee's allegations and identify the anonymous harasser.

VIII. Miscellaneous Issues

- *Hils v. Davis,* No. 22-3224 (6th Cir. November 7, 2022) (recommended for publication). Police officers do not have right to record their interviews during investigations of citizen complaints by Citizen Complaint Authority even though officers are required to participate in the investigations as a condition of their employment.

THE LATEST ON WORKPLACE HARASSMENT

Catherine Duclos
Duclos Legal LLC

Recent Developments in Employment Law
Indiana Continuing Legal Education Forum

December 20, 2022

Primer on the Current State of the Law

Employers are obligated to discover and remedy harassment and discrimination

Policies, reporting procedures, and training are important but insufficient alone

Employers must promptly investigate complaints and take corrective action

STATUTORY CHANGES IN 2022

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- Signed into law March 3, 2022
- Amends Federal Arbitration Act
- No predispute arbitration agreement is enforceable under Federal, Tribal, or State law
- Courts (not arbitrators) determine whether claim is sexual harassment or sexual assault

EFASASHA?

Speak Out Act

- Signed into law December 7, 2022.
- Predispute non-disclosure and non-disparagement clauses are unenforceable.
- When does a dispute arise?
- Applies to predispute agreements signed before December 7, 2022.

Signal from the Seventh Circuit

***Paschall v. Tube Processing Corp.*, 28 F.4th 805 (7th Cir. 2022)**

- Summary judgment for employer affirmed.
- Prompt remedial action dispositive even if hostile work environment existed.
- No spectrum when it comes to racial epithets in the workplace.
- "There may be a situation in which the one-time use of the N-word can be found to be severe enough to warrant liability."

But Liability Still Depends on Totality of Circumstances

***Scaife v. U.S. Dept. of Veterans Affairs*, 49 F.4th 1109 (7th Cir. 2022)**

- Summary judgment for employer affirmed.
- Single incident not severe where not said to plaintiff or by her direct supervisor, and plaintiff learned of it months later.
- Department lead's history of racial insensitivity doesn't bolster hostile environment claim ("second-hand harassment").
- Courts should not automatically combine allegations of harassment in assessing environment.

Conduct Outside Employee's Presence Can Be Harassing

Abbt v. City of Houston, 28 F. 4th 601 (5th Cir. 2022)

- Summary judgment for employer reversed.
- Unauthorized repeated viewing by coworker and supervisor of explicit video involving plaintiff was severe conduct.
- Supervisor's knowledge of coworker's conduct was imputed to employer.

Failure to Act Supports Constructive Discharge Claim

Stamey v. Forest River, Inc., 37 F.4th 1220 (7th Cir. 2022)

- Summary judgment for employer reversed.
- Failure to address harassment was sufficient to allow constructive discharge claim to proceed.
- Court must give credence to employee's account of over 1,000 insults in a single year with no management response.
- Employee not required to give employer more time where employee believed it would be futile.

Offensive Language May Be Protected Concerted Activity

Constellium Rolled Products Ravenswood LLC v. NLRB, 45 F.4th 234 (D.C. Cir. 2022)

- NLRB order enforced.
- Even though conduct may violate no-harassment policy, it was protected concerted activity.
- An employer can enforce no-harassment policy without violating NLRB.
- BUT . . . there was no evidence employer enforced policy in consistent manner or was "turning over a new leaf."

EEOC Says The Customer Isn't Always Right

EEOC v. Elderwood at Burlington

- Filed September 2022
- Alleges patients harassed nurse

EEOC v. Riverwalk Post-Acute

- Filed March 2022
- Alleges residents harassed staff

EEOC v. Kelley Williamson Co

- Filed February 2022
- Alleged customer harassed employee
- Settled for $75,000

Waiver of Attorney-Client and Work Product Privileges in Harassment Investigations

