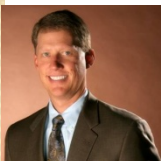


The Pool as an Employer: Trends in Employment Litigation to Avoid on Your Path to a Leadership Culture:

2010 AGRiP Institute for Management & Leadership
Semiahmoo, Washington

August 17, 2010



Developed & Presented by Mr. Chris Burton, JD
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REYNOLDS BURTON
ATTORNEYS

Affirmative Defenses / Aspirational Goals

- Leadership often determines the goals and direction of an organization through a business lens, assuming or overlooking the need to set and communicate values, ethics, and vision.
- Leaders who are proactive in creating, communicating, and reinforcing values, ethics, and vision provide the guiding principles that employees need to work together effectively.



Reasons to Know the Trends

- More claims but fewer resources

YET

- Court holidays/furloughs
- Criminal cases are the scheduling priority
- General civil litigation cases are at the bottom of the scheduling priority list
- Trial dates are hard to come by

SO

- Summary Judgment and Being Able to Defend



**NUMBERS
CRUNCH**

**Looking Back
to
Look Forward**

Harassment Charges

- Receipts

- 2006- 23,192 07- 27,112 08- 32,535 09- 30,641

- No Reasonable Cause

- 2006- 59% 07- 58% 08- 58.3% 09- 59%

- Reasonable Cause

- 2006- 3.8% 07- 3.8% 08- 3.4% 09- 4.0%

Age Discrimination in Employment Act

- Receipts

- 2006- 16,548 07- 19,103 08- 24,582 09- 22,778

- No Reasonable Cause

- 2006- 61.8% 07- 62% 08- 51.9% 09- 62.3%

- Reasonable Cause

- 2006- 4.3% 07- 3.9% 08- 3.2% 09- 3.0%

- Obama administration announced increased enforcement.
- The proposed budget included:
 - \$25 million to investigate and combat employee misclassification
 - 100 new investigators

PRESS RELEASE

7-20-10

EEOC Chair Berrien Promotes Equal Pay Task Force Recommendations at White House Event

WASHINGTON – U.S. Equal Employment Opportunity (EEOC) Chair Jacqueline Berrien spoke today at an [event hosted by Vice President Joseph Biden](#) to release the recommendations of the White House Equal Pay Enforcement Task Force. The recommendations were issued as a part of a broader effort coordinated by the White House Middle Class Task Force and the White House Council on Women and Girls to develop solutions for families balancing the dual demands of work and caring for family.

President Obama announced major budget increases for EEOC and DOJ Civil Rights Division on February 1, 2010

- The Equal Employment Opportunity Commission's 2009 fiscal year ended with the Commission receiving nearly 95,000 discrimination claims – **the second most in its history.**
- The Commission expects the number of discrimination claims to increase significantly in 2010, due in part to the struggling economy, increased accessibility of the EEOC to the public, and employees' heightened awareness of their rights. Significantly, at a time when many other federal and state agencies are cutting their budgets, the **EEOC received an \$18 million dollar budget increase for 2010.**
- Much of this extra funding will go toward hiring approximately **300 investigators and attorneys to strengthen the Commission's enforcement capabilities.**



Worker Misclassification

Trend # 2

Current Test for Employment

- The label used by the parties is immaterial.
- The **facts of the relationship**, not its name, are what matters.

Common Law Test for Employment

- A worker is an employee if the purchaser of that worker's service has the **right to direct or control the worker**.
- **Control need not actually be exercised.**

Misclassification Consequences

- State and federal taxes, penalties, and interest
- Criminal penalties under state and federal law
- “Employee” claims for overtime, employment discrimination
- ICE enforcement for Form I-9 noncompliance
- Industrial Insurance claims

The Role of Leadership

- Contract with businesses, not individuals
- Ensure that businesses have proper licenses and indices of independent business operation
- Avoid payroll-like payment practices
- Use independent contractor's forms
- Avoid assigning similar work to employees and purported independent contractors
- Make voluntary changes; don't wait for an audit

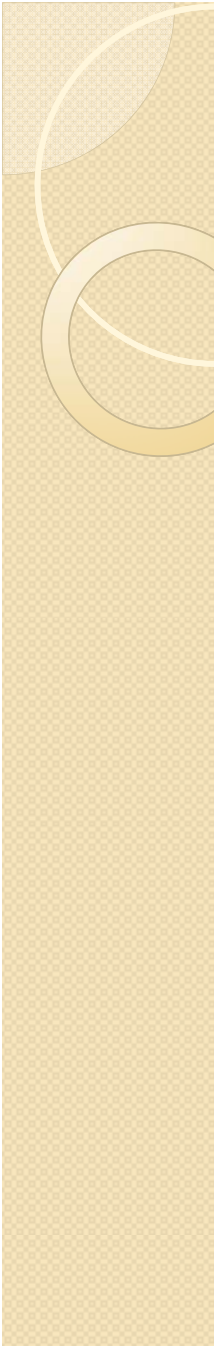


Disabilities

Trend # 3

ADA As It Has Always Been

- Leave is a form of reasonable accommodation
- It is difficult to prove undue hardship
- Interactive process required; failure is a per se violation in the Ninth Circuit
- Same obligation to consider accommodation in other jobs
- Individualized assessment required; no arbitrary deadlines

