



14th Annual Parsons Behle & Latimer **Idaho Employment Law Seminar**

for corporate counsel, business owners & human resource professionals

SEPTEMBER 22, 2026 | BOISE CENTRE EAST | BOISE, IDAHO

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**EXCEPTIONAL RESULTS
EVERY DAY**

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14th Annual Idaho Employment Law Seminar

Social Media, Free Speech and Employer Liability

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14th Annual Idaho Employment Law Seminar

Social Media, Free Speech
and Employer Liability



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Sept. 22, 2026 | Boise Centre East

Legal Disclaimer and PDF Handbook

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To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/idaho-seminar



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Thanks to social media, who recognizes this guy?

How about now?



A SKY FULL OF SPARKS Tech CEO Andy Byron and HR chief spotted "all over each other" moments before being caught on kiss cam at Coldplay gig



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Employees Going Viral



Employees Going Viral

**California healthcare workers
fired after TikTok video mocking
patients goes viral**

Charlie Kirk Says Gun Deaths 'Unfortunately' Worth it to Keep 2nd Amendment

PUBLISHED: APR 06, 2023 AT 05:39 PM EDT
UPDATED: APR 07, 2023 AT 08:44 AM EDT

**University to Pay \$500,000 to
Professor It Fired Over Charlie
Kirk Post**

Austin Peay State University in Tennessee also reinstated Darren Michael, a tenured acting professor whose post about Mr. Kirk's killing inflamed conservatives.

What can a social media policy do for you?

- Define prohibited conduct:
 - Disclosing confidential information.
 - Using social media during working time.
 - Bullying and abuse, including discrimination, harassment, and retaliation.
- Set expectations for employees who post online content about the company:
 - Disclose affiliation.
 - Disclaim that "Opinions are my own."

Consult counsel and consider trusted sources like SHRM
<https://www.shrm.org/topics-tools/tools/policies/social-media-workplace-policy-template>



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Social Media Landmines: where do employers step in it?

- Public sector: Failing to address an employee's First Amendment speech rights.
- Private sector: Failing to provide context that a social media policy does not restrict "concerted activity" under NLRA Section 7 (i.e., the right of employees to complain together about work).
- Ignoring state-specific speech protections.
- Believing that off-duty social media misbehavior does not need to be addressed, i.e., adhering to the misnomer that after-hours employee misconduct is never an employer's business.



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First Amendment (public sector)



Public Employers Must be Mindful of First Amendment Issues

To prevail on a **First Amendment retaliation claim**, a **public employee** must show:

- (1) their speech was not made pursuant to their **official duties**
- (2) their speech was on a matter of **public concern**
- (3) the **government's interests** in promoting the efficiency of the public services it provides do not outweigh the **plaintiff's speech interests**
- (4) the plaintiff's speech was a **substantial or motivating factor** in the adverse employment action taken against them
- (5) the government would not have reached the **same employment decision** absent the plaintiff's speech

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Hook v. Rave, 4:25-CV-04188 (D.S.D.)



vs

University of
South Dakota

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Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- Phillip Michael Hook, tenured professor of art at the University of South Dakota
- Hook posted on Facebook about the Charlie Kirk assassination:
 - Okay, I don't give a flying f*** about this Kirk person. Apparently he was a hate spreading Nazi. I wasn't paying close enough attention to the idiotic right fringe to even know who he was. I'm sorry for his family that he was a hate spreading Nazi and got killed. I'm sure they deserved better. Maybe good people could now enter their lives. But geez, where was all this concern when the politicians in Minnesota were shot? And the school shootings? And Capitol Police? I have no thoughts or prayers for this hate spreading Nazi. A shrug, maybe.
- Three hours later, he removed his post and made a second one:
 - Apparently my frustration with the sudden onslaught of coverage concerning a guy shot today led to a post I now [sic] regret posting. I'm sure many folks fully understood my premise but the simple fact that some were offended, led me to remove the post. I extend this public apology to those who were offended. Om Shanti.

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Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- Two days later, the **South Dakota Speaker of the House** shared a screenshot of Hook's first post and included the following message:
 - "Yesterday, I was made aware of these **hateful and vile** comments made by a University of South Dakota professor regarding the death of Charlie Kirk and Charlie's family. I am **disgusted** by his remarks, and think they are unbecoming of someone who works for and represents our University. Yesterday, after seeing the post, I **immediately reached out to USD President** Sheila Gestring and **called on the professor to be fired.**"



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- A few hours later, South Dakota's **Governor** also shared a screenshot of Hook's first post and included the following message:
 - "When I read this post, I was **shaking mad**. The Board of Regents intends to **FIRE** this University of South Dakota professor, and I'm glad."



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

- The school sent Hook a letter putting him on **administrative leave** and stating its **intent to terminate** his employment
- Hook sued alleging First Amendment retaliation
- He moved for a temporary restraining order or "TRO" preventing the school from "retaliating against him" and "continuing his administrative leave"



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

The court granted the Professor's TRO (i.e., it put a hold on his termination), finding that the University had failed to put on evidence that Hook's "speech had an adverse impact on the efficiency of the University's operations."

- Defendants allege that in the days following Hook's post, hundreds of calls and messages were made to the Board of Regents and/or the University of South Dakota commenting negatively regarding the comment or calling for the removal of Professor Hook. **But mere allegations that speech disrupted the workplace or affected morale, without evidentiary support, are insufficient.**



Hook v. Rave, 4:25-CV-04188 (D.S.D.)

And now the rest of the story...

Newsweek

U.S. South Carolina Free Speech First Amendment Universities Hook v.

News Article ID:

University Drops Bid To Fire Professor Over Charlie Kirk Post

Updated: 02/19/2025 at 11:49 AM EST

Hook commented, "I am thrilled that I can continue teaching my students at the University of South Dakota. . . . I hope that the state now understands that the First Amendment prohibits it from punishing anyone for speech about public issues—no matter how much State or national leaders or others disagree with it."



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)



VS

University of
Tennessee - Knoxville



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

- Plaintiff was an anthropology professor at the University of Tennessee
- She commented on someone else's social media post about Charlie Kirk:
 - "The world is better off without him in it. Even those who are claiming to be sad for his wife and kids....like, his kids are better off living in a world without a **disgusting psychopath** like him and his wife, well, she's a sick f*** for marrying him so I don't care about her feelings."



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

- Robby Starbuck, a political activist, discovered the post and shared it publicly with his hundreds of thousands of followers
- At least two elected representatives, **U.S. Rep.** Tim Burchett and **Tennessee Rep.** Jack Zachary, reached out to the University to express concern about Plaintiff's comment
- The university **terminated** Shirinian's employment. She sued and sought a temporary restraining order (TRO)



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

- Employees' rights must be balanced against "the effective functioning of the public employer's enterprise."
- If, as here, "an employee's speech 'substantially involves matters of public concern,' an employer may be required to make a **particularly strong showing** that the employee's speech interfered with workplace functioning."



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

Still, the court denied the Professor's TRO (i.e., it did not halt her termination), concluding that the University **could** make the "particularly strong showing" of disruption:

- The comment was **shared broadly** on social media and "at least two (2) elected representatives" contacted the University to express concerns
- The comment caused the school's chancellor to assess that the Professor did "**not have the competencies** necessary to be an effective instructor"
- The chancellor also determined that the Professor's comment "**negatively impacted the academic environment** and increased the risk of violence on our campus"
- And the chancellor believed that the Professor's comment "brought the University into **disrepute**" and "adversely affected the University."

But remember what the court said in *Hook* case?

"Mere allegations that speech disrupted the workplace or affected morale, without evidentiary support, are insufficient."



Shirinian v. Plowman, 3:25-cv-528 (E.D. Tenn.)

And now the rest of the story....

Tennessee university to pay professor \$1.9M after calling Charlie Kirk a 'disgusting psychopath'

By Rachel del Guidice | FOX News | Tennessee | Published July 2, 2026 12:48 PM CDT



Concerted Activity (private sector)



What has the NLRB said about concerted activity that occurs on social media?

"You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media."

"But just individually griping about some aspect of work is not 'concerted activity'"

Social media "activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy."

<https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/social-media-0#:~:text=Federal%20law%20protects%20your%20right%20to%20use,%20Seeking%20help%20to%20form%20a%20union>

7/16



NLRB Case Study

Gwen complained on Facebook about her supervisor—she called him a "scumbag." Several co-workers posted supportive responses leading to more negative remarks by Gwen about her supervisor. Employer terminated Gwen's employment because she disparaged her supervisor.

Did the employer violate Section 7?

Yes. The NLRB concluded that the name-calling was not malicious and unaccompanied by any physical threats.

7/16



NLRB Case Study

Jane told another employee, Sarah, that her performance was lacking and that they should take the issue up with their supervisor. Before the supervisor meeting, Sarah complained on Facebook about Jane and asked her co-workers for input. Four co-workers weighed in. Several posts were sarcastic. Some were even profane.