Attorney-Client Privilege cannot be used both as a sword and shield

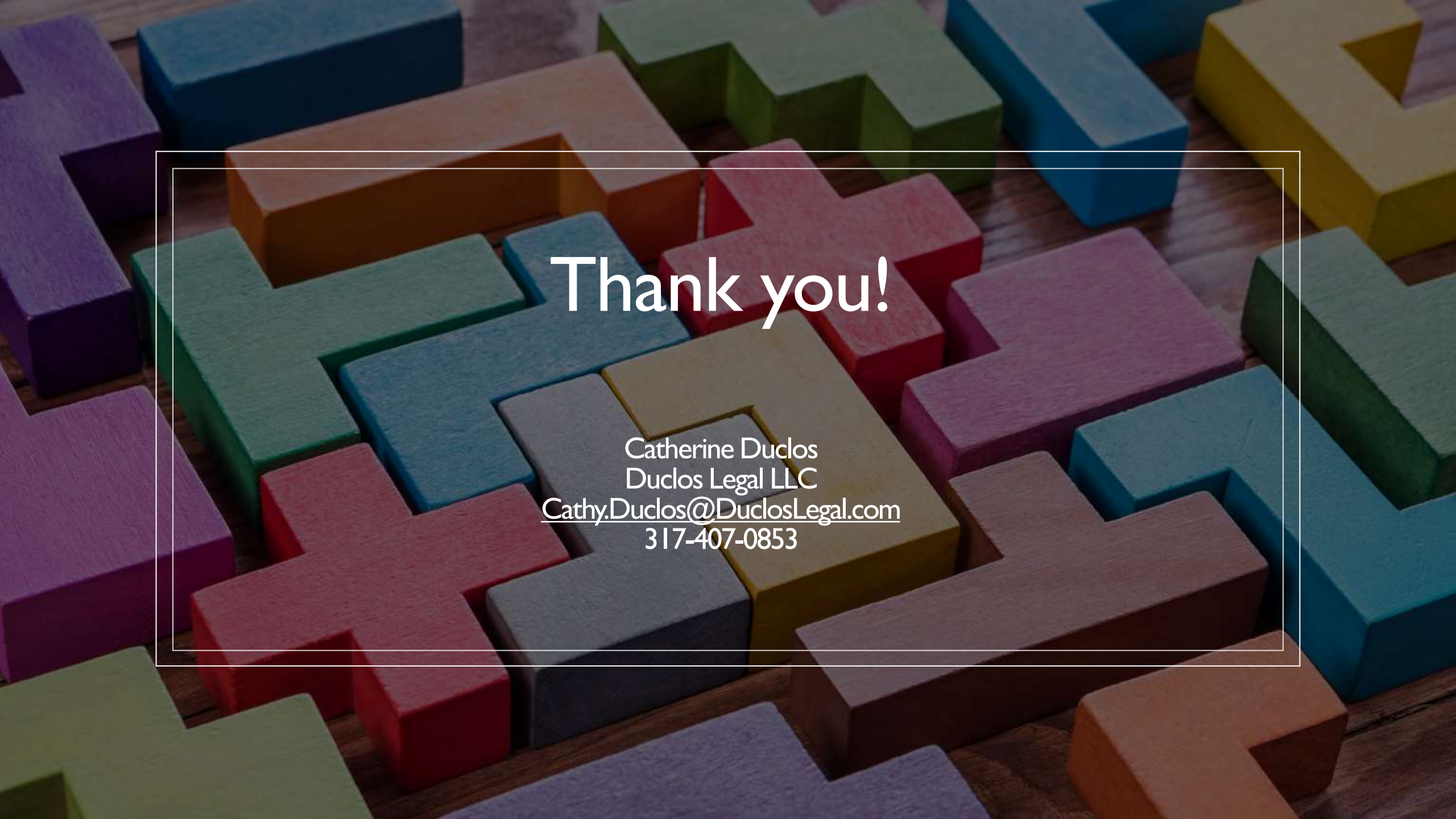
Assertion of Faragher/Ellerth affirmative defense or reasonableness of employer's response puts adequacy of investigation at issue

Employer usually waives privileges not only for report but also for documents, interviews, notes and memoranda created as part of and in furtherance of investigation

Attorney's Work With Investigator Led to Waiver of Privilege

Brown v. Town of Front Royal (W.D. Va. 2022)

- Magistrate's order compelling production of employer's communications with attorney was not clearly erroneous.
- Employer put attorney's advice at issue.
- Attorney was retained to ensure investigation was done properly and consult with investigator.



Thank you!

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Section Eleven

Ethical Issues for Employment Lawyers

James J. Bell
Hoover Hull Turner LLP
Indianapolis, Indiana

Section Eleven

Ethical Issues for Employment Lawyers……..…..James J. Bell

PowerPoint Presentation

ICLEF – Ethical Issues for Employment Lawyers

James Bell
Hoover Hull Turner
December 20, 2022

THE ETHICS OF “SHUT UP”/OBSTRUCTION

SO WHEN DOES THIS COME UP?

IN RPC 3.4(F)

A lawyer shall not:

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

IN RPC 3.4(F) COMMENT

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

IN RE STANFORD, 48 SO. 3D 224 (LA 2010)

- Criminal Defense Lawyers procured affidavit from victim that included confidentiality provision that discouraged testimony.

IN RE KORNREICH, 693 A.2D 877 (NJ 1997)

- Lawyer attempted to dissuade witness from returning from another state to testify at trial.

IND. ETHICS OP. 2014-1 (2014)

- Non-disparagement provision in settlement agreement may violate rule 3.4(f) if it prohibits lawyer from "privately and voluntarily providing evidence to third parties for their use in litigation, upon request."

MATTER OF D.J,
778 N.E.2D 805 (IND. 2002)

- DV Case
- Witness didn't show? . . . Case dismissed.
- Lawyer asked witness to wait in the hall
- Convicted of Obstruction of Justice and Attempted Obstruction of Justice
- 8.4(b) – Crime Reflected on Trustworthiness
- Disciplined with 2-year suspension

BTW – DV CASE

- Should I come to court?
- Who is your client?
- See Rule 4.3
- (Is this call recorded? More on that later)

RULE 4.3

Rule 4.3. Dealing with Unrepresented Persons

. . . The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Other Settlement Rules

RULE 1.8

Rule 1.8 – Conflicts of Interest

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

RULE 1.8

Rule 1.8 – Conflicts of Interest

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

RULE 1.8

Rule 1.8 – Conflicts of Interest

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

RULE 1.8

Rule 1.8 – Conflicts of Interest

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

RULE 1.8

Rule 1.8 – Conflicts of Interest

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Video Time

NON-REFUNDABLE FEE

MAKING DISCIPLINARY THREATS

SWIFT SETTLEMENT

Lawyers And Recordings


Automatic Call Recorder
Easy to record

MATTER OF CE, 87 N.E.3D 470 (IND. 2017)

- In this case, recorded phone conversations with the defendant.
- Attorney “bragged about his personal relationships with judges in a manner that implied he had the ability to improperly influence judges”
- “spoke in pejorative terms about another client’s race”

MATTER OF CE, 87 N.E.3D 470 (IND. 2017)

- 8.4(e): Stating or implying an ability to influence improperly a government agency or official.
- 8.4(g): Engaging in conduct that was not legitimate advocacy, in a professional capacity, manifesting bias

MATTER OF CE, 87 N.E.3D 470 (IND. 2017)

- "[I]n multiple conversations he discussed with Defendant the option of fleeing the jurisdiction to avoid or delay criminal prosecution."