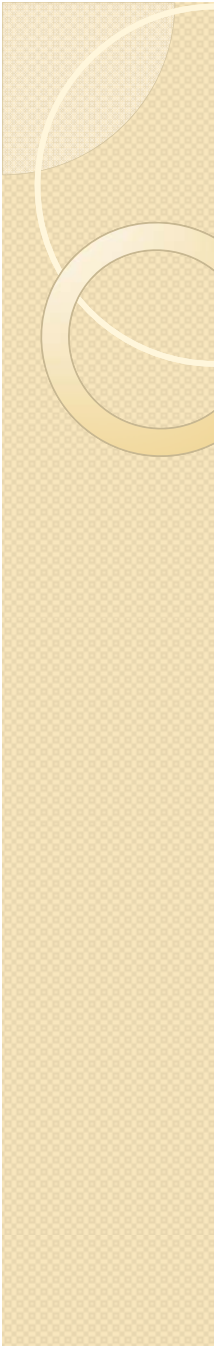
- 
- Employee/applicant must still be able to perform essential functions with or without reasonable accommodation
 - Employee still has same *freedom to define and burden to prove essential functions*

 - Only reasonable accommodations of known disabilities are required, but this can be a trapdoor
 - Employee must prove the existence of an accommodation that would allow him/her to perform essential functions

ADA and What Has Changed

- Mitigating Measures
 - Mitigating measures (other than eyeglasses) shall not be considered *in determining whether* an individual has a disability
- Major Life Activity
 - A disability is a physical or mental impairment that substantially limits one or more major life activities of such individual
 - The ADA did not define “major life activity,” but rather left that to the EEOC and federal courts.
 - Courts defined major as being important or “of central importance to daily life”
 - ADAAA expanded and clarified the definition of major life activity by including two non-exhaustive lists:

- Caring for oneself Performing manual tasks
 - Seeing Learning
 - Hearing Reading
 - Eating Concentrating
 - Sleeping Thinking
 - Walking Communicating
 - Standing Working?
 - Speaking Lifting
 - Breathing Bending

- 
- **Episodic and Remission Count**
 - ADAAA clarifies that an impairment that is episodic or in remission or latent is a disability if it would substantially limit a major life activity when active. Thus, if an impairment comes and goes, it may still qualify as a disability.
 - Transitory and minor impairments with duration of less than 6 months are still excluded. None of this matters in WA, where temporary conditions expressly qualify as disabilities.

- The Ninth Circuit and ADA Leaves of Absence
 - Leaves of absence can be a reasonable accommodation, even if “lengthy, unpredictable, and likely to be fruitless”
 - “The ADA does not require an employee to show that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation...”
 - The duty to accommodate is a continuing duty—not exhausted by one effort.
 - Individualized assessment = no hard and fast rules; no arbitrary deadlines; no automatic one-year termination rules.

At the end of the day.....

- ADAAA Simplifies the Analysis
- Virtually all employer obligations remain the same;

- except:

If there is any mental or physical impairment, you can pretty much skip the “are they disabled?” analysis and proceed to the accommodation questions

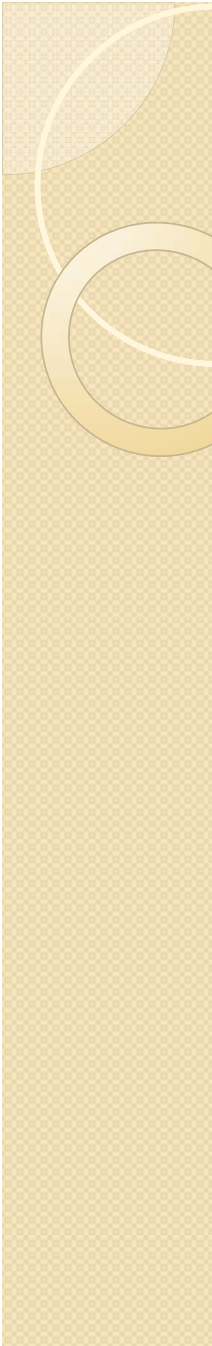
The Role of Leadership

- Don't Rely or Delegate this Responsibility without recognizing that Support is proactive in training or education and NOT reactive in upholding.
- Accommodation issues are among the most difficult issues to manage.
- Supervisors and managers must be trained to recognize disability/accommodation issues, and to hand them off to HR or legal counsel. HR must know what they are doing, or they will make it worse for the company if a claim is filed.
- Keep your eye on the job description.