Employer terminated Sarah and the four other employees who participated in the Facebook exchange.

Did the employer violate Section 7?

Yes. NLRB called this a textbook example of concerted activity. Sarcasm and swearing was not malicious.

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NLRB Case Study

Joe, a bartender, posted disparaging remarks about the bar (his employer) on Facebook—he said that he had not received a raise in five years and that the bar’s customers were “rednecks.” None of his co-workers responded. The employer terminated his employment.

Did this employer violate Section 7?

No. The NLRB concluded that this employee was merely griping about work and did not attempt to engage any coworkers in a conversation about the terms and conditions of work.

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Policy Solution

Avoid broad statements that could chill Section 7 activity, like this: “You may not post content online that harms the reputation of the Company.”

Instead, provide context for the social media behaviors you want to regulate, like this: “Communicate professionally when engaging online on behalf of the Company.”

Or this, “You may not post content online about the Company that is knowingly and deliberately false.”

Add a Section 7 Disclaimer, like this: “Nothing about this policy prohibits you from engaging in activity protected by Section 7 of the National Labor Relations Act, including engaging with your coworkers to improve working conditions.”

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State Restrictions

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State Laws Protecting Political Speech

Several states (including two of your neighbors) have laws that protect after hours employee speech, including on social media.

- Prohibition on adverse action based on exercise of free speech
- Prohibition on adverse action based on political speech and affiliation
- Prohibition on adverse action based on off duty conduct

7/31



State Laws Protecting Political Speech



7/31



State Laws Protecting Political Speech

- **California** (Cal. Labor Code §§ 98.6, 1101, and 1102) (participation in politics, political activity, and political affiliation)
- **Colorado** (4 Colo. Code Regs. § 801-1:9) (political affiliation)
- **Connecticut** (Conn. Ge. Stat. § 31-51q) (first amendment)
- **District of Columbia** (D.C. Code § 2-14022.11; 4 D.C. Mun. Regs. § 515) (political affiliation)
- **Louisiana** (La. R.S. § 23:961) (employer with 20 or more employees no rule prohibiting engaging or participating in politics)
- **Montana** (Mont. Code Ann. 39-2-904) (free speech)
- **New York** (N.Y. Labor Law § 201-d (McKinney)) (political activities)
- **North Dakota** (N.D.C.C. § 14-02.4-03) (lawful conduct during nonworking hours)
- **Utah** (Utah Code Ann. 34A-5-112) (religious, moral, or political conviction)
- **Vermont** (21 V.S.A. § 1726(a)(7)) (political affiliation)

7/31



Utah Policy Solution

A Utah-specific social media disclaimer may look something like this (depending on the specific requirements of state law):

Team members may engage in lawful expression or expressive activity outside of the workplace regarding their religious, political, or personal convictions, unless the expression or activity is in direct conflict with the essential business-related interests of the Company (e.g., the Company's policies against discrimination and harassment).

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Online Harassment

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Okonowsky v. Garland (9th Cir. 2024)

Lindsay Okonowsky worked as a psychologist for a federal prison.

Steven Hellman was a corrections Lieutenant in the same facility.

Instagram "suggested" that Lindsay follow Steven's page, "8_and_hitthe_gate."



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Steven's posts were awful



Steven's hundreds of posts were "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes" that expressly or impliedly referred to the prison's employees and inmates.

Yet, Steven's page was followed by more than 100 prison employees, including supervisors and even the HR Manager!

Lindsay was shocked to see several posts that vaguely referred to her, the "psychologist," including one post where Steven implied that he wanted to shoot Lindsay and an inmate.



When Lindsay complained, the prison was dismissive.



Lindsay complained to Robert Grice, Acting Safety Manager.

Robert dismissed Lindsay's concerns, telling her that he was:

"Sorry, not sorry."



Making matters worse, the HR Manager dismissed Lindsay's concerns too, concluding that her complaint did not involve the workplace. He also said the memes were "funny."



As a result, Steven's behavior got worse.

Steven's posts became "sexually debasing" toward Lindsay.

He threatened Lindsay. And he posted a meme, with the caption: "Tomorrow's forecast, hot enough to melt a snowflake."

Lindsay was eventually transferred to another prison. And she filed a sexual harassment claim against the prison.



Ninth Circuit drops the gavel.

A district court sided with the prison, concluding that all the conduct “occurred entirely outside of the workplace.”

But the Ninth Court reversed, holding that **“even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment.”**



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Bonus post-script: what happened at trial?

7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9
10 LINDSAY OKONOWSKY, Case No. 2:21-cv-07581-MCS-AS
11 Plaintiff, VERDICT FORM
12
13 v.
14 MERRICK GARLAND,
15 Defendant.
16
17

AMERICAN
PEOPLE'S
LITMUS

Bonus post-script: what happened at trial?

1 VERDICT
2 We, the jury in the above-entitled action, unanimously answer the following
3 questions submitted to us:
4
5 QUESTION NO. 1:
6 Was Plaintiff Lindsay Okonowsky subjected to sexual advances, requests for sexual
7 conduct, or other verbal or physical conduct of a sexual nature?
8 ☒ Yes
9 ☐ No
10 If your answer to Question No. 1 is yes, then answer Question No. 2. If your answer
11 to Question No. 1 is no, stop here and have the presiding juror sign and date this form
12 below.
13
14 QUESTION NO. 2:
15 Was the conduct unwelcome to Plaintiff Lindsay Okonowsky?
16 ☒ Yes
17 ☐ No
18 If your answer to Question No. 2 is yes, then answer Question No. 3. If your answer
19 to Question No. 2 is no, stop here and have the presiding juror sign and date this form
20 below.
21

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Bonus post-script: *what happened at trial?*

1 **QUESTION NO. 3:**

2 Was the conduct sufficiently severe or pervasive to alter the conditions of Plaintiff
3 Lindsay Okonowsky's employment and create a sexually abusive or hostile work
4 environment?

5 ☐ Yes

6 ☒ No

7 *If your answer to Question No. 3 is yes, then answer Question No. 4. If your answer*
8 *to Question No. 3 is no, stop here and have the presiding juror sign and date this form*
9 *below.*

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Policy Solution

"You may not post content online that violates the Company's policies against discrimination, harassment, and retaliation."

And don't say, "Sorry, not sorry" when an employee reports that they are being harassed by coworkers online.

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Thank you for attending

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Thank You



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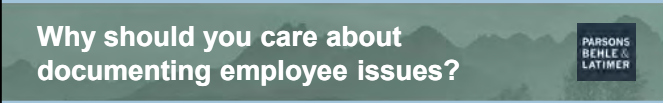
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Why should you care about documenting employee issues?

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"If You Had to Defend It Tomorrow"



If a complaint, audit, or board inquiry landed tomorrow, could you defend your hiring, promotion, or pay decisions with documentation that is job-related and consistently applied?

Expectations are shifting. HR leaders are being asked to demonstrate not just intent, but disciplined decision-making.

Source: SHRM email dated March 3, 2026



Two Pillars of Managing Risk & Employee Performance

Communication

- Oral and written communication conveys information about:
 - Job duties
 - Expectations
 - Performance feedback
 - Corrective action
- Frequent and early communication avoids claims and helps protect against claims

Documentation

It is a *form* of communication

AND

Evidence of communication



"Golden Rule" of Documentation

**IF IT IS NOT IN WRITING,
IT DIDN'T HAPPEN!**



How will documentation help limit risk?

- In a jury trial, never rely on testimony alone because the jury gets to pick who to believe
 - **Spoiler Alert: They tend to believe the employee more often than the company!**
 - See *Frappied v. Affinity Gaming Black Hawk, LLC* (10th Cir. 2020): reversing summary judgment for employer because inconsistent reasons for termination, including as entered in employer's contemporaneously created spreadsheet, could support a jury's finding that employer lacked credibility
 - Memories fade
 - Witnesses are unreachable (death; outside of subpoena power)
- Documents help to establish **intent** and disciplined, consistent decision-making:
 - Decisions were performance or business based
 - Decisions were **NOT** motivated by discriminatory, retaliatory, or other unlawful intent



Important Documents in Litigation

- Job Description
- Employee Handbook
- Performance Evaluations
- Discipline Records
- Records of interactive process
- But, lots of others can be important depending on the claim:
 - Time cards, payroll, attendance record, emails/Slack/Team chats/texts, etc.



Other Reasons for Documenting?

- Improves communication between management and employees
- Record performance issues, feedback/discipline, and employee's growth or development
- Uniformity in business decisions
- Show that you did everything you should in furtherance of the employee's rights, such as:
 - ADA accommodations
 - Interactive process takes time, and every point should be documented
 - Investigated claims of discrimination, harassment, or retaliation



Who Else Cares About Documentation?