MATTER OF CE, 87 N.E.3D 470 (IND. 2017)

- 1.2(d): Counseling or assisting a client in conduct the lawyer knows to be criminal or fraudulent.

Criminal Lawyer v.

CRIMINAL LAWYER

WARRANT OUT FOR YOUR ARREST?

I KNOW A GUY
WHO KNOWS A GUY
WHO WILL TAKE CARE OF IT.

BETTERCALLSAUL.COM

Saul Goodman
ATTORNEY AT LAW

Fixer v. Problem Solver

Fixer v. Problem Mitigator

"I'm the guy who stops the leaks. I'm the guy who protects the president and the family. I'm the guy who would **take a bullet for the president.**"

--Michael Cohen

Vanity Fair, 9/6/17

If Someone Ought to Go to Jail, It Ought to Be the Client

MATTER OF CE, 87 N.E.3D 470 (IND. 2017)

- 90 Days without automatic reinstatement

Tangent:

What About Recording the Other Lawyer?

ABA FORMAL OPINION 01-422

- "[a] lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules."

RECORDING CONVERSATIONS IN INDIANA

- Indiana bars the intentional recording or acquisition of the contents of an electronic communication the consent of at least one party to the conversation. *See* Ind. Code § 35-31.5-2-176.
- "One-party consent" state, meaning technically you can choose to record your conversations with a client, witness, or opposing counsel with only your consent and not the other party's knowledge.

RECORDING CONVERSATIONS IN INDIANA

- BUT People don’t like it.
- State Bar Opinion Against It

Tangent:

What About Recording the Zoom Hearing?

INDIANA CODE OF JUDICIAL ETHICS

RULE 2.17: Prohibiting Broadcasting of Proceedings

Except with prior approval of the Indiana Supreme Court, a judge shall prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize . . . [Ceremonies, recording proceedings]

LOCAL RULE?

Update #1

Handling the Media

Disciplinary Comm:

Advisory Op 1-22

WHAT IS AN ADVISORY OP?

- Nonbinding opinion from the Disciplinary Commission.
- “The advice contained in this opinion is not attributable to the Indiana Supreme Court.”

Advisory Op 1-22

- **Question:** Can a lawyer's pretrial publicity or extrajudicial comments **on social media** platforms about a pending legal dispute in which the lawyer is participating (or has participated) have ethical implications?"

Media Consideration #1:

Protect Confidentiality

CONFIDENTIALITY

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives **informed consent**, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Tangent:

Confidentiality

MATTER OF GOEBEL, 703 N.E.2D 1045 (IND. 1998)

- Poor Crawfordsville Attorney
- Represents Guardianship Client
- Guardianship's Client's Husband was a Witness in a Criminal Case
- Criminal Client wanted to kill client and husband
- Attorney = Don't Do That.

MATTER OF GOEBEL

- Criminal Client Demands Address
- Has envelope. Returned for “NSS” (No Such Street)
- Two Days Later, Guardianship client murdered at 3813 South 300 East
- Hearing Officer: Did not reveal information relating to the representation

MATTER OF GOEBEL

- Supreme Court of Indiana: “Information relating to the representation of a client” is a “broad definition and has been construed to include all information relating to the representation regardless of the source.”
- “Information” may include identity or whereabouts of client.
- “[I]nformation relating to the representation of the guardianship client was not excepted frim Rule 1.6’s confidentiality requirement.”

CONFIDENTIALITY

- Areas Where This Will Arise:
  - Staff Comments
  - Social Media
- Requests for Interviews
- Request for Files
  - Duty to Resist

WHAT IF YOU GET A SUBPOENA

Here is what you need

- Court Order?
- Consent?
- Other?
- There is a duty to resist

Media Consideration #2:

Nature of the Comments

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter **shall not make an extrajudicial statement that the lawyer knows** or reasonably should know **will be disseminated by means of public communication** and will have a **substantial likelihood of materially prejudicing an adjudicative proceeding** in the matter.

Advisory Op 1-22

- "The purpose of Rule 3.6 is to preserve the impartiality of the justice system **by only preventing attorneys** from making statements that are likely to affect a party's right to a fair trial by prejudicing the proceedings."

RULE 3.6: TRIAL PUBLICITY

Note:

- "Substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."
- Not actual prejudice

RULE 3.6: TRIAL PUBLICITY

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. **A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.**

Advisory Op 1-22

- **Minefields:**
- Commenting on Inadmissible Evidence or Credibility
- Commenting on Prejudicial Matters Outside the Public Record
- Expressing Opinions of Guilt/Innocence

Advisory Op 1-22

- Don’t talk about the polygraph
- Any private testing
- Information the public would not have access to . . .

Advisory Op 1-22

- Be boring
- State things like . . .
- Steps in litigation, list of claims, information in public records

Big Lesson:

Investigations

Speaking With Represented People

Update #2

Let’s Stop and Look at the Rule

RULE 4.2

- In representing the client, a lawyer shall not communicate about the **subject of the representation with a person the lawyer knows to represented by another lawyer in the matter**, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

MATTER OF PM (IND. 2021)

- Respondent represented Husband in post-dissolution litigation with First Wife.
- Domestic dispute led to criminal charges against his Second Wife
- Deposition of the Second Wife set to talk about First Wife case.

MATTER OF PM (IND. 2021)

- Respondent knew Second Wife represented in Second Wife Case
- By the way, there is also a criminal case that presumably Second Wife is represented on.
- At depo, talk about Second Wife Case and Criminal Case in First Wife Case Cause #.
- Problem?