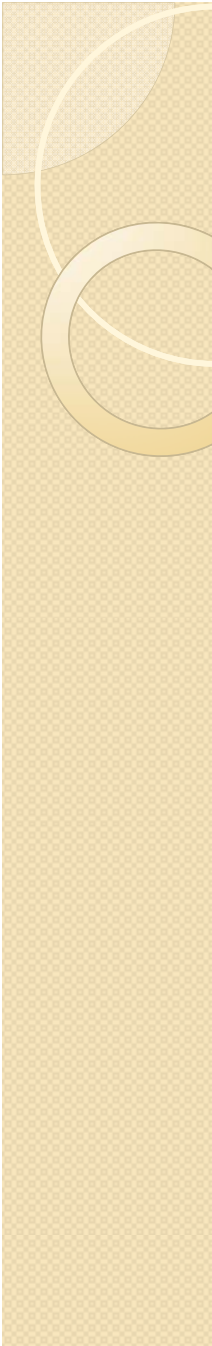


Investigations

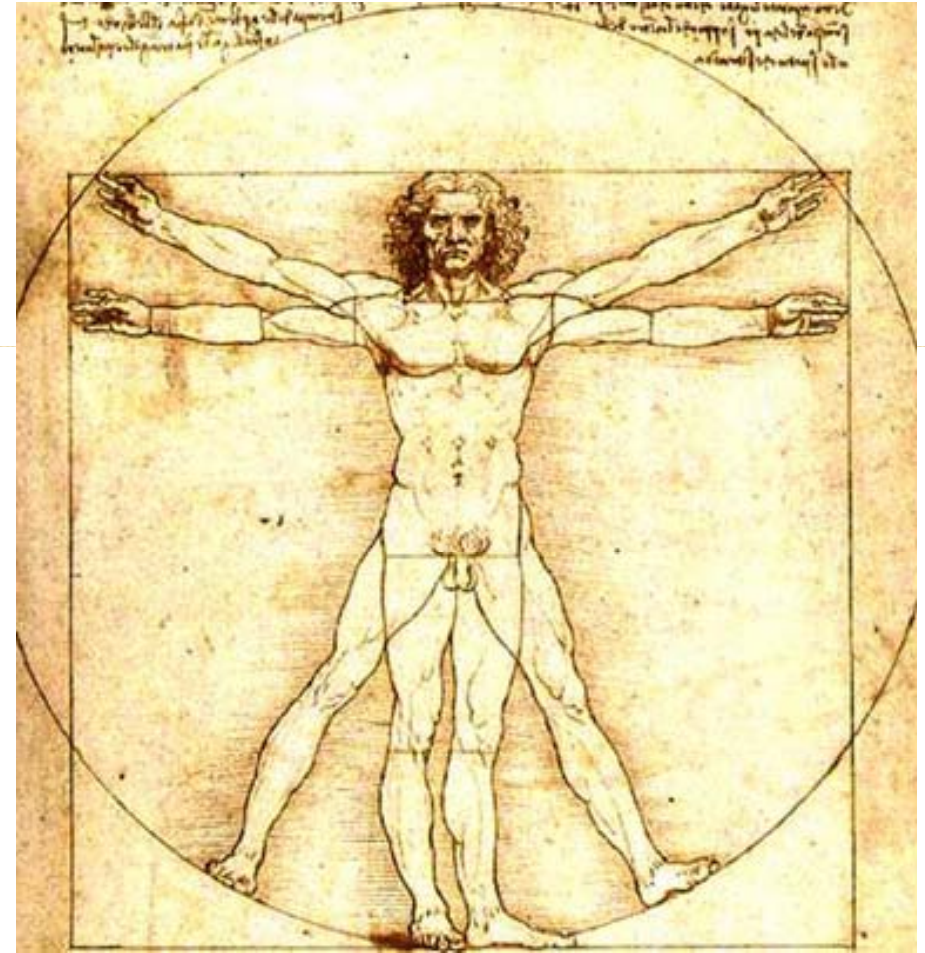
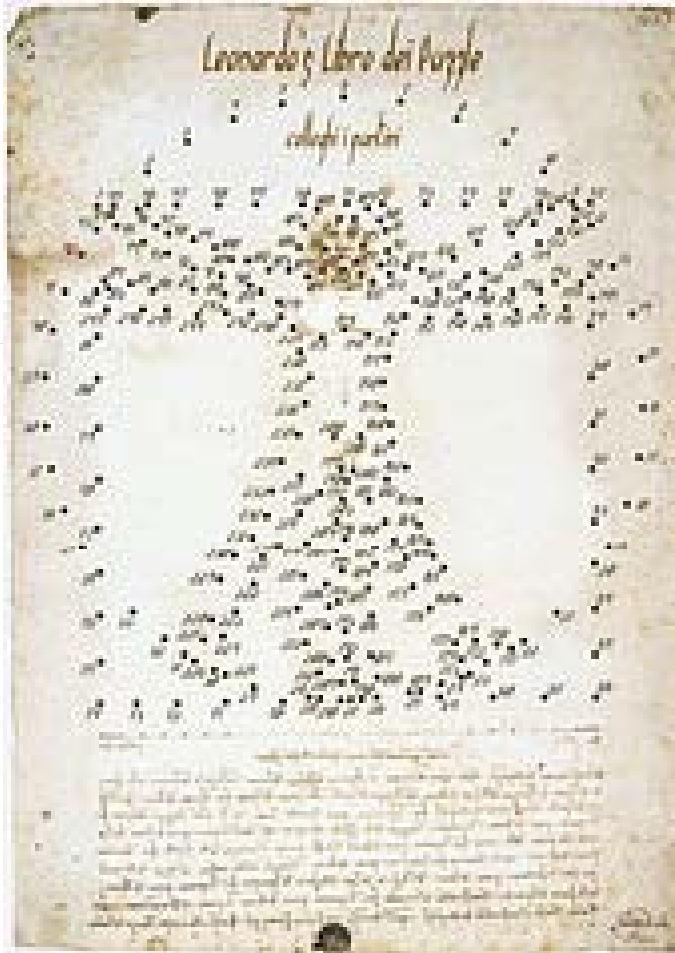
Trend # 4

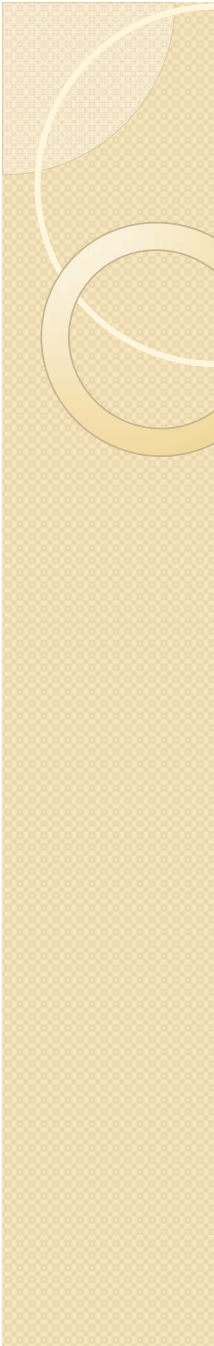
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- The Supreme Court in *Crawford v. Metro Gov't of Nashville* confirms that any participation in an investigation is protected.
 - Dicta: Refusing to commit an unlawful act is protected conduct.