- Documentation also really matters to the agencies that enforce anti-discrimination and anti-retaliation employment laws:
 - State Agencies (e.g. Idaho Human Rights Commission)
 - EEOC
 - DOL
- Service of a Charge or Complaint by IHRC is usually accompanied by a Request for Information



Documents Relevant to IHRC Investigations

- All documents relating to any disciplinary actions taken by Respondent against Charging Party in the past five years.
- All documents related to the Charge.
- A copy of Charging Party's job description at the time he/she left their employment or at the time you received this charge of discrimination as well as any minimum requirements of the position.
- All documents that explain the reason(s) why Charging Party is no longer employed by Respondent. (If Charging Party is still employed by Respondent you do not need to answer this question.)



Real World Example: *Ames v. Ohio Department of Youth Services* (2025)



Ames v. Ohio Dept. of Youth Servs.



(Photo credit: Megan Jelinger, REUTERS)

- Marlene Ames, heterosexual woman working for Ohio Dept of Youth Services
- After she was interviewed for a management position, she was fired from her program administration role and offered a secretarial position
- Lesbian woman hired to fill management position
- Gay man was hired to fill vacant program admin position
- Ames alleged she was denied a promotion and effectively demoted (with pay cut) based on her sexual orientation
- Alleged LGBTQ+ candidates were favored



Ames, continued

- District Court dismissed her case because she is failed to show "background circumstances" suggesting employer discriminates against majority group she is part of
- Sixth Circuit Court of Appeals affirmed
- **Unanimous** SCOTUS vacated and remanded = Title VII's protections apply equally to majority and minority groups (no higher standard for majority group)



Ames, continued

Why is this relevant to documentation?

- The Department gave shifting reasons for demotion at different points in the process:
 - Supervisors refused to give Ames a reason for her demotion when it occurred
 - But, before the EEOC, Department said it demoted Ames because she was at-will and it could remove her at any time without cause;
 - Then, in deposition, one supervisor claimed Ames was not the right person to fill his "vision"
- If had Department properly documented what occurred, when, and why – it could have avoided Ames filling in the gaps by assuming discrimination



Documenting Throughout Employment Cycle

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When to document?

- Numerous opportunities to document employee interactions:
 - Recruitment
 - Hiring
 - Training
 - Day-to-day Feedback/Daily Meetings
 - Biannual Reviews
 - Write Ups/Performance Improvement Plans
 - Termination of employment relationship

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What to document?

- Performance Issues
- Performance Review/Evaluations
- Employee Discipline
- Requests for accommodation or leave
- Complaints about discrimination, harassment, retaliation
- Investigation into complaint
- Termination

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Be smart about what you document

Actual Employee Evaluations

- "Since my last report, this employee has hit rock bottom and has started to dig."
- "His men would follow him anywhere, but only out of morbid curiosity."
- "I would not allow this employee to breed."
- "He sets low personal standards and then consistently fails to achieve them."
- "This employee should go far – and the sooner he starts the better."
- "This employee is depriving a village somewhere of an idiot."



Be smart about what you document

Ann Hopkins v. Price Waterhouse: story of an evaluation gone bad (and resulting in a legal dispute)

- "macho"
- "overcompensated for being a woman"
- "needs a course in charm school"
- "matured from a masculine manager to an appealing lady partner candidate"
- "should walk, talk and dress more femininely, wear makeup, get her hair styled and wear jewelry"



Documenting Performance Issues

Managers should **intervene immediately** after the **first** sign of a serious performance or conduct problem.

- Don't need a formal performance improvement plan in the first instance; can be a verbal feedback session
- Document the discussion with a note to file or email (or possibly discipline, like a written warning).
- And **involve HR!**



Conduct a Truthful and Accurate Performance Review



Conduct a truthful and accurate review of employee's performance during full relevant period (e.g., one year).

- Note if problems exist and include discussion of relevant job actions (e.g. warnings or discipline, successes, etc.).



Performance Evaluations, Reviews, Appraisals

- Should address: C.A.P.

CONDUCT

ATTENDANCE

PERFORMANCE

- Be Courageously Honest
- But Not About Non C.A.P. Issues!



Characteristics of Good Evaluation Ratings

- Addresses C.A.P. (Conduct, Attendance, Performance)
- Provides same or similar review/ratings to same or similar Conduct, Attendance, Performance
- Connected to Job Duties and Description
- Looks at entire performance period; notes trends
- Supports employment decisions
 - Ask: Should this person be promoted? Should this person be on a PIP?
- Avoids stereotypes and personal attacks



Characteristics of Bad Evaluation Ratings

Central Tendency – supervisor avoids rating employees either very high or very low. Reviews are clustered in the middle of the rating scale for all employees.

Leniency – supervisor gives high ratings to all employees.

Strictness – supervisor gives low ratings to all employees.

Similar-to-Me – supervisor gives high ratings only to employees who share similar thinking, personality, background.



Key Ingredients for Documenting Discipline

When managing performance or conduct, including in **warnings**, always include these **FOUR** ingredients:

- 1) nature of problem,
- 2) how it can be fixed,
- 3) clear timetable for doing so, and
- 4) consequences of failure to do so (such as discharge).



Bad Example of Discipline Document

Sam Supervisor observed an incident. His report is as follows:

"There was something on the floor in the hall. I told Jerry Janitor to take care of it. He mouthed off and blew me off."

Is this helpful documentation?



Good Example of Discipline Document

A proper signed write-up might look like this:

"On 9/15/2021, I, Sam Supervisor, saw a puddle of grease on the floor in the west service hall. I told Jerry Janitor of the puddle, where it was, and to please clean it up immediately. He said, 'I'm busy right now. I'll get to that when I get around to it. If you need it sooner than then, you can \$@&% well do it yourself.' I verbally warned him that his response was unacceptable, that his behavior would be noted in his file, and that further disciplinary action might be taken. Angie Assistant witnessed this exchange, and I asked her to write up a statement."



Common Mistakes Documenting Discipline

- Vague communication of the expectations and consequences going forward
 - Be clear and unequivocal
- Inconsistent discipline for similar infractions across the company
 - Disparate treatment claims rise from inconsistent treatment (even unintentional)
 - Communicate across managers/supervisors to ensure acting similarly
- Inappropriately light discipline or giving too many chances to improve
 - Being the "nice guy" can backfire!
- Bringing unrelated or irrelevant issues into the documentation
 - Keep it clean and business-related



Documenting Termination/Discharge

Trigger for Discharge: should be some event that moves situation towards termination (e.g., expiration of last chance time-period without needed improvement, additional major mistake, misconduct, etc.)

Beware of subjective conclusions (e.g., "He just doesn't fit in!") and instead identify underlying objective facts leading to your conclusions and decisions



Primary goal: anyone second-guessing you should conclude there was **clear explanation of expectations, notice of problems and a documented chance to improve** before discharge.



HR involvement ensures company-wide consistency and that written record supports the termination decision.



Common Mistakes in Termination

- NO DOCUMENTATION
- Not giving a complete, written reason for the termination to employee
- Terminating without having exhausted the ADA reasonable accommodation process
- Termination for retaliatory reasons (known to the decisionmaker, but not to HR)
- Ignoring company's own procedure/process for discipline
- Sugar-coating or leaving out some reasons for termination – if it is not noted in a contemporaneous document, it did not happen
- Getting HR or counsel involved too late – after a bad decision has been made or bad documentation has been created



Hypotheticals to Consider



Too Busy to Document, Until...

Shannon's supervisor, Jan, finds Shannon "abrasive" and believes she "doesn't collaborate well with others." Shannon's team members have informally complained to Jan that Shannon "talks over others in meetings" and "pushes back too much." Jan did not document these conversations.

Jan has not issued Shannon a formal write up. Jan has made some vague meeting notes where she references "culture" and messages to Shannon like "let's work on tone."



Still Too Busy to Document, Until...

Shannon complains to HR that she feels Jan is targeting her because she is neurodivergent and communicates differently than others.

A few days later, Shannon makes a comment in a team meeting that Jan views as disrespectful. Jan wants to terminate Shannon.

- *What risks might exist if Shannon is terminated?*
- *What should Jan have done to limit these risks?*



Too Obvious to Document, Until...

Matt has constant attendance issues and has been late for work nineteen times. His supervisor, Jake, has not mentioned it to him, because he figures it is obvious that employees need to be to work on time. Further, the employee handbook states that tardiness may result in discipline.

Matt requests leave under FMLA. A few days after putting in his request, Matt is tardy for the twentieth time. Jake has had enough and wants to terminate him.

- Are there potential risks to terminating Matt?*
- What should Jake have done to minimize the risk?*



Questions?