MATTER OF PM (IND. 2021)

- Allegation: You spoke to represented party about the subject of representation.
- Defense: She was not represented in the First Wife case.

MATTER OF PM (IND. 2021)

- The Court found that this violated Rule 4.2 and noted that "all three underlying cases involved overlapping subject matter, and Second Wife was a party to the other two cases." *Id*.

MATTER OF PM (IND. 2021)

- “Respondent's interpretation . . . runs directly contrary to the purpose of the Rule, which . . . is aimed at protection of the rights of a represented person with respect to the subject of the representation and not merely the protection afforded in any given proceeding . . . “

MATTER OF PM (IND. 2021)

- The Court rejected Respondent's argument that the "matter" referenced in Rule 4.2 should be read narrowly to mean only the specific lawsuit in which the deposition was taken.

MATTER OF PM (IND. 2021)

- Conclusion: Cause numbers don’t matter.
- Subject matter . . . matters

What do you do if represented party formally waives right to counsel?

RULE 4.2

- In representing the client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to represented by another lawyer in the matter, **unless the lawyer has the consent of the other lawyer** or is authorized by law or a court order.

Can you talk to a represented person who is seeking a second opinion?

RULE 4.2

- **In representing the client**, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

COMMENT [4]: RULE 4.2

- This Rule does not "preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter."


DANGER
HOT
TAKES
AUTHORIZED
PERSONNEL ONLY

ABA Opinion:

9/28/22

Can a Pro Se Lawyer Communicate with a Represented Party?

ANSWER

"[U]nless the pro se lawyer has the consent of the represented person's lawyer or is authorized by law or court order to communicate directly with the other represented person about the subject of representation, such communication is prohibited."

ANSWER

The opinion concludes that when a "lawyer is engaged in self representation," the lawyer is "representing a client" and is, therefore, "subject to Model Rule 4.2's prohibition."

What if I am not sure?

RULE 4.2

- In representing the client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer **or is authorized by law or a court order.**

What about an Unrepresented Witness?

RULE 4.3 – DEALING WITH UN-REP'D PRTY

- " . . . a lawyer shall not state or imply that the lawyer is disinterested."

LAWYERS CAN'T GO UNDERCOVER

RULE 4.3 – DEALING WITH UN-REP'D PRTY

- "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter . . . shall make reasonable efforts to correct the misunderstanding."

RULE 4.3 – DEALING WITH UN-REP'D PRTY

"The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

Social Media Investigations

- **Can an attorney create a false profile to contact witnesses?**

No False Statements

RULE 4.1(a)

Rule 4.1(a) of the Indiana Rules of Professional Conduct states that “In the course of representing a client a lawyer shall not knowingly. . . make a false statement of material fact or law to a third person.”

- **Can an attorney check out a potential juror's profile?**

SOCIAL MEDIA QUESTION

- “Would it be a violation of the RPC to routinely advise clients at the beginning of a case to make sure that all of their social media is either private or to shut it down?”

IN RPC 3.4(A)

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

QUESTION

- Change Privacy Settings?
- That is . . .
- Ok
- Pa. Bar Ass’n, Formal Op. 2014-300 (2014)

QUESTION

- Shutting Down?
- More tricky.
- Are you altering or destroying? **3.4(a)**
- Shutting down is ok if evidence is preserved.
- D.C. Bar Ethics Opinion 371 (2016)

Who is Doing this Investigation?

An Investigator?

Always Supervise Nonlawyers (Including Investigators)

Bad Excuse:
“It Was My Secretary’s Fault.”

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

- With respect to a nonlawyer … associated with a lawyer:
  - (a) a lawyer [with] … managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligation's of the lawyer;

POTENTIAL PITFALLS

Rule 1.6: Confidentiality of Information

Rule 4.2: Speaking with Represented People

Rule 4.4: Respect for Rights of Third Persons

GUIDELINE 9.3. PROHIBITED DELEGATION

A lawyer may not delegate to a non-lawyer assistant:

(a) responsibility for establishing an attorney-client relationship;

(b) responsibility for establishing the amount of a fee to be charged for a legal service; or

(c) responsibility for a legal opinion rendered to a client.

Speaking of Staff . . .

Update-ish #3

Maintain Competence While Working at Home

Questions for Staff As They Work From Home

CONFIDENTIALITY DURING COVID-19

- Working from home:
  - Headset?
  - Visible Files?
  - Shared devices?
  - WiFi-Secure?
  - Can your Video Conference be Zoom Bombed?