- **Valdez-Zontek v. Eastmont Sch. Dist.**
(Wn. Ct.App. 2010)
 - Plaintiff accused of affair with the superintendent; rumors spread in the course of investigation
 - Jury awarded more than \$300,000 for defamation and attorneys' fees
 - Court rejected assertion of "privilege"
 - Court found no evidence that employer tried to stop the rumor.
 - Note Faragher-Ellerth tension: Investigate to avoid liability; but investigation creates a class of potential plaintiffs
 - Note NLRB employees may grouse, need shoulder, communicate with colleagues and can't necessarily limit speech in course of investigation.

- 
- A reasonable investigation that is timely and objective needs to be executed to ascertain the facts.
 - Investigations that solely focus on “characterizations” rather than “actual facts” are not reasonable.
 - Embarrassing or incriminating communications and other documents cannot be excluded or suppressed in the course of a reasonable investigation.

- The telling of the narrative is art, but the documentation is science.



- 
- "Documentation is the key to lawful termination....A lot of times organizations are real sloppy about appraisals and reviews with managers....Second, when appraisal documentation does exist, it is not an accurate reflection of the manager's performance, especially because of politics or if they have problems. ...[W]hen it is time to provide evidence of performance failure, it does not exist, and this creates big problems in the termination process."
 - Although, even though, despite



THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECTING
AN ESTABLISHMENT OF RELIGION OR
PROHIBITING THE FREE EXERCISE THEREOF;
OR THE FREEDOM OF SPEECH OR OF THE
PRESS; OR THE RIGHT OF THE PEOPLE
PEACEABLY TO ASSEMBLE, AND TO PETITION
THEIR GOVERNMENT FOR A REDRESS OF GRIEVANCES.
SUPPORT THE FIRST AMENDMENT, SUPPORT THE

Employee Speech

Trend # 5

Blogs, Tweets, and Social Networks

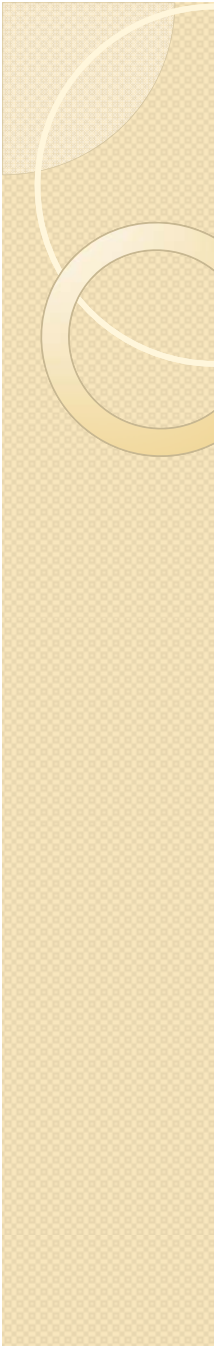
- In a First Amendment retaliation case, to constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind; depending on the circumstances, even minor acts of retaliation can infringe on a public employee's First Amendment rights.

However;

- The First Amendment may shield a public employee if he speaks as a citizen on a matter of public concern; but, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

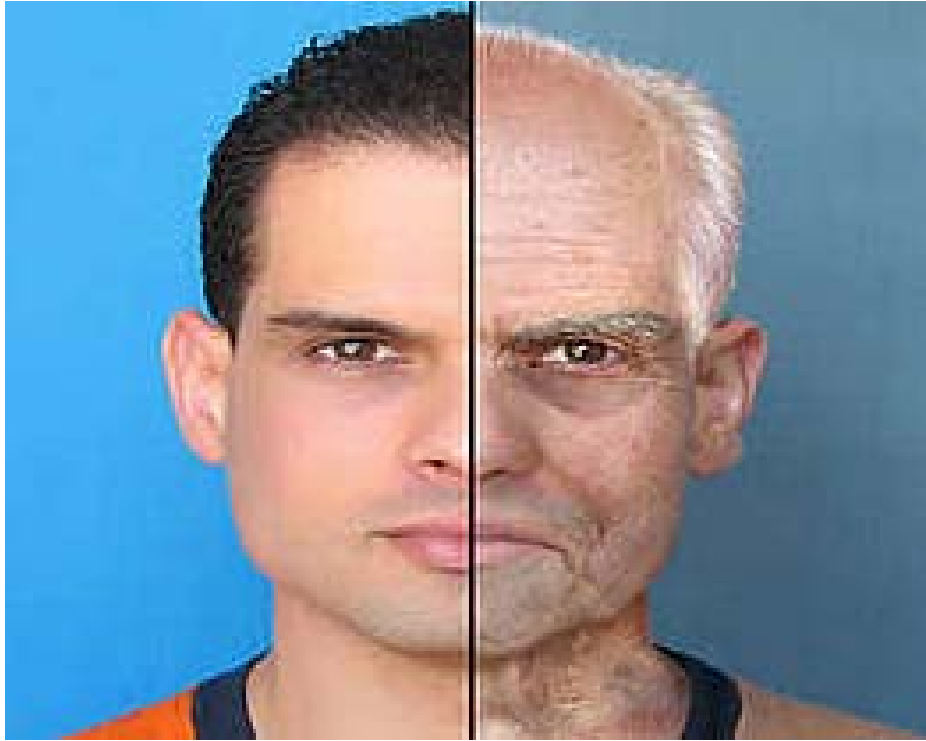
The Test

- Courts typically employ a sequential five-step series of questions to determine whether a public employer impermissibly retaliated against an employee for protected speech:
- (1) whether the plaintiff spoke on a matter of public concern;
- (2) whether the plaintiff spoke as a private citizen or public employee;
- (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
- (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and
- (5) whether the state would have taken the adverse employment action even absent the protected speech.