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Thank You



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14th Annual Idaho Employment Law Seminar

Off the Radar: HIPAA and Protecting Health Information in the Workplace

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14th Annual Idaho Employment Law Seminar

Off the Radar: HIPAA and Protecting
Health Information in the Workplace

J. Kevin West
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Sept. 22, 2026 | Boise Centre East

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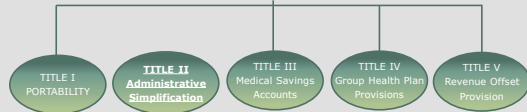
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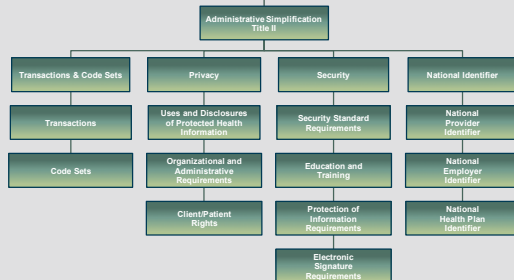
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HIPAA Health Insurance Portability and Accountability Act of 1996



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Health Insurance Portability and Accountability Act HIPAA Signed into law in August 1996



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A Real-Life Example

- Company X sponsored a health benefit plan for its numerous employees
- A ransomware attack exposed health information of 9300 employees
- The company reported the breach to the OCR



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- The OCR did an investigation and found—
 - Company X had not done security risk assessment of its computer system
 - The company had not identified and addressed vulnerabilities in its systems



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- Following the OCR's investigation, the company was required to:
 1. Pay a fine of \$695,000
 2. Develop a corrective action plan, including—
 - a. a comprehensive risk assessment
 - a. a risk management plan
 - c. revise and update its HIPAA policies/procedures
 - d. do workforce training
 3. Be monitored by the OCR for 2 years



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HIPAA PRIVACY: Rules for Employers

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Who Must Comply with HIPAA?

- Health care providers
- Clearing houses
- “Health plans”

} “Covered Entities”

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What is a Health Plan?

- Private health insurance companies (Blue Cross, Blue Shield)
- Government health insurers (Medicare, Medicaid)
- Employer sponsored group health plans or HMO's
 - Fully insured plans
 - Self funded plans
- Includes FSA's, dental and vision plans

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The HIPAA Fiction

The employer's health benefit plan is a separate, distinct legal entity from the employer.



What is **Not** a Health Plan?

- Excluded entities:
 - Worker's comp insurers
 - Disability insurers
 - Life insurance companies
 - Property and casualty insurers



What is Protected Health Information (PHI)?

- Protected health information =
 - "Individually identifiable health information," i.e., reasonably used to identify individual.
 - Concerns person's past, present or future physical or mental health, healthcare, or **payment for health care**.
 - Created or received by a covered entity.
 - Transmitted or maintained in any form or medium, e.g., oral, paper, or electronic.



PHI in Employer Health Plans

- Reports generated by insurers, brokers or TPAs
- Health claim information
- Advocacy efforts by the employer
- Health history found in enrollment forms
- FSA claims information



PHI Does Not Include

- Mere enrollment information (i.e. demographic information that does not include health information)
- Claim payment reports that have names/identifiers scrubbed



What is Protected Health Information (PHI)?

Definition of PHI does **NOT** include "employment records held by a company in its role as an employer."



Excluded from HIPAA

- Health information kept or maintained by employers that is **not** part of a health plan

- Examples:
- sick leave info
 - FMLA leave
 - ADA accommodation
 - STD/LTD



HIPAA's Basic Philosophy for Plan Sponsors (Employers)

PHI should not be accessible to, or used by, employers in making employment related decisions.



Q: What Are My HIPAA Obligations?

A: Depends on whether the health plan is:

- Fully insured
- Self-funded
- Partially self-funded



What is a Self-Funded Plan?

- The employer takes on the financial risk of paying health care claims, instead of paying premiums to an insurance carrier
- A TPA is usually used to assist the employer



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What is a TPA?

- An independent company that manages day-to-day operations of the health plan
- Often is an insurance company, like Blue Cross
- Does not have financial risk to pay claims
- Handles most or all of employee PHI



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The Self-Funding Players

- The employer
- The health plan
- The TPA



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Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

Description	Compliance Obligations
A. Health FSA with fewer than 50 employees <u>and</u> 100% internally self-administered (no TPA)	None (excluded from HIPAA)

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Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

Description	Compliance Obligations
B. Most other health FSA's (i.e., more than 50 employees, or not self-administered)	Full HIPAA compliance

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Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

Description	Compliance Obligations
C. Dental or vision plans:	Minimal HIPAA compliance
1. Fully insured and employer keeps/receives only summary and enrollment information	Full HIPAA compliance
2. Fully insured, but employer keeps/receives PHI	Full HIPAA compliance
3. Self-funded	

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Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

Description	Compliance Obligations
D. Fully insured health plans or HMO's: 1. Employer keeps/receives only summary/enrollment information 2. Employer keeps/receives PHI	Minimal HIPAA compliance Full HIPAA compliance

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Types of Health Plans

(or, How Does Your Health Benefits Package Fit In?)

Description	Compliance Obligations
E. Self-funded health plans: 1. Less than 50 employees and totally self-administered (no TPA). 2. All other self-funded plans	None (excluded from HIPAA) Full HIPAA compliance

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What types of employer-sponsored health plans require full HIPAA compliance?

YES	NO
▪ Self-funded plans ▪ Flex plans ▪ High-deductible plans and HSA's ▪ Fully insured plans (employer keeps PHI)	▪ Fully insured plans (employer keeps no PHI)

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Totally or Partially Self-Funded Health Plans: What Does “Full Compliance” Mean?

- Full HIPAA Compliance:
1. Notice of Privacy Practices (provided by the health plan)
 2. Privacy officer
 3. Personnel training
 4. Written privacy policies
 5. Amendment to plan docs
 6. Physical, technical & administrative safeguards
 7. Business Associate contracts
 8. Define and “firewall” the health benefits department
 9. Rights of Plan Participants

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Please Note

Employers cannot rely on brokers or the TPA and its systems for HIPAA compliance; compliance is the employer's responsibility

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What Are My Compliance Obligations?

1. Notice of Privacy Practices
 - Provided by insurer (for full insured plans)
 - Provided by employer/plan sponsor for self-insured plans
 - Must be provided to all plan participants in plan (providing to named insured is sufficient)

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What Are My Compliance Obligations?

1. Notice of Privacy Practices (cont'd)

- Must be provided to all plan participants
- Must be provided to new participants upon enrolling
- Reminder notice must be provided every 3 years thereafter



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What Are My Compliance Obligations?

2. Privacy Officer

- Privacy Officer: Person responsible for overseeing overall compliance with HIPAA rules



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What Are My Compliance Obligations?

3. Employee training

WHEN

- Must be completed for existing workforce
- Must be completed within a "reasonable time" for workforce hired later

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What Are My Compliance Obligations?

WHO



- Appropriate company personnel:
 - Top management and executives
 - Benefits personnel
 - HR department personnel
 - Others, as appropriate

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What Are My Compliance Obligations?

4. Preparation of Written Policies and Procedures

- Do you have a Privacy Manual that meets all HIPAA requirements?
- Use a competent HIPAA attorney



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What Are My Compliance Obligations?

5. Amendment of Plan Documents & Certification

- To reflect HIPAA responsibilities, rights and rules
- To affirm to insurer or TPA that plan sponsor will keep proper "separation" and fulfill other HIPAA obligations (remember the HIPAA fiction).



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What Are My Compliance Obligations?

6. Administrative, Physical and Technical Safeguards

- Physical plant layout
- Storage and retention of paper records
- Computer systems
 - Passwords
 - Location of monitors
 - Technical personnel
- Fax and copy machines
- Electronic security (will discuss next)



ADDITIONAL PRACTICE

What Are My Compliance Obligations?

7. Identify Business Associates

Definition: A person or entity who performs a function for a covered entity that involves use or disclosure of PHI.

Examples: Brokers, Third-Party Administrators



ADDITIONAL PRACTICE

What Are My Compliance Obligations?

- Covered entities must provide "satisfactory assurances" that business associates will comply with privacy restrictions
- "Satisfactory assurances" = business associate agreement

ADDITIONAL PRACTICE

What Are My Compliance Obligations?

8. "Firewalls" to Keep PHI separate

- Employee PHI may not be accessed by anyone without legitimate need to know (i.e., without a legitimate benefits purpose)
- "Separation of church and state" concept (Management vs. benefits department)



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What Are My Compliance Obligations?

9. Rights of Plan Participants

- Notice
- Access to PHI (Paper or electronic)
- Confidential Communications
- Accounting
- Amendment

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"More Stringent" State Laws Still Apply

State law is "more stringent" if it:

- Grants individuals greater rights of access to PHI; or
- Provides greater privacy protection to the individual

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Idaho Law

- No major differences with HIPAA except as to substance abuse, mental health and HIV status.



What Can Happen If You Don't Comply?