Questions for Anyone As They Work From Home

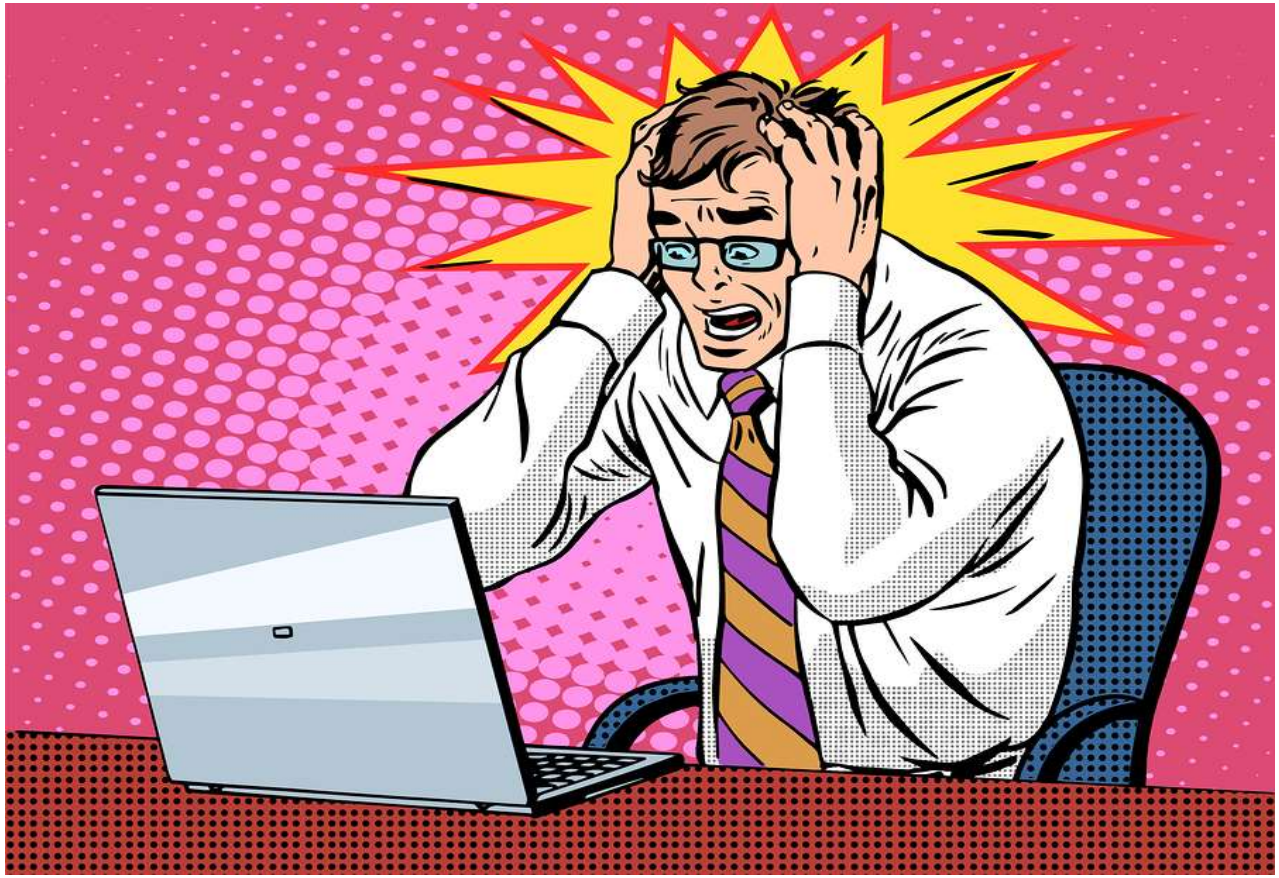
COMPETENCE WHILE AT HOME

- Working from home:
  - Have you audited your calendar?
  - Is someone getting the mail?
  - Is someone still maintaining your calendar?
  - Are you up to speed on the latest Emergency Order?
  - Are times slow?
    - Are you “in the gray?”

Is Anyone Mentoring the Young Lawyers?

Is Anyone Monitoring the Young Lawyers?

PANIC WHILE WORKING AT HOME



PANICKING IN WRITING

- Panic Orally
- Don’t Panic in Writing
- The lawyer in your firm is not your lawyer
- There is no privilege – Most Likely
- Is there an attorney-client relationship established?

Civility

PREAMBLE TO IRPC

- Zealous v. Honorable v. Effective
- ”Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.”
- Redacted the words “zealous” and “zeal” and replaced with “effective.”

DISRUPTING A TRIBUNAL

Rule 3.5(d): "A lawyer shall not … engage in conduct intended to disrupt a tribunal."

- A.K.A. Don’t Act like a Fool in Front of a Judge or While a Tape Recorder is Running

MATTER OF K.M.

- Attorney disrupted tribunal when immediately after a discussion in chambers with a judge, attorney grabbed and struck opposing counsel, thereby knocking him over the table in the judge's office.
- 60-day suspension

MATTER OF A.M.

- Throwing soft drink at opposing counsel and restraining him in his chair in response to deposition questioning of attorney's wife, causing premature conclusion to deposition, is conduct intended to disrupt tribunal and that is prejudicial to the administration of justice.
- 60-day suspension

Professionalism In Writing Is Good Advocacy

7 DEADLY WORDS AND PHRASES

- “Ridiculous”
- “Ludicrous”
- “Disingenuous”
- “Preposterous”
- “Absurd”
- “Outlandish”
- “Absolutely False”

BRIEFING

- “Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time.”
- *Amax Coal Co. v. Adams*, 597 N.E.2d 350 (Ind.Ct.App. 1992).

BRIEFING

- The appellant's brief on transfer stated: "indeed the opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for the appellee … and then said whatever was necessary to reach that conclusion. (Regardless of whether the facts or the law supported its decision.)"
- Public reprimand
- *Michigan Mutual Ins. Co. v. Sports, Inc.*, 706 N.E.2d 555 (Ind. 1999).

MATTER OF MW, 782 N.E.2d 985 (IND. 2003)

- "Lawyers are completely free to criticize the decisions of judges. As licensed professionals, they are not free to make recklessly false claims about a judge's integrity."

- Rule 8.2: "A lawyer shall not make a statement that the lawyer knows to be false … concerning the qualifications or the integrity of a judge."

But Kentucky Violates 8.2 Better than We Do

KY Bar Ass'n v. L.W.
929 S.W.2d 181 (1996)

- KY Example
- Judge grants injunction and then recuses.
- Motion to Set Aside Injunction:
- "Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced . . ."