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- Speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies is generally not of public concern for the purposes of a First Amendment retaliation claim.

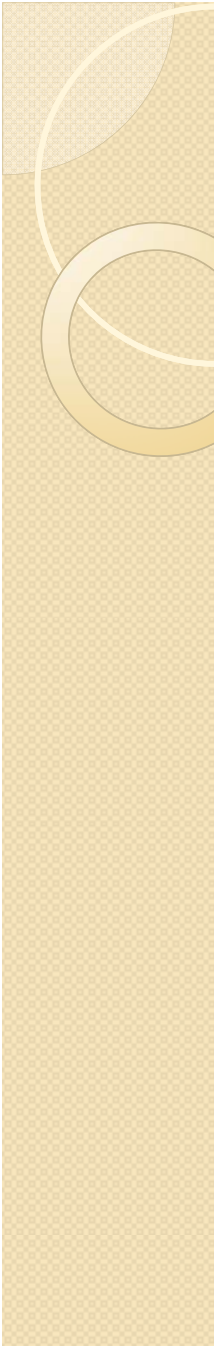
The Role of Leadership

- The district court properly concluded that Zandberg failed to raise a genuine issue of material fact as to whether the School District took an “adverse employment action” against him in retaliation for the exercise of his First Amendment rights. Viewed in the light most favorable to Zandberg, none of the School District's actions were “reasonably likely to deter” him from engaging in protected speech.
- The Letter of Direction issued by the School District to Zandberg and the School District's subsequent communications with him served as guidance for future expression of personal opinion and for communications prepared on behalf of the School District.
- In directing Zandberg to “clearly distinguish personal opinion from communication on behalf of the district,” the School District's Letter of Direction stated that it “respects the right of individual employees to express personal opinions.” Further, Zandberg's supervisors explained to him that the Letter of Direction required Zandberg to request approval only for communications prepared on behalf of the School District that lent themselves to “editorializing.”



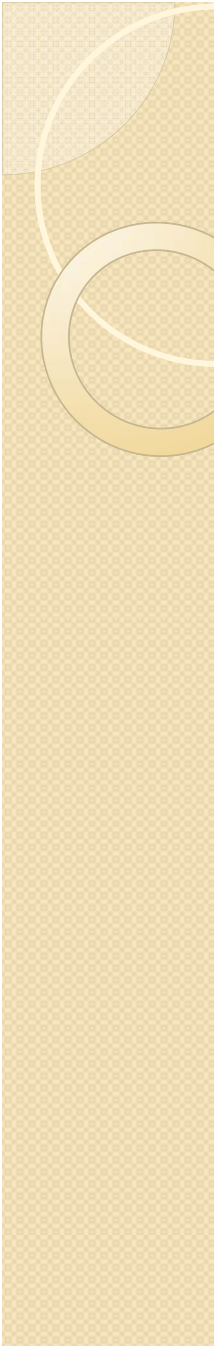
Age Claims

Trend # 6

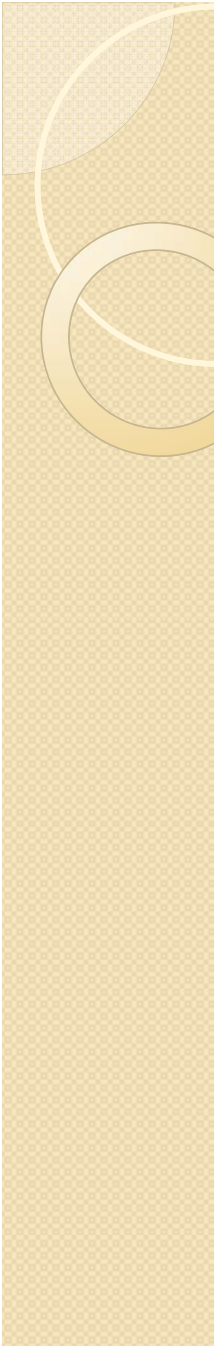
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- An individual alleging an unlawful discharge under the ADEA must first establish a prima facie case of age discrimination. In such actions, courts generally borrow the Title VII formula for establishing a prima facie case of disparate treatment. This formula requires a showing that: (1) the plaintiff is within the class of persons protected by the statute; (2) the plaintiff performed satisfactorily in his or her job; (3) the employer terminated the plaintiff's employment; and (4) the employer replaced the plaintiff with someone with no better qualifications. The first element would be satisfied by a showing that the plaintiff is at least 40 years of age. Also, as to the fourth element, some courts require proof that a younger person was selected to replace the plaintiff; however, other courts hold that proof of replacement by a younger individual is not essential.
 - Once a prima facie case has been established, the burden of proof shifts to the employer, who must articulate a legitimate, nondiscriminatory explanation for the discharge. When an employer articulates a nondiscriminatory reason for its actions, the plaintiff must present evidence that such a reason was merely a pretext—that is, it was not the true reason for the employer's actions. This may be accomplished by demonstrating that the actions taken by the employer were motivated by a discriminatory reason.