- Enforcement by Office of Civil Rights (OCR)
- On-line complaint process makes it easy to complain



HIPAA Enforcement/Penalties

1. Civil penalties ranging from \$100/day up to maximum of \$1.5 million
2. If a HIPAA violation resulted from "willful neglect," a penalty is mandatory
"willful neglect" to be defined in upcoming regulations



Four Changes to HIPAA Enforcement/Penalties

3. State attorney general may investigate and enforce HIPAA
4. DHHS has additional funding and authority to audit and enforce



What Can Happen If You Don't Comply?

- Idaho State University
- Medical info of 17,500 people exposed on internet due to insufficient security measures
- \$400,000 settlement



What Can Happen If You Don't Comply?

- State of Alaska Case
- Theft of USB hard drive with data on 500 people
- No training of workforce, risk analysis etc.
- \$1.7 million settlement paid



Concluding Comments

- Management personnel need to respect the separation between health benefits information vs. other employee information.
- All employee health information (whether benefits related or not) is protected under:

- ✓ ADA
- ✓ Title VII (EEO)
- ✓ FMLA
- ✓ State laws



The HIPAA Security Rule



Do you . . .

- Have employee health benefits information on your computer system?
- Use email for communicating with insurance companies or other brokers?
- Have a networked computer system that has Internet access?

If so, Security Rule compliance is vital to your organization.



What if . . .

- A virus wiped out or corrupted employee benefits records or accounting data for:
 - Last 24 hours?
 - Indefinitely?
- A fire destroyed your computer system?
- An employee or hacker crashed your system or deleted or stole key data (e.g., embezzlement)
- You failed to destroy employee benefits data on a computer that you gave away?

How would it affect:

- Your ability to administer health benefits for your employees?
- Your hardware, software, and other expensive capital?
- Your relationships with employees, brokers, insurers?

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HIPAA Enforcement

- The OCR conducted many investigations in 2024; 19 resulted civil monetary penalties ("CMP")
- 17 of the 19 stemmed from the lack of a computer system risk assessment

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Breach Statistics (Sept 2009 – present)

- BCBS of Tennessee – 500,000 records resulting from theft of a hard drive
- AvMed, Inc. – 360,000 records from theft of a laptop
- DD&C – 83,000 records involving incorrect mailing (BA)

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Basic HIPAA Concepts

- The Privacy Rule governs PHI in any form – oral, written or electronic
- The Security Rule governs only electronic PHI (ePHI)



What is ePHI?

- Information stored on computers, laptops, PDA's, floppy disks, databases, websites, etc... ("data at rest")
- Information transmitted via telephone lines, Internet, e-mail ("data in motion")



Examples of ePHI:

- Employee health benefits information stored on the Company's computer system
- Employee health benefits information transmitted via the Internet
- Electronic billing claims
- Electronic faxes (computer to computer faxes) but not paper to paper faxes
- NOT voicemail, video conferencing



Basic Security Concepts

- Three basic goals of the HIPAA Security Rule: to ensure the

- 1) Confidentiality (*only the right people see it*)
- 2) Integrity (*the information has not been improperly altered*)
- 3) Availability (*the right people can see the information when needed*)

of ePHI



Basic Security Concepts

- The Security Rule consists of 18 standards, which are grouped into 3 categories:

- 1) Administrative safeguards
- 2) Physical safeguards
- 3) Technical safeguards



Basic Security Concepts

- Basic goal of the Security Rules: To prevent or minimize “security incidents” (i.e., a breach of confidentiality, integrity or availability)



Examples of Security Incidents

- A hacker or ex-employee accesses your Company's computer system (confidentiality)
- Your laptop is stolen with employee health benefits data on its hard drive (confidentiality and availability)
- Your computer system crashes and all employee health benefits data is lost (availability)
- A Company employee alters electronic records on your computer system without authorization (integrity)



A Review of the Security Rule Standards

- Administrative safeguards
- Physical safeguards
- Technical safeguards



Administrative Safeguards

1. Appoint Security Officer
2. Train Company personnel
3. Security management
4. Information access management
5. Workforce security
6. Security incident procedures
7. Emergency plan
8. Evaluation procedures
9. Business associate agreements



1. Appoint A Security Officer

- Has overall responsibility to ensure compliance with the Security Rule
- Could be the head of the IT department
- Could be an outside consultant or contractor



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2. Training of Company Personnel

- Basic training of applicable company personnel must be done
- Security officer should have more detailed training



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3. Security Management Process

- A risk analysis of your ePHI systems
- Written security policies and procedures must be prepared and implemented
- Personnel are to report security violations and take reasonable steps to prevent further violations

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4. Information Access Management

- Implement policies and procedures for authorizing access to ePHI.
- For example, policy should state which job positions have access to ePHI and for what purposes.



5. Workforce Security

- The organization should only allow authorized personnel to have access to ePHI
- Organization benefits/personnel should log off computers and/or shut down at the end of each day
- Security measures as to terminating benefits personnel:
 - Return of keys, ID, laptops
 - Change locks, where needed
 - Change computer passwords



6. Security Incident Procedure

- Organization personnel are to report security incidents
- Response to security incidents
- Documentation of response measures



7. Emergency Plan

- Backup of ePHI
 - Paper copies
 - Tape back-ups, CD-ROM, zip drives, key drives
- Have a plan for restoring lost data
- Emergency operation plan ("contingency planning")



8. Evaluation Procedures

- Routine review and evaluation of security safeguards
- Goal: are security policies and procedures working?



9. Business Associates

- Identify business associates
- Sign business associate agreements
- No business associate agreement required between health plan or insurance company and plan sponsor (employer)



Physical Safeguards

1. Facility access controls
2. Computer workstation security
3. Device and media controls



1. Facility Access Controls

- Access to the "benefits department" must be limited to authorized personnel
- Access to computer/electronic systems containing employee health benefits must be limited to authorized personnel
- Access by authorized personnel must be ensured



2. Computer Workstation Security

- Benefits department computers may only be used by personnel with "need to know"
- Logging off when not in use
- Appropriate location of monitors



3. Device and Media Controls

- Proper disposal of computer hardware or electronic media that has ePHI
- Documenting receipt or removal or destruction of computer hardware, disks, etc. . .



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Technical Safeguards

1. Access Controls
2. Audit Controls
3. Integrity of ePHI
4. Person or entity authorization
5. Transmission security



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1. Access Controls

- Unique individual passwords/user ID's
- Emergency access procedures



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2. Audit Controls

- Measures to record and review activity in the Company's computer system regarding employee health benefits
 - All log-ins
 - Attempted log-ins (hacking)
 - Database access



3. Integrity of ePHI

- Protecting ePHI from improper alteration or destruction
 - Virus protection software
 - Firewall
 - Regular back-ups of data
 - Electronic signatures
 - Auditing software



4. Person or Entity Authentication

- Verification of the identify of those seeking to access PHI
 - Passwords
 - verifying identify of electronic transmissions



5. Transmission Security

- Prevention of access to ePHI while being transmitted
- Transmission methods:
 - Dial-up access to a single secure telephone line
 - Dial-up Internet transmission
 - High speed Internet transmission
- Encryption
- Electronic privacy notices
- Secure websites



Plan participant notification of breach

- Old rule: none
- New rule: If there is a breach (i.e., an unsecured disclosure of plan participant's PHI) the plan participant must be notified of such



Notification Rules:

1. Must be provided to plan participant by 1st class mail
2. Must be provided as soon as possible, but not later than 60 days after discovery
3. If breach affects over 10 individuals for whom the plan sponsor does not have sufficient contact information (e.g., former employees or family members), notice must be posted on the home page of the plan sponsor's website



Notification Rules (con't):

4. If the breach involves more than 500 plan participants in a state, notice must also be made via prominent news outlets in the state
5. Content of notice
6. Log of all breaches must be given annually to DHHS



Notification to the OCR

All breaches must be reported to the OCR electronically



Other Protections to Health Information in the Workplace

1. Title VII
 - Health Information may not be used for purposes of workplace decisions.
 - Firewall concept with supervisors/managers



2. The Americans and Disability Act (ADA)

- Employers must gather health info as part of the “collaborative process”
- Proper vs. improper use
- Job descriptions and “essential job functions”
- “Reasonable accommodation”



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3. State EEO Laws

- The Idaho Human Rights Act



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4. Tort Law

- Invasion of Privacy



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5. FMLA

- Employers must obtain health information for doctor certifications, FMLA requests, etc...
- Same analysis as with ADA, Title VII



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Thank You



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14th Annual Idaho Employment Law Seminar

Investigations: Lessons from the Trenches

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Investigations: Lessons From The Trenches

Introduction:
What Do Courts Look for in an Investigation?
(Christina)

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Investigations: What Are Courts Looking For?