KY Bar Ass'n v. L.W.
929 S.W.2d 181 (Cont'd)

- In response to why he should not be found in contempt, he filed:
- "Memorandum In Defense of the Use of the Term 'Ass-hole' to Draw Attention to the Public Corruption in Judicial Office."

KY Bar Ass'n v. L.W.
929 S.W.2d 181 (Cont'd)

- In his Answer to First Amended Complaint, he repeated allegations of corruption and then added a "P.S.":
- "There is a better and happier way and – with due temerity I claim to have found it – it requires one to identify an ass-hole when he sees one."

KY Bar Ass'n v. L.W.
929 S.W.2d 181 (Cont'd)

- "Respondent appears to believe that truth or some concept akin to truth . . . is a defense."
- "There can never be a justification for lawyer to use such scurrilous language with respect to a judge."
- "The reason is not that the judge is of such delicate sensibilities as to be unable to withstand the comment, but rather that such language promotes disrespect of the law and for the judicial system."

KY Bar Ass'n v. L.W.
929 S.W.2d 181 (Cont'd)

- "Officers of the court are obligated to uphold the dignity of the Court of Justice."
- 6 month suspension

Professionalism With Opposing Counsel

Is Good Advocacy

Watch What You Say In A “Professional Capacity”

INDIANA RULE 8.4(g)

"It is professional misconduct for a lawyer to . . . (g) engage in conduct, in a *professional capacity*, manifesting, by words or conduct, **bias** or **prejudice** based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors . . ."

CONT'D - INDIANA RULE 8.4(g)

". . . Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule."

MULLANEY v. AUDE (MD.)

- Atty.(F): You got a problem with me?
- Atty.(M): No, I don’t have any problem with you, babe.
- Atty.(F): Babe? You called me babe? What generation are you from?
- Atty.(M): At least I didn’t call you a bimbo.

MODEL RULE 8.4(g)

It is professional misconduct for a lawyer to . . .

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law . . .

CONT'D MODEL RULE 8.4(g)

(g) . . . This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

LEGITIMATE ADVOCACY???

- **<u>Defense Lawyer:</u>**
- “Turning Ahmaud Arbery into a victim after the choices that he made, does not reflect the reality of what brought Ahmaud Arbery to Satilla Shores in his khaki shorts, with no socks to cover his long, dirty toenails.”

Civility With A Jury

Judges Need to Be Civil Too

DECORUM, COMMUNICATION AND DEMEANOR WITH JURORS

- **Rule 2.8(C)**:
- A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

DECORUM, COMMUNICATION AND DEMEANOR WITH JURORS

Rule 2.8:

Comment [2]

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

In Re Goshgarin, No. 98-CC-2 (Ill. Cts. Comm'n 1998)

- Judge called jury's "not guilty" verdict "stupid" and "gutless"
- 3 Month Suspension

RICHARD "RACEHORSE" HAYNES

- Would this Texas Judge be in Trouble?
- Practice of having client thank judge and jury after acquittal for murder
- Judge's response: "Don't thank me you little turd. We both know you are guilty."

RICHARD “RACEHORSE” HAYNES

- “Thank you ladies and gentlemen of the jury. I will never do it again.”

Professionalism in Responding to a Grievance

Don’t Do What This Guy Did

MATTER OF DIVORCE LAWYER, 674 N.E.2d 551 (IND. 1996)

- Hired May of 1987 for divorce case
- February 1988 sexual relations begin and continue
- Conducts trial for the client in April 1988
- Assures her that the bill is “taken care of”

MATTER OF DIVORCE LAWYER

- Aug 1988 client terminates personal relationship: “Not Appropriate.”
- Sends Bill/Files Attny Lien
- Client Goes to the Commission

MATTER DIVORCE ATTORNEY

- Response to Grievance: Called Client's accusations:
- "Nothing more than the raving of a lazy, promiscuous, greedy, psychotic b****."

ONLY THING WORSE TO SEND

Dear Commission:

A Lack of Professionalism Can Be Cause for Discipline

MATTER OF M.H. (IND. 2015)

- Post Dissolution Case: Began Representing the Mom. Upset over a denial for change of venue.
- Accused Opposing Counsel in Writing: Fraud, Deceit, Trickery.
- “Your possibly homophobic, racist, sexist clients should not be using the Courts to further that agenda.”
- Threats of Grievances and criminal prosecution if no agreement to change of venue.

MATTER OF M.H. (CONT'D)

- Accused the Judge of a "Stubbornly injudicious attitude."
- "Taking off on detours and frolics that ignore the fact that there are laws in Indiana that the Court is supposed to follow."
- 8.4(d); Lack of Remorse
- Violation of Oath for acting in an "offensive personality."
- 60 Days Without Automatic Reinstatement

DO YOU REMEMBER TAKING THE OATH?

HERE IS YOUR OATH REFRESHER

- "I do solemnly swear or affirm that . . . I will maintain the respect due to courts of justice and judicial officers . . . I will abstain from **offensive personality** and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged . . . so help me God."

ADRIENNE MEIRING'S ADVICE TO JUDGES:

- BE KIND!
- Or as they say in Kentucky . . . .

Who is the Most Important Person In Your Case?

If You're Having Trouble Remembering This . . .

Remember the "DTT"

You're Not Your Client's Teammate

- A Teammate Encourages
- A Teammate Has the Client's Back
- A Teammate Is In The Foxhole
- A Teammate Cheers
- A Teammate Says "Keep Going" or "You Can Do It!"

A Lawyer . . .

- Says “No!”
- Says “Don’t Do That”
- Says “Stop”
- Says “You’re being an . . ."

Webster's Dictionary Defines "Client's Teammate" As . . .