Constructive Discharge

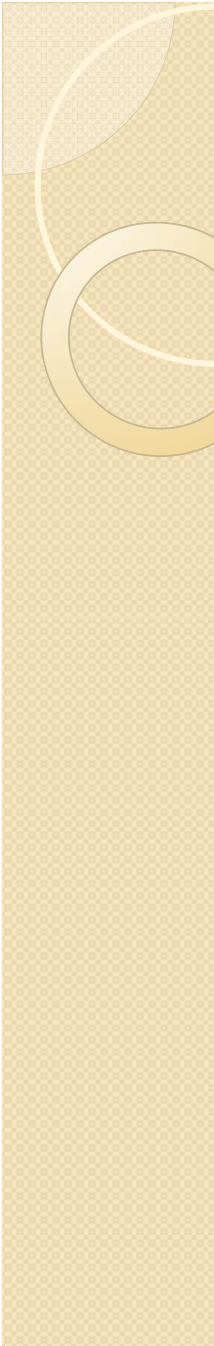
- An actual discharge occurs when an employer fires, dismisses, releases, ousts, lets go, terminates, sacks, gets rid of, gives the gate to, cans, axes, bounces, or gives walking papers to an employee, resulting in the severance of the entire employment relationship.
- However, if the plaintiff resigned or otherwise terminated the employment relationship, it must be shown that he or she was forced to quit as a result of intolerable working conditions imposed by the employer. An employee who quits under such intolerable working conditions is considered to have been "constructively discharged" and will be treated, for ADEA purposes, as if he or she had been terminated.

- 
- Among the factors that a court should consider in ruling on a constructive discharge claim are whether there has been:
 - (1) a demotion;
 - (2) a reduction in salary;
 - (3) a reduction in job responsibilities;
 - (4) reassignment to menial or degrading work;
 - (5) badgering, harassment, or humiliation by employer calculated to encourage the employee's resignation; or
 - (6) an offer of early retirement that would make the employee worse off whether the offer was accepted or not.

 - Other situations that may be indicative of constructive discharge include:
 - (1) a threat of discharge;
 - (2) suggestions or encouragement of resignation;
 - (3) a demotion or reduction of pay or benefits;
 - (4) involuntary transfer to a less desirable position;
 - (5) alteration of job responsibilities; and
 - (6) unsatisfactory job evaluations.

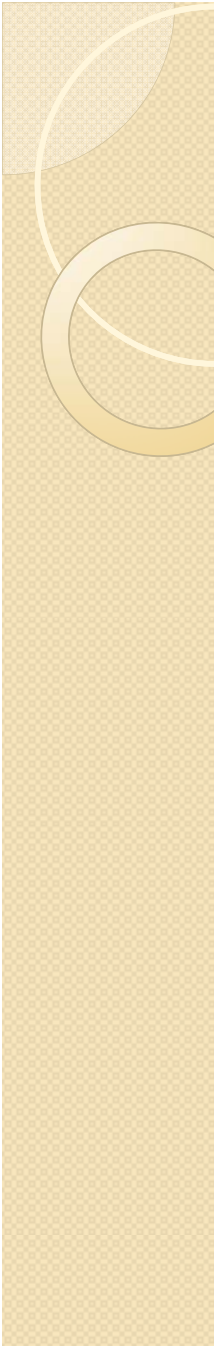
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- In order to establish a claim of constructive discharge under the ADEA, some courts require that a plaintiff demonstrate the existence of "aggravating factors" beyond the fact of adverse treatment—of discrimination—on the basis of age. In this regard, at least one court has stated that such aggravating factors could be an atmosphere of hostility toward an employee or attacks upon the employee's confidence. Other courts hold that a continuous pattern of discriminatory treatment aimed at an employee can establish the aggravating factors necessary to establish a constructive discharge.

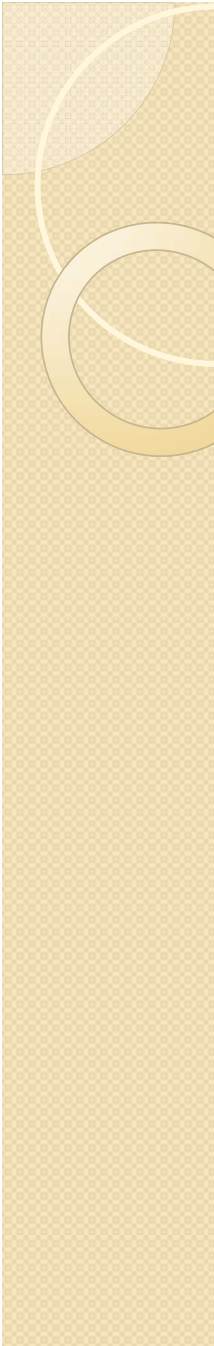
- An employer's inquiries or suggestions concerning retirement have been, at least in part, the basis for claims of constructive discharge in ADEA actions. It has been held that a constructive discharge occurred or was supportable where an employer made repeated inquiries or suggestions as to retirement prior to an employee's termination of employment .
 - However, at least one court has held that no constructive discharge occurred where an employee's health was the basis for suggestions from the employer that he retire.
- The presence of open criticism or verbal abuse before subordinates has been a factor in leading some courts to conclude that persons who terminated the employment relationship after exposure to such conduct were constructively discharged in violation of the ADEA .
- Threats or reprimands flowing from employer to employee have been considered by the courts in determining whether a constructive discharge occurred in the context of an ADEA action. Thus, the fact that an individual resigned after, among other things, being threatened by the employer with a drastic increase in working hours if he did not retire led at least one court to conclude that the individual was constructively discharged . Also, some courts have held that a constructive discharge occurred or was supportable where employees resigned after, inter alia, being threatened with discharge;
 - however, other courts have held that no constructive discharge occurred despite the presence of real or implied threats of job loss made in conjunction with an offer of early retirement.