- Promptness
- Thorough
- Impartial/Fair
- Competent Investigator
- Notice Provided to the Accused
- Reasoned Conclusion/Substantial Evidence/Documented
- Perfection



An Adequate Investigation Can Help:

- **Show No Material Dispute of Fact:** Well documented investigation shows court there is no genuine dispute over what conduct occurred or how handled
- **Assert Affirmative Defense:** Show employer exercised reasonable care to prevent and correct behavior
- **Defend Against a Retaliation Claim:** Document a legitimate non-retaliatory reason for discipline
- **Defend Against Punitive Damages:** Shows good faith and lack of discriminatory intent



Investigations: Lessons From The Trenches

Investigations Done Wrong
Case # 1
(Christina)



**Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)**

- In 2014, Lindsey Yeaman began working as a lab technician for the City of Burley
- A year later, her supervisor Dee Hodge allegedly began giving her **unwanted sexual attention**
- He allegedly remarked on her breast size, stated that an office pen looked like a 'big ol dildo' and attributing her divorce to her failure to do a 'good enough job sowing her husband's oats.'
- Yeaman worked under Hodge and Jean Gorringer, the Pretreatment Coordinator for the Wastewater Department
- Gorringer was planning on retiring and as his retirement neared Yeaman **hoped to be promoted** to Pretreatment Coordinator

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**Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)**

- Hodge allegedly capitalized on Yeaman's desire to be promoted by "dangling the **possibility of her advancement** to Pretreatment Coordinator as he made sexual advances"
- Hodge allegedly would stand behind Yeaman's chair and dangle his arms over her or rest his arms on her arms. If Yeaman retreated from Hodge's touch he would comment that her **job was on the line** and that she had "better be careful" because she hadn't been promoted yet.
- **Hodge allegedly reached his hand** down Yeaman's shirt between her cleavage and pulled up a ring which was at the bottom of her necklace
- Hodge allegedly walked up behind her, placed a hand on her back and her hand, and asked her to go for a "ride with him."
- When Yeaman asked where Hodge said "Does it matter? Don't worry. I won't keep you for long." Yeaman understood this to mean that Hodge was asking for sex and when she declined Hodge became angry and **stormed out warning** Yeaman to be careful because Gorringer hadn't retired yet.

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**Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)**

- Gorringer retired and Yeaman was promoted
- Hodge's sexual advances stopped but he allegedly began **making Yeaman's job more difficult** as punishment for rejecting his prior advances
- Hodge allegedly deleted files from her computer, frequently changed instructions on assignments, told her he would handle certain tasks but as the due date neared make them her responsibility, and "maliciously provided the wrong materials for her to use in drafting sewer permits because he wanted her to fail"
- Hodge also imposed **"special rules"** on Yeaman which he did not impose on other employees:
 - Requiring her to keep her office door open
 - Prohibiting her from wearing ballcaps
 - Telling her to adjust her shirt
 - Not allowing her to leave the office on coffee breaks, and
 - Demanding that she keep him informed of her whereabouts at all times
- Hodge also brought a **mug** into work with the words "so good with my rod I make fish come" that he waved in Yeaman's face and kept in his office throughout her employment.

AMERICAN
PEOPLE'S
LITMUS

***Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)***

- On January 6, 2020, Yeaman reported Hodge's behavior to Carol Anderson, the City's Director of **Human Resources**
- As Yeaman reported Hodge's behavior, Anderson interrupted her and brought in Mark Mitton, the City Administrator
- Anderson asked **Yeaman to repeat everything she had told her to Mitton. Before Yeaman could do so, Mitton** "cut her off and let her know that he didn't have time to deal with it"
- Neither Anderson nor Mitton ever followed up with Yeaman
- On January 14, 2020, Yeaman received her first evaluation in over a year.
- Hodge did not complete the evaluation but gave "guidance" to the evaluator. Yeaman's scores were dramatically lower than any of her previous evaluations.
- What happens next?



***Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)***

- On January 31, 2020, Hodge gave Yeaman a Notice of **Termination**
- A termination hearing was scheduled for February 10, 2020
- On February 3, 2020, Dan Pherigo, one of Yeaman's coworkers, went to Anderson's office (HR) and reported Hodge's sexual harassment of Yeaman
- That same day, the City hired Kerry McMurray to conduct an **independent investigation** into Pherrigo's claim that Hodge sexually harassed Yeaman
- That sounds good. What could go wrong?



***Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)***

- McMurray was given six days to complete the investigation apparently because of the termination hearing
- Yeaman and Pherrigo (the two complainants) were placed on leave (not Hodge)
- On February 10, 2020 (the date of the termination hearing), McMurray completed his investigation concluding that no sexual harassment had occurred, but that Hodge had engaged in "some troubling behavior"



***Yeaman v. City of Buley*, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)**

- Yeaman's termination hearing was also held on February 10, 2020
- Anderson (HR), Hodge (alleged harasser), Pherigo (co-worker) and Yeaman were present
- Yeaman spoke "explaining why Hodge's criticisms of her job performance were meritless."
- She did not, however, raise the issue of sexual harassment because she 'could not see a reason to report to Hodge, her harasser, that he had harassed her.'"
- A few days later, Anderson (HR) delivered a final notice of termination to Yeaman's home



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***Yeaman v. City of Buley*, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)**

- Yeaman subsequently filed a lawsuit against the City
- The City moved for summary judgment under the Faragher-Ellerth affirmative defense
- An employer is not liable on a hostile work environment claim when there has been no tangible employment action and the employer can show:
 - a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
 - b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
- No affirmative defense is available when the supervisor's harassment culminates in a tangible employment action



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***Yeaman v. City of Buley*, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)**

- The District Court declined to grant summary judgment for two reasons
- There was a genuine dispute of fact regarding whether Hodge's sexual harassment resulted in a tangible employment action
- There was a genuine dispute of fact over whether the City exercised "reasonable care in preventing and promptly addressing her allegations of sexual harassment"
 - Yeaman pointed to the fact that that Anderson and Milton interrupted her and **did not allow her to finish her report** on January 6, 2020
 - City failed to follow its own written sexual harassment policy by not having Pherigo put his February 3 **report in writing**
 - City put Yeaman and Pherigo **on leave** but allowed Hodge to continue working during the investigation
 - City did not give the independent investigator **enough time to complete a thorough investigation**
 - City **allowed Hodge to attend** Yeaman's termination hearing despite her reports of harassment
- According to Boise State Public Radio, the case settled before trial for \$250,000 and Hodges and Milton were no longer employed by the city



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***Yeaman v. City of Buley, No. 4:21-CV-00345-BLW,
2023 WL 2868575 (D. Idaho April 10, 2023)***

TAKEAWAYS

- Investigate employee's claims. Don't ignore them!
- Ensure that adequate time is provided for the investigation to be completed
- Follow internal policies and procedures regarding employee reports, investigations, terminations, etc.



Investigations: Lessons From The Trenches

**Investigations Done Wrong
Case #2
(Susan)**



***Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)***

- In 2016, Reba Mohamed, a non-white Egyptian woman, was hired by SHRM
- On **January 19, 2020**, Mohamed was promoted to Senior Instructional Designer where she worked with vendors on education programs that were offered to clients. **Her supervisor was Carolyn Barley**
- On **June 3, 2020**, Mohamed complained to Jeanne Morris, Vice President of Education, that she was having trouble performing her work because Barley micromanaged her and treated her white peers differently
- On **June 4, 2020**, Mohamed raised these same concerns in a Zoom meeting with Morris and Barley. Barley was upset by Morris's complaint and cried.
- On **June 12, 2020**, Mohamed discussed her concerns with Barley again.



Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

Getting HR involved is the right idea. But what should have happened at this point?

- Barley consulted with Mike Jackson, an HR employee, who told Barley to document her interactions with Mohamed.
- Jackson was also placed in charge of investigating Mohamed's complaint. It was his first investigation.
- Jackson interviewed Mohamed and Barley's team.
 - Mohamed and another black employee complained that Barley micromanaged them and treated them differently due to their race. Two white employees did not report similar concerns.
 - Mohamed testified that Barley asked to review all of her emails and to attend all of her meetings with vendors.
 - Mohammed also testified she was discouraged from attending an important meeting that all team members were invited to.

AMANO
PEOPLE &
LAWFIRM

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

Should HR be ghostwriting emails for Barley?

- During the investigation, Jackson helped Barley ghostwrite emails regarding Mohamed's deadlines.
- On **August 12, 2020**, Barley emailed Mohamed stating that two projects she was working on should be finished by **August 31, 2020**.
- Mohamed replied describing issues she was having with the vendors and asking Barley to "work with [her] to ensure that these deadlines are met."

AMANO
PEOPLE &
LAWFIRM

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

Does the "support an eventual case for termination" language make you nervous?

- On August 13, Nick Schalcht, SHRM's Chief Global Development Officer, sent an email to Jackson asking him to assist Barley with drafting a response.
- The email stated that "this offers an opportunity to get the right language on the table to correct her quickly, or to support an eventual case for termination."
- Barley's ghostwritten reply to Mohamed's email stated that no help would be provided and that the deadlines were non-negotiable.