- **Noun**
- 1. Co-Defendant; Person who was once an attorney, but went too far and wished he could turn back the clock

If Someone Ought to Go to Jail, It Ought to Be the Client

Happens More Than You Think . . .

Remember:

You Can Go Too Far

WHY DID YOU BECOME AN ATTORNEY?

- **Because I Want To Help People**

MATTER OF D.S.

- Criminal defense attorney tried to discredit the State's witness by proving he was still dealing drugs.
- Attorney set up a drug by with two teenagers, who used the money to buy and then consume the drugs.
- A Misdemeanor Conviction
- 9 month suspension without automatic reinstatement

- **WHAT THE HELL WERE YOU THINKING?**
- **Case affected him personally**
- **Clouded Judgment**

Saint Atticus Wants to Help People Too - Cases Affect Him Personally

“Miss Jean Louise Sit Down. James Bell is Passing.”

ATTICUS GETS A "PERSONAL" CASE

- "[E]very lawyer gets at least one case in his lifetime that **affects him personally**. This one's mine, I guess. You might hear some ugly talk about it at school, but just hold your head high and keep those fists down . . . Try fighting with your head for a change . . . It's a good one, even if it does resist learning." --Atticus Finch, *To Kill a Mockingbird*

ATTICUS ON CLIENTS

- “You never really understand a person until you consider things from his point of view … until you climb into his skin and walk around in it.” – Atticus Finch

ATTICUS JUST WANTS TO HELP

- **Caution: Seeing Things Through the Eyes of Your Client and Not the Eyes of a Lawyer Can Be Dangerous**

MR. CUNNINGHAM

"Walter [Cunningham's] father was one of Atticus's clients. After a dreary conversation in our livingroom one night about his entailment, before Mr. Cunningham left he said, 'Mr. Finch, I don't know when I'll ever be able to repay you.'

'Let that be the least of your worries, Walter,' Atticus said." -- *To Kill a Mockingbird*

MR. CUNNINGHAM – CONT'D

"One morning Jem and I found a load of stovewood in the back yard. Later, a sack of hickory nuts appeared on the back steps . . . That spring when we found a croker sack full of turnip greens, Atticus said Mr. Cunningham had more than paid him."

-- *To Kill a Mockingbird*

The Night Before Trial

ATTICUS JUST WANTS TO HELP

- **He is Going to Protect Tom Robinson with a Book**

Scout to the Rescue

CUNNINGHAM TURNS ON ATTICUS

"Hey Mr. Cunningham. How's your entailment getting' along?" . . .

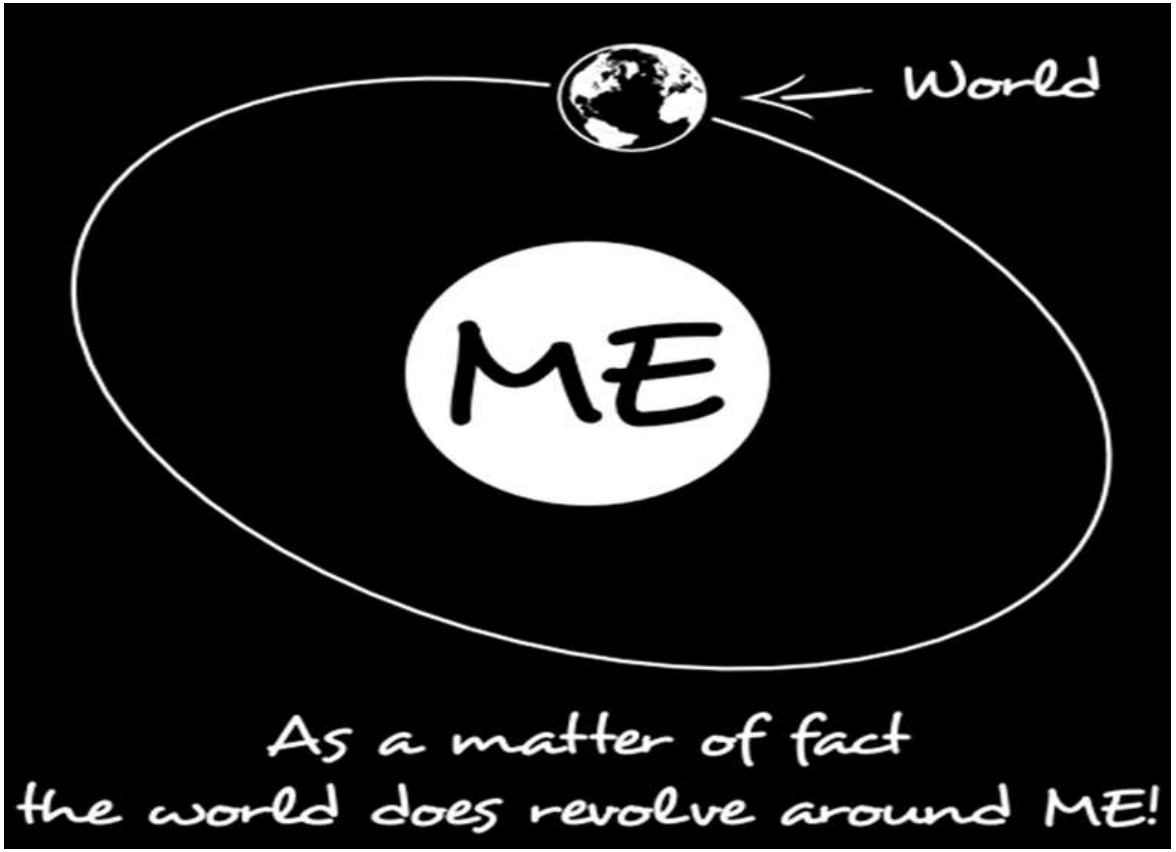
"The big man blinked and hooked his thumbs in his overall straps. He seemed uncomfortable . . . My friendly overture had fallen flat."