- 
- Individuals who terminated their employment have alleged constructive discharge in ADEA actions against their former employers based on, among other things, the receipt of poor performance appraisals. Thus, it has been held that a constructive discharge occurred or was supportable where employees resigned after receiving poor performance appraisals;
 - however, other courts have concluded that no constructive discharge occurred or was supportable where employees resigned after poor performance ratings.
 - An employer's imposition of a change in job responsibilities has often been alleged as a basis for a constructive discharge in an ADEA action. Thus, where individuals resigned after, among other things, experiencing a general loss of job responsibilities, it has been held that a constructive discharge occurred or was supportable;
 - however, other courts have held that no constructive discharge occurred where persons resigned after experiencing a loss of job responsibilities.
 - The imposition of heightened performance standards upon an employee was another type of job change that was considered, along with other factors, by at least one court, which held that the employee, who resigned, was constructively discharged in violation of the ADEA.

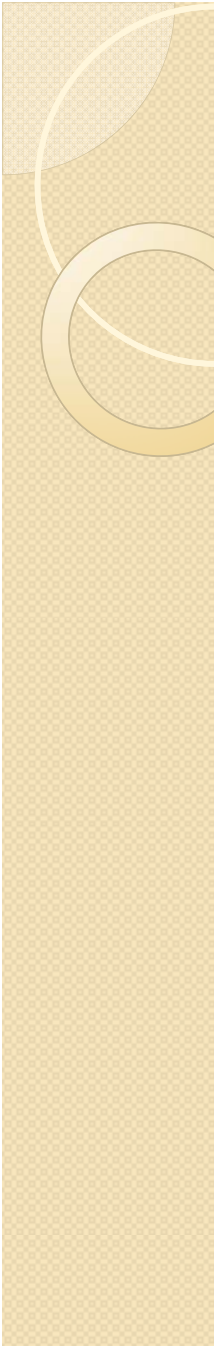
Constructive Discharge vs. Accountability

- In this regard, it has been stated that while an employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions in excess of those faced by his co-workers, he is not guaranteed a working environment free from stress.

- 
- Likewise, while she faced constant criticism and closer scrutiny by the supervisor, as well as having her office moved closer to the supervisor's, an increase in time spent at the primary company location, and the loss of certain discretionary authority, she failed to establish that any of these had a formal effect on her employment status so that a reasonable person would have found the conditions of her employment intolerable.

- 
- An employee was found to have been constructively discharged where no one worked with him or spoke to him, day after day, week after week, for more than one year following his filing of an EEOC complaint. Such treatment could lead him to believe he was no longer wanted and would continue to receive the cold shoulder until he left.

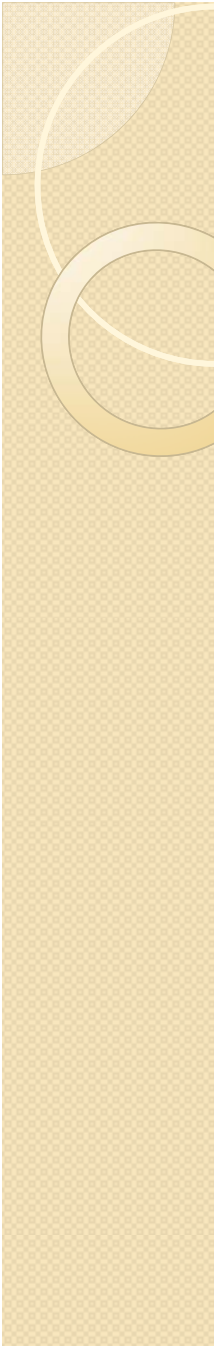
 - Furthermore, evidence that a supervisor harassed, criticized, and then accused an employee of insubordination because the supervisor wanted to replace the employee with a Christian employee was evidence of intolerable working conditions sufficient to establish constructive discharge.

- 
- A kindergarten teacher was not constructively discharged in violation of her due process rights as a result of alleged monitoring by an assistant principal during parents' night at the school, alleged rudeness by a school counsel chairman, and a demand for a doctor's note after five consecutive sick days.