AMANO
PEOPLE &
LAWFIRM

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

What should SHRM have done when it received Mohamed's additional retaliation complaint?

- On **August 19, 2020**, Mohamed complained to HR that she was being retaliated against for her prior complaint.
- That same day, SHRM created a draft of Mohammed's termination documents.
- Jackson was also placed in charge of investigating Mohamed's retaliation complaint.
- **No investigation was conducted.**
- On **August 31, 2020** Jackson notified Mohamed that it had concluded its investigations and that both her complaints were unfounded.

AMONG PEOPLE & LITIGATION

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)



- **Mohamed turned in both of her projects before the August 31, 2020 deadline.**
- On September 1, 2020, SHRM gave Mohamed termination documents including documents that had been prepared and approved a few days before.
- **SHRM and Barley claimed they terminated Mohamed solely for failing to meet the August 31 deadline.**

AMONG PEOPLE & LITIGATION

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)



- Mohamed's projects were reassigned to two white members of the team.
 - One of the teammates, Carrie Mills, testified that Barley told her that she not sure how complete the project was and gave her no completion date. Mills finished it in a week.
 - Mills also stated that "not once during my employment with Defendant did I ever meet the target completion deadline for a major project and was never coached or disciplined or coached for missing a deadline."
 - Mills also stated that Barley's focus on Mohamed's deadline was "quite odd given that neither me nor [another white employee] were held to the same standard."
- Mohamed sued and a jury trial was held.

AMONG PEOPLE & LITIGATION

Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

1. Did Ms. Mohamed prove by a preponderance of the evidence that but for her race Defendant SHRM would not have terminated her in violation of Section 1981?

ANSWER: Yes ☒ No ☐

2. Did Ms. Mohamed prove by a preponderance of the evidence that but for her complaints about race discrimination and/or retaliation Defendant SHRM would not have terminated her in violation of Section 1981?

ANSWER: Yes ☒ No ☐



Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

PART TWO: DAMAGES

3. Did Ms. Mohamed prove by a preponderance of the evidence that she is entitled to an award of compensatory damages, as described in Instruction No. 21?

ANSWER: Yes ☒ No ☐

If you answered "Yes," state the amount of such damages: \$ 1.5 Million

4. Do you find by a preponderance of the evidence that Ms. Mohamed is entitled to an award of punitive damages, as described in Instruction No. 23?

ANSWER: Yes ☒ No ☐

If you answered "Yes," state the amount of such damages: \$ 10 Million



Mohamed v. Society for Human Resource Management
No. 1:22-CV-01625 (D. Colo.)

TAKEAWAYS

- Investigations need to actually investigate and determine facts, not function as formalities.
- Complete all investigations - SHRM never investigated Mohamed's retaliation complaint.
- Investigations should be unbiased and seek to uncover what occurred rather than serve to support and execute decisions made by others.



Investigations: Lessons From The Trenches

Investigations Done Wrong

Case #3

(Christina)



Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Camille Kramer worked in the Wasatch County Sheriff's Dept. in Utah
- In 2006, she complained to the Sheriff about sexual harassment
- Sheriff said: "I'll deal with it."
- Convened a staff meeting, used Kramer as the "victim," and acted out the exact harassing scenarios complained about
- He said: "that's harassment. Don't do it."



Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Kramer was moved to a Court position as a bailiff
- Kramer reported to Sergeant Benson
- Benson allegedly demanded foot massages from Kramer and jokingly made a doctor's note
- Benson allegedly said he would stop bothering her if she came to his house and gave him a foot massage
- He promised "road training"
- Allegedly grabbed her, pulled her on top of him, and tried to kiss her. She escaped and ran out
- Kramer did not report - feared demotion, as Benson was her supervisor



Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Benson agreed to take Kramer for road training in his patrol car
- Instead, **he sexually assaulted her** – twice in the patrol car
- Told her: "Don't act weird. Don't act weird on me"
- Benson became retaliatory and controlling
 - Denied leave requests
 - Monitored her to see where she went after work
 - Messaged or called her if she did not go straight home

AMARON
BENJ. C.
LITWACK

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Kramer also cleaned houses on the side for extra money
- She declined to clean Benson's house
- Benson told coworkers that Kramer thought she was "too good" to clean his house and got coworkers to harass her to clean his house
- Kramer agreed to clean if her kids and his daughter were home
- When kids were outside playing, **Benson allegedly raped Kramer**
 - Benson: "This is wrong. I can't believe you made me do this."
 - "You better be quiet about this and not say anything. This is a career ender."
- Threatened her with a bad performance review and said, "keep [your] mouth shut and not say anything and you'll be taken care of"
- Assigned her an undesirable job and accused her of stealing money

AMARON
BENJ. C.
LITWACK

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014)

- Final alleged sexual assault: Benson on medical leave and convinced Kramer to come to his house.
- He grabbed her, exposed his penis, and pulled her on top of him
- Shortly after, Kramer confided in several court clerks that Benson had raped and sexually assaulted her
- Consented to one of the clerks reporting it
- Sheriff assigned Detective Brian Garner to investigate **"possible sexual misconduct"** between Benson and Kramer
- Why Garner: **"the unfortunate guy that was on-duty on that particular day"** to investigate
- Was Garner the right guy to investigate?

AMARON
BENJ. C.
LITWACK

Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014): The Investigation

- Detective Garner:
 - Not a human resource professional
 - Not trained in conducting sexual harassment investigations
 - Was not aware of and did not look at County procedure for sexual harassment investigations
 - **Friend of Benson's for over 10 years; viewed Benson as a "mentor"**
- Investigation Focus:
 - Kramer was having an affair with another County employee and was pregnant
 - Who was father? Had they had sex while on-duty? Where and when?
 - Threatened Kramer that nobody would believe her allegations of rape if she did not disclose the identity of the father of her baby
 - Encouraged Kramer to resign



Kramer v. Wasatch County Sheriff's Office (10th Cir. 2014): The Investigation

- Transferred investigation to Detective Hull, a state investigator in charge of the stolen money investigations
 - **Detective Hull interviewed Kramer about Benson's sexual assaults – that's it! Nobody else**
- Sheriff reported Kramer to POST (Peace Officer Standards and Training) because she had an affair with another employee
 - **Her certifications were suspended because they had sex while her paramour (but not her) was on duty**
 - Sheriff wanted Kramer to resign to "protect" the other employee and the Sheriff's Dept.
- Kramer resigned and brought lawsuit
- District Court granted summary judgment to County



Kramer v. Wasatch County Sheriff's Office, (10th Cir. 2014)

- Appeals Court reversed, finding investigation was inadequate:
 - Investigator was neither competent nor impartial
 - Did not explore Kramer's allegations
 - Did not investigate prior complaints that Benson had sexual relations with confidential informants
 - Did not investigate prior complaints from other female court employees that Benson had intimidated them
 - **"There is no legitimate, nondiscriminatory reason for forcing Ms. Kramer into choosing whether to in effect retract her allegations of sexual harassment and rape or else disclose the father of her baby."**



Kramer v. Wasatch County Sheriff's Office
(10th Cir. 2014)

TAKEAWAYS

- Choose a trained, competent, and unbiased investigator
- Investigate the allegations – all of them
- Scope the investigation appropriately – interview more people than just the complainant
- Do not side-track the investigation at hand with other issues
- Do not threaten or unfairly punish the complainant



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Investigations: Lessons From The Trenches

Investigations Done Wrong
Case #4
(Susan)



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Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Monica Gray was a longtime State Farm employee who worked on a team managed by Chris Martin.
- Gray was friends with another State Farm employee Sonya Mauter who worked on a different team managed by Joe Kyle.
- Mauter had an ADA accommodation that exempted her from overtime work.
- In August 2017, Kyle told Mauter that State Farm would no longer accommodate her work schedule and that if she did not agree to work overtime that she could eventually be terminated.
- Mauter asked to use her FMLA leave but Kyle falsely told her that she had none left.



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Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Mauter asked Gray to help her with the situation. Gray agreed to help and took the following actions:
 - Researched ADA law and State Farm policies
 - Contacted human resources for information
 - Lodged an internal complaint against Kyle
 - Coached Mauter how to advocate for herself
 - Advised Mauter to seek legal counsel and file an EEOC charge – which Mauter did
- Mauter repeatedly informed Kyle that Gray was assisting her

AMERICAN
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LITMUS

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Kyle responded by intensifying his scrutiny of Mauter and issued her a warning for discussing accommodations with colleagues, threatening her with “action up to and including termination.”
- Mauter’s lawyer sent State Farm a letter alleging that Kyle engaged in illegal retaliation.
- State Farm investigated Mauter’s claim and transferred her to another team.
- In November 2017, Gray’s supervisor Martin went on vacation and Kyle filled in for him.