-- *To Kill a Mockingbird*

ATTICUS JUST WANTS TO HELP

- **He Took Turnips for Fees**
- **Atticus needs the …**

THE POWER OF SELF CENTERED THINKING



Gets Back

To Who The Most Important Person In Your Case Is

Who is It?

Hint: He Or She Has 2 Thumbs (Usually)

SHORT ANSWER QUESTIONS

Short Answer Question #1: **(3 points)**

Assume you are an attorney involved in Case A. Who is the most important person in Case A?
(Please answer using five words or less.)

ME !!!

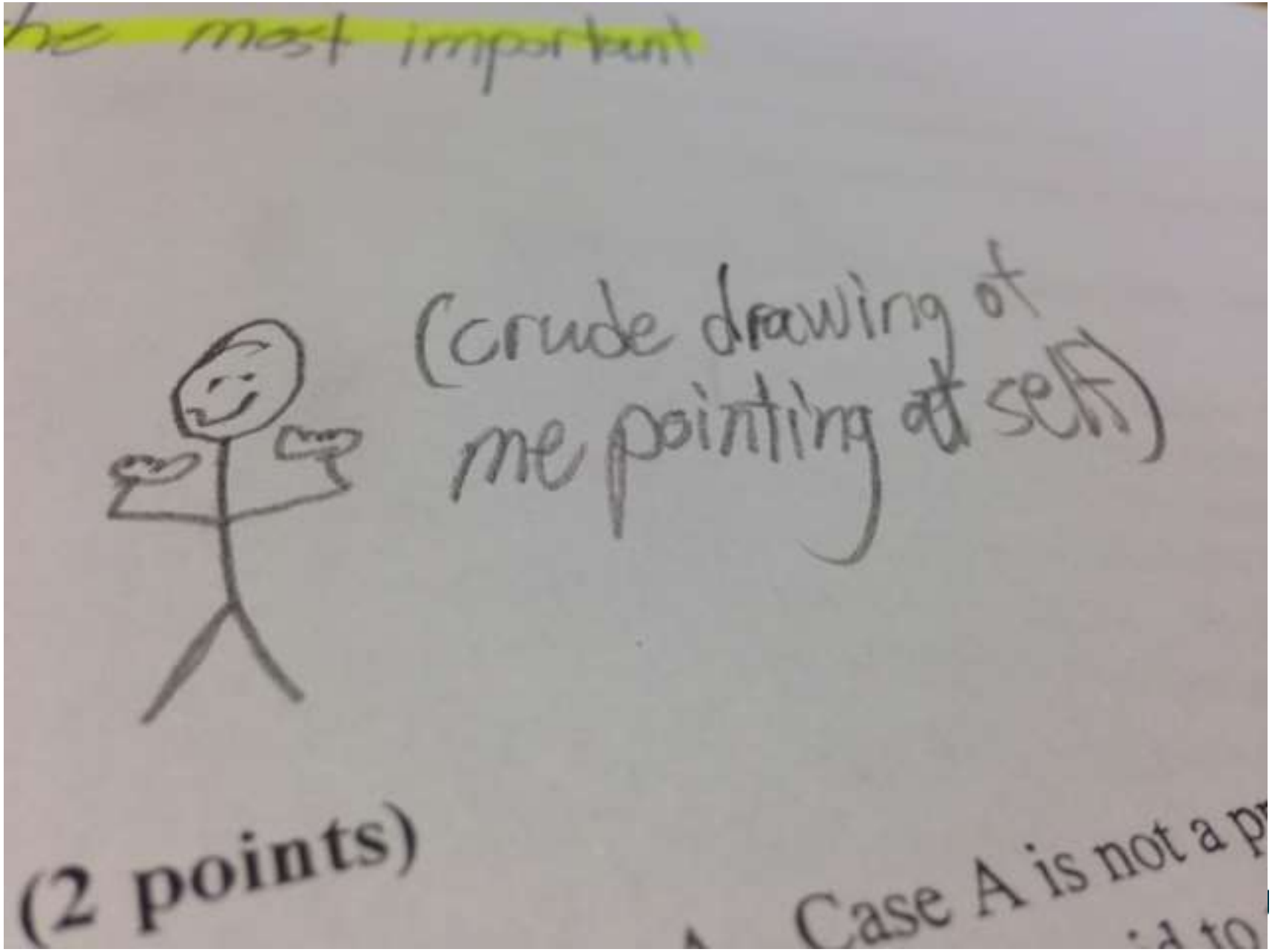
5

SHORT ANSWER QUESTIONS

Short Answer Question #1: (3 points)

Assume you are an attorney involved in Case A. Who is the most important person in Case A? (Please answer using five words or less.)

ME!


he most important
(crude drawing of me pointing at self)
(2 points)
Case A is not a

6490

PROFESSIONAL RESPONSIBILITY (MBE)

SHORT ANSWER QUESTIONS

Short Answer Question #1: **(3 points)**

Assume you are an attorney involved in Case A. Who is the most important person in Case A? (Please answer using five words or less.)

ATTORNEY!

DON'T SEE THE CASE THROUGH THE CLIENT'S EYES

- **See the Case Through Your Eyes: The Clear Eyes Of An Attorney**
- **See Through the Community's Eyes, the Judge's Eyes, the Jury's Eyes**
- **Better Judgment/Better Result**

The End