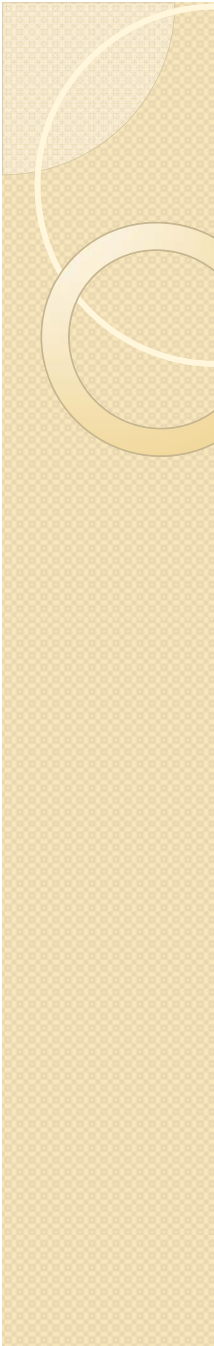


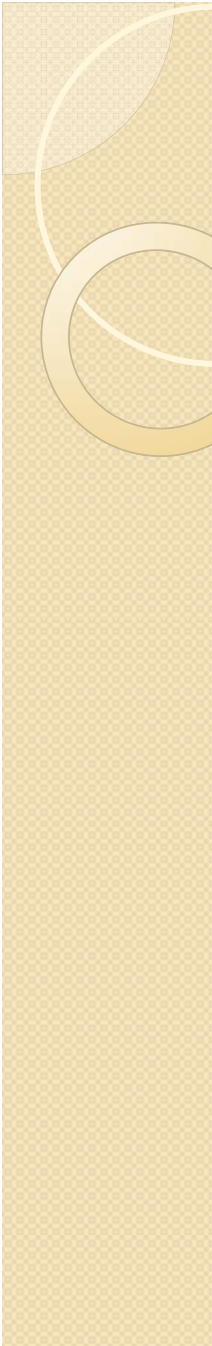
**Retaliation
&
Timing of workplace actions**

Trend # 7

- 
- Fact that school district was contemplating employee's transfer prior to learning of employee's Title VII sexual harassment complaint against district rendered immaterial, in employee's action alleging retaliation for filing of complaint, fact that transfer was carried out one month after district learned of complaint.

- Female former police officer who sued municipality and male officer established sufficient evidence of retaliation as result of complaining about male officer's sexual harassment to maintain claim under Title VII; during same month that complaints were made, female officer was assigned extra double shifts, removed from her favorable traffic duty, and given unusually long posting at locale where work was remote and solitary.

- 
- Evidence that one day after supervisor was deposed in co-worker's Title VII action, and presumably learned that employee was a voluntary witness for co-worker, employee was shifted from career-enhancing position; that one week later employer rescinded a position which allowed employee to supplement her income by teaching a course; and that less than one month later, employer denied employee a promised promotion created question for jury on issue of whether such conduct created a chain of events supporting employee's claim of retaliation under Title VII.

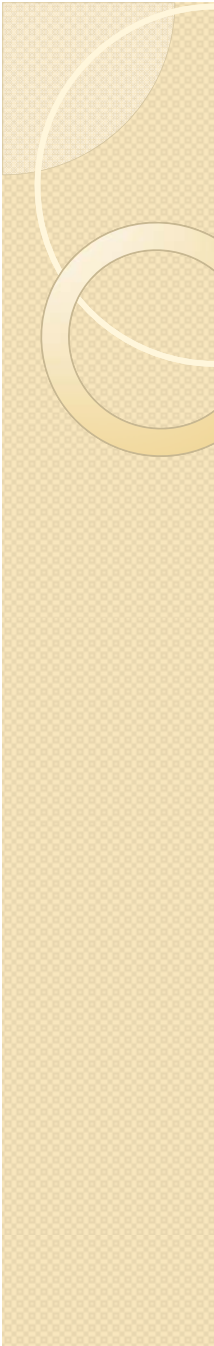
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- Three-year gap between filing of sexual harassment complaint by female medical college employee and her termination, during which time employee was promoted, precluded inference that termination was in retaliation for filing complaint, as required to establish Title VII claim.

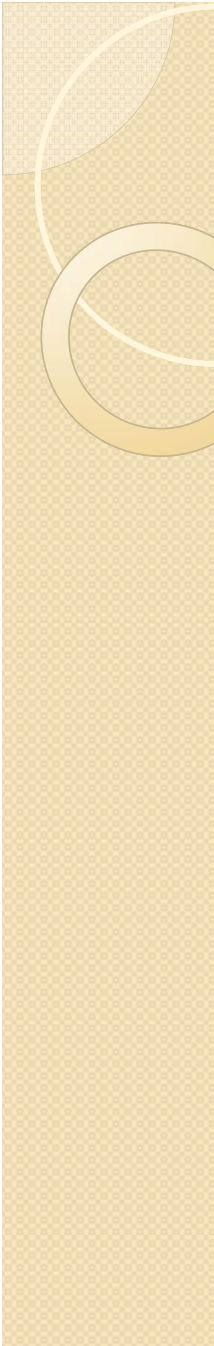
Role of Leadership



What are we doing? vs. What did we do?

- Although this is a fluid and dynamic area of the law that varies by state, there is a nucleus of accepted guidelines to protect against a wrongful discharge:
 - Ensure that employment applications and employee handbooks are precise and do not represent an implied contract.
 - Provide clearly defined work rules, standards, and expectations of performance.
 - Maintain accurate documentation of employees' performance.
 - Provide progressive discipline and feedback that allow employees the opportunity to improve their performance.
 - Apply performance standards consistently to all organization members, thereby avoiding favoritism.
 - Investigate the causes of performance problems or work rule violations.
 - Provide clear examples and explanations of why termination is taking place.
 - Document both sides of the situation.

- 
- Trap Three: Withholding performance feedback limits a manager's opportunity to correct deficient performance.
 - "For anyone's performance to improve or change they need feedback and specific feedback at that, especially managers.... [W]ithholding that information discourages good performers and allows poor performers to falsely believe they are doing fine—which creates long-term problems, potentially leading up to dismissal."

- 
- "While Selsor received satisfactory overall reviews in the past, the criticisms of his work were consistent even in these satisfactory reviews... It is clear that Callaghan has met its burden of articulating lawful reasons for firing Selsor."



QUESTIONS?

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