

Employment Law

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The Game



EEOC	ADEA	Social Media Employer Liability	Retaliation	Protected Speech & The NLRA	Pot Luck
100	100	100	100	100	100
200	200	200	200	200	200
300	300	300	300	300	300
400	400	400	400	400	400

2

The EEOC received a record number (99,947) of these in 2011.

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What are Charges of Discrimination?



This is the EEOC's favorite tool for obtaining additional information from employers after the EEOC receives the employer's Position Statement.

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What is a Request for Information?



The EEOC always fairly investigates claims and accurately assesses Charge allegations.

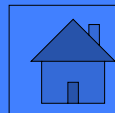
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What is “are you kidding me?”



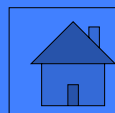
HYPOTHETICAL

Joel filed an EEOC Charge claiming disability harassment (termination) based on a speech impediment. The employer's Position Statement points out that Joel was terminated by the company President for poor performance and that the President did not even know about his stutter. The EEOC conducts interviews and David, Joel's supervisor, tells them the speech issue was a major factor in David's assessment of Joel's poor performance. The President tells the EEOC he based his termination decision solely on David's evaluation of Joel's performance. How do you evaluate the claim following the EEOC interviews?



Questions:

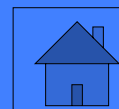
1. Does the ADA apply? Is the speech impediment a disability? Did David regard Joel as being disabled?
2. The President made the termination decision and didn't know about the speech impediment. Is that a defense, or does the "cats' paw" liability theory apply because the President's decision was influenced by David's evaluation and David took the speech impediment into account in making his evaluation?
3. Does the Position Statement's apparent inaccuracy factor into the evaluation?



You need to wait this number of days after an over-40 claimant signs a release before giving them the settlement payment.

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What is Seven?



An employment practice that has this effect can violate the ADEA even if on its face it applies to every employee regardless of age.

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What is (1) has a negative impact on employees over 40 and (2) is not based on reasonable factors other than age?



When evaluating an ADEA claim, one of the primary issues you want to consider is the potential application of this defense created by the U.S. Supreme Court in *Gross v. FBL Financial Services, Inc.*

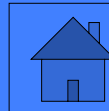
15

What is “but for” causation?



HYPOTHETICAL

Barry is a 52 year old nurse in a dialysis center. His manager, Robin is concerned that Barry is not seeing as many patients as the other nurses in his department. Robin says to Barry, “I’m concerned this job demands too much from you and that you cannot keep up.” Several days later, Barry is insubordinate to one of the dialysis center physicians. Robin informs HR Director Maurice of the insubordination. Based on Robin’s report, Maurice terminates Barry’s employment. Does Barry have an ADEA claim?



Questions:

1. Is Robin’s comment demonstrative of age discrimination?
2. Even if Robin held age based animosity towards Barry, was age the “but for” cause of the termination – or was the insubordination a sufficient non-discriminatory reason for termination?
3. Can the employer argue that Maurice made the termination decision and there is no evidence that Maurice held age animosity towards Barry – or does the cat’s paw theory come into play?
4. The names in this hypothetical were chosen in homage to what 70’s Pop Band?



How Employers may be held liable for defamation
arising from their employees' private blogs...

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What is Employer Ratification?
Ward v. Cisco



Employers cannot be liable if they have a social media policy prohibiting defamatory or other improper usage.

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What is false?
See *Blakely v. Continental Airlines*; NLRB 2012 Report from Social Media Policies www.NLRB.gov



HYPOTHETICAL

Company ABC maintains a strict social media policy prohibiting any misuse of social media that could lead to liability for defamation or damage to reputation. Steve posts embarrassing photos of himself in try-outs for The Biggest Loser on ABC's Facebook account. Joe, Steve's boss, posts on the same Facebook account-accessible by all 1500 employees-that Steve really is The Biggest Loser, because his posted photos cost him his job and he is fired. Before being escorted from the building, Steve posts back that his female co-workers submitted much more embarrassing photos when they tried out for "Project Runway."

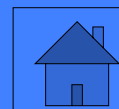
Does Steve have a claim?

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POSSIBLY

- No evidence Steve's posts caused damage to company – just embarrassing to himself
- Joe's email firing Steve and calling him the Biggest Loser is defamatory
- Disparate Treatment concerns as well

See Marshall v. Mayer & Alderman of City of Savannah, et al., 2010 U.S. App. Lexis 3233 (11th Cir. 2010)



What happens when co-workers post sexually explicit comments on Facebook and when the supervisor then blogs negative comments about the employee who complains about those Facebook posts, calling her a “loser” and a religious zealot who should become a nun if she can’t handle some good natured joking.

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What is hostile work environment harassment and what is retaliation?

See Blakey v. Continental Airlines, 751 A.2d 538 (NJ 2000)



In Burlington Northern v. White, the U.S. Supreme Court defined this as: “Any action that would dissuade a reasonable worker from making or supporting a charge of discrimination.”

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What is retaliation?



An employer can be liable for this type of retaliation claim when a decision-maker makes an adverse employment action for seemingly appropriate reasons but that decision is motivated by another supervisor's retaliatory animus.

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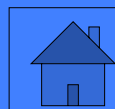
What is “cat’s paw” retaliation or discrimination?



The Supreme Court recently created a new form of retaliation claim in Thompson v. North American Stainless.

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What is third-party retaliation?



HYPOTHETICAL

Bill and Mary are married and work for Dubious Motor Works. Their boss previously agreed that they could work the same shift for convenience sake. Mary reports to Dubious management that she observed a supervisor calling a Muslim co-worker a “rag-head” on one occasion. Dubious investigates the incident and disciplines the supervisor. Five months after Mary’s report, Bill’s supervisor tells him that due to reduced business they are cutting personnel on all shifts. Bill must choose between 1) being transferred to another plant across town, or 2) working a later shift.

Is there a retaliation claim against Dubious?



Questions:

1. The mere fact the adverse action was taken against Bill does not insulate Dubious from retaliation liability under third-party retaliation theory.
2. Do the alternative changes in Bill’s working conditions constitute an adverse employment act?
3. Is the reason given for the proposed change in Bill’s employment a legitimate non-retaliatory reason for the change?
4. Does the five month delay between the protected activity and the arguable adverse employment act provide a defense to the retaliation claim?



S.Ct. decision on “SEXTING” regarding company-owned phones as “possibly” protected private speech.

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What is City of Ontario v. Quon (2010)?



Facebook trash talking about the boss and
workplace conditions.

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What is “possibly” protected speech?
NLRB v. AMR (2011)
2012 NLRB Report on Social Media Policies
www.NLRB.gov



NLRB will protect employees' lewd, and derogatory Facebook posts as long as the communication also reflects this.

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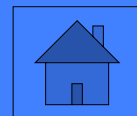
What is “concerted activity” pertaining to workplace conditions?
2012 NLRB Report on Social Media Policies
www.NLRB.gov



Employers cannot be liable if they have a social media policy prohibiting defamatory or other improper usage.

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What is false?
See NLRB 2012 Report on Social Media –
www.NLRB.gov





In AT&T Mobility v. Concepcion – the S.Ct. held that employers can require employees to do this in order to prohibit class action lawsuits.

What is sign a mandatory Arbitration
Agreement
But See NLRB' s Conflicting Opinion in
NLRB v. D. R. Horton



