Keeping Up with Employment Law

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What Type of Conduct is Actionable?

- **Harassment**
  - Co-Workers – Employer negligence
  - Supervisors
    - Tangible Employment Action = Liability
    - Hostile Work Environment = Defense if employer has a policy that employee did not follow

- **Retaliation**
  - Protected Activity
  - Adverse Employment Action
  - Causal Connection
Harassment Claims

Conduct must be so **objectively** offensive as to alter the condition’s of victim’s employment

Alteration in employment:
- Tangible employment action
- Hostile Work Environment
Hostile Work Environment

- Verbal/physical conduct
- Motivated by race, sex, religion, national origin, age, or disability
  - Bullying, Sexual Harassment
- Conduct is Unwelcome
- Severe Pervasive and Alters Conditions of Employment
Bullying

• Definition: repeated, health-harming mistreatment that includes:
  ▪ Verbal Abuse
  ▪ Conscious, Offensive conduct/behavior
  ▪ Threatening, humiliating, intimidating
  ▪ Prevents Work from getting Done
Sexual Harassment

• Definition: Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, where:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; or
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.
Employer Defenses - Harassment

• Supervisor
  • Is the person a supervisor (See Vance case)
  • If no tangible employment action
    • Employer exercised reasonable care
    • Employee unreasonably failed to report or limit damage

• Co-Worker
  • Employer was not negligent
Retaliation

• Most Common Discrimination Claim
• Supreme Court Expansion
  ▪ *Burlington Northern*: Expanding definition of adverse action
  ▪ *Thompson*: Expanding potential claimants to those in the “zone of interest”
Retaliation claims are often the “tail that wags the dog”.

- Anti-retaliation provisions can be found in:
  - Title VII
  - ADA
  - ADEA
  - FMLA

- Protection in case law given to employees for exercising First Amendment Right of Free Speech

Retaliation Claims

• Can be easier to prove than a discrimination claim.

• Complaint is made; supervisor becomes upset and begins to “take it out on the employee”.

• Even if underlying discrimination complaint is unfounded, employee can still make a claim.

• Action is taken against them because they complained.
**Definitions**

**Retaliation:** Unlawful adverse treatment of an employee for purpose of seeking revenge or inflicting punishment.

**Adverse Action:** Termination, suspension, demotion, change of job assignment, negative evaluations, exclusion from meetings, systemic hostile behavior from supervisor or co-worker.
Protected activity:

Participation in a proceeding such as filing an EEOC charge, testifying or assisting in EEOC investigation.

or

Opposition to employer’s discriminatory practice.
• Opposition must be reasonable.
  ▪ *Nelson v. Pima Community College*, 83 F.3d 1075 (9th Cir. 1996).

• Plaintiff must have a “good faith” belief that employer engaged in unlawful discrimination.
  ▪ *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994).
Adverse Employment Action

- Much broader than suspension, demotion or termination.
  - *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)
    - Male postal worker complained about discrimination against women.
  - Supervisors:
    1. Eliminated Employee Involvement Program.
    2. Ended flexible work schedule.
    3. Instituted lock-down policy.
    4. Reduced plaintiff’s workload and pay.
  - 9th Circuit held each of the above constituted an adverse employment action.
Co-Worker Harassment

• Co-worker harassment can constitute “adverse employment action.”

  ▪ *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000)
    • Plaintiff sexually harassed by a co-worker.
    • Co-worker rallied other employees against plaintiff.
    • Employer on notice that employees were retaliating against her for complaining about harassment.
    • 9th Circuit found that Title VII protection against retaliatory discrimination extended employer liability for co-worker retaliation.
Causal Connection

• Timing - - how close in time is the retaliation to the complaint?
• “I didn’t know about the complaint before I fired him.”

• Adverse action was taken for reasons other than plaintiff’s protected conduct.
Strategies To Avoid Harassment Claims

- **Keep eyes and ears open**
  - Even if it looks like the conduct is welcomed, if it sounds or looks bad, end it or at least inquire if welcomed
  - Important thing is how the recipient feels about the conduct, not what you or co-employees think

- **Comprehensive Policy**
- **Employee-friendly Complaint Procedure**
- **Thorough and confidential investigation**
- **Prompt corrective action**
Strategies to Avoid Discrimination Allegations

- Be objective
- Be consistent
- Be serious
- Document
  - Facts, not feelings
  - Document consistently
Strategies to Avoid Retaliation Claims

• Tool for employees seeking to avoid legitimate discipline

• How avoid and defend
  ▪ Policies and Training
  ▪ Consider protected activity by associates
  ▪ Document discipline
QUESTIONS & ANSWERS

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“Current Issues in Government Liability”
November 5, 2014, 8:30am-12pm | Phoenix Convention Center

Seminar Breakdown
• Focus Jury’s
• Notice of Claim
• Social Media/1st Amendment Issues that Deal with Public Employees
• Public Records Requests

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November 5, 2014, 1-6pm | Phoenix Convention Center

Seminar Breakdown

• Arizona Law
• Rapid Fire AZ Case Law Review & Arizona Law
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• Damages
• Live NEURO IME
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• Cocktail Reception

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