AMERICAN
PEOPLE'S
LITMUS

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- State Farm policy required employees to closely adhere to their scheduled shifts and allotted meal breaks and to track their time to the minute.
- However, Martin was relaxed about this policy and did not monitor or verify his employee’s timesheets and at least some members of his team rounded time rather than reporting it to the minute.
- While filling in for Martin, Kyle pored over Gray’s timesheet and compared it to her computer activity. Kyle found three instances where Gray reported time while logged off her computer.

AMERICAN
PEOPLE'S
LITMUS

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Kyle reported this issue to Martin's direct supervisor Denise Hensley. Hensley told Kyle to report the issue to HR in accordance with State Farm policy.
- Kyle reported to HR that
 - "Gray had manually adjusted her time to hide long lunches and early departures," falsely claimed that Gray had been coached for such behaviors, and suggested that HR would find more discrepancies if it investigated Gary's records.
- HR launched an investigation and found more errors, including seven instances when Gray reported returning from lunch before she had re-entered the building.

ANSWER PEOPLE'S LITMUS

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

What did State Farm do right regarding their investigation?
What could State Farm have done better?

- Martin and HR interviewed Gray about these discrepancies
- Gray denied wrongdoing and insisted that Kyle had targeted her for helping Mauter secure an accommodation
- Gray also claimed the timing was suspicious and asked if State Farm was reviewing other employee's timesheets
- HR reported Gray's retaliation claim to Hensley (Martin's Supervisor) but State Farm did not pursue the issue further
- A little over a week later, State Farm terminated Gray for falsifying time sheets

ANSWER PEOPLE'S LITMUS

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Gray sued State Farm alleging **retaliation** under the ADA
- The district court granted summary judgment in favor of State Farm holding that Gray could not prove pretext because State Farm had an "honest belief" that Gray falsified her time and fired her for that reason. Gray appealed
- Sixth Circuit **reversed** holding that State Farm could potentially be held liable under a "Catspaw" theory, *i.e.*, State Farm could be liable for Kyle's actions if he had an improper retaliatory motive and manipulated State Farm into firing Gray

ANSWER PEOPLE'S LITMUS

Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

- Kyle selectively reported her to HR, and that his report led State Farm to investigate and terminate her. **What's more, Gray alerted State Farm to potential retaliation, but State Farm failed to take her allegation seriously.** Gray told [State Farm] that Kyle targeted her because she had helped Mauter with her accommodation. And **she identified specific colleagues who also rounded their time entries but were not reported.** Yet **State Farm made no effort** to determine whether Kyle had singled Gray out for retaliatory reasons. From these factual allegations, a jury could conclude that State Farm acted as a quintessential 'conduit' of Kyle's bias."



Gray v. State Farm Auto. Mutual Ins. Co.
159 F. 4th 1024 (6th Cir. 2025)

TAKEAWAYS

- Don't ignore claims of retaliation – investigate!
- Ensure that similar claims are reported and investigated in the same manner



Investigations: Lessons From The Trenches

Investigations Done Wrong
Case # 5
(Christina)



Brenyah V. Columbia Hospital Corp. of Bay Area
181 F. 4th 609 (5th Circuit)

- In March 2017, Brenda Brenyah, a black woman and naturalized citizen of Ghana, began working as nurse at a Bay Area Hospital
- Brenyah was subject to a 90-day probation period after she was hired
- In April 2017, Brenyah alleged that several nurses in her unit began discriminating against her and other black nurses including Lawrence Dike
- Brenyah alleged that "among other things, Hispanic nurses mocked her and Dike's African food and accents, made unflattering comments about black employees, and expressed a preference for Filipino employees."
- Brenyah alleged that these "incidents occurred frequently, sometimes almost every shift, which offended her and impaired her work."



Brenyah V. Columbia Hospital Corp. of Bay Area
181 F. 4th 609

- Brennah reported these incidents to Jason Sewell, Director of Patient Care, and Vince Goodwine, the Human Resources Vice President
- Sewell and Goodwine investigated the claims by interviewing employees on the unit and coaching the nurses who had made the allegedly discrimination comments
- Sewell and Goodwine met with Brenyah a month later to share their findings.
- They offered to transfer Brenyah to another department, but she declined.
- Brenyah complained about the harassment again and alleged she was retaliated against by being issued informal "coaching" sessions, formal disciplinary proceedings, and an extension of "her probation, citing poor time management and patient issues."



Brenyah V. Columbia Hospital Corp. of Bay Area
181 F. 4th 609

- Brenyah eventually sued the hospital alleging a hostile work environment
- The district court granted summary judgment to the hospital and Brenyah appealed
- The Fifth Circuit reversing explaining that "[w]hen an employer, once informed of alleged harassment takes prompt remedial action to protect the claimant it may avoid liability. Prompt remedial action must be reasonably calculated to end the harassment.
- An employer **that takes the allegations seriously, conducts prompt and thorough investigations and immediately implements remedial and disciplinary measures based on the results of such investigations satisfies this prong."**



Brenyah V. Columbia Hospital Corp. of Bay Area
181 F. 4th 609

- The hospital's "investigation was not prompt, thorough, or transparent"
- Discrepancies in Sewell and Goodwine's testimony about the investigation and interview records
- The hospital did not produce an investigation file or notes in discovery despite Goodwine stating in his deposition that "there was an investigation file" and he "most definitely took interview notes."
- A black employee on the unit was not interviewed despite Goodwine testifying to the contrary
- Statements corroborating Brenyah and Dyke's allegations were left out of the investigation summary
- Contrary to the usual practice, Brenyah and Dyke's were not allowed to review or sign their statements
- Contrary to the usual practice, no interview statements were created



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Brenyah V. Columbia Hospital Corp. of Bay Area
181 F. 4th 609

- The Fifth Circuit also found that the hospital did not take prompt remedial and disciplinary measures to correct the harassment because Sewell and Goodwine told Brenyah that "the cliques were not going anywhere" and that harassing behavior continued after the investigation.



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Brenyah V. Columbia Hospital Corp. of Bay Area
181 F. 4th 609

TAKEAWAYS

- Investigations should be conducted according to established policies and procedures that are followed in every case.
- If an investigation discovers evidence of harassment prompt remedial and disciplinary measures should be undertaken.



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Investigations: Lessons From The Trenches

Cautionary Tale: Investigation Done Wrong Leads to Secondary Case for Malicious Prosecution

Case #6

(Susan)



Cautionary Tale: Bungled Investigation

Cole v. Skin RN Aesthetics, LLC (Tenn. Ct. of App 2023)

- Plaintiff was registered nurse aesthetician caught up in botched investigation
- Medical spa owner had been tracking missing supplies for several months and suspected RN was the thief
- Discovered **two vials of Botox missing (50 and 100 units)** and went to search the nurse's purse
- Purse was allegedly hanging open enough for the owners to see the vials; upon search of purse, owner found additional supplies



Cautionary Tale: Bungled Investigation

- The owner took pictures of the purse contents and called the police
- The RN was in with a walk-in patient; after the visit, she was called to the office where the police were waiting
- The police handcuffed her and searched her purse and her car, where more supplies were found
- Employee said she had planned on holding an off-site Botox party with her mom; claimed the other supplies were hers from an employee gift bag or her former place of employment
- Spa owner claimed she had video proof; employee confessed and was arrested



Cautionary Tale: Bungled Investigation

- Employee was indicted for the theft, but was acquitted at trial
- Employee then sued medical spa and owner for malicious prosecution; owner and spa countersued for value of missing product
- At trial, the spa owner admitted she lied about having video proof
- Only proof at trial was two vials in the employee's purse and a spreadsheet tracking the stolen items
- Jury found in favor of employee and awarded her \$325,000 in compensatory damages; appellate court affirmed



Cautionary Tale: Bungled Investigation

WHAT DID THE SPA OWNER DO WRONG?

- Jumped to conclusions about the thief without further investigation
- Made accusations about the missing inventory without proof
 - All employees had access to the products for business and personal use
- Used coercive tactics to obtain a confession (lied about the video)
- Continuing criminal proceedings even after there was no probable cause (which she tried to overcome by lying about having a video)



To download a PDF handbook of today's seminar, including presentations and materials, please scan the QR code or visit parsonsbehle.com/idaho-seminar



Thank you for attending



Thank You



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14th Annual Idaho Employment Law Seminar

Threading the Needle: How to Find the Middle Ground and Avoid Tricky Employment Law Traps

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Sept. 22, 2026 | Boise Centre East

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As an HR Professional, do you ever feel like . . .

The Oregon Trail



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Everything starts out fine . . .

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AMONG
THE
LIFE

. . . Until it's not!

55

AMONG
THE
LIFE

Can I play Oregon Trail on my
phone?

What month should I leave in
The Oregon Trail game?

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We're here to help.



Threading the Needle: DEI



In the sphere of DEI:

- What does the law allow?
- What do leaders and stakeholders—and employees—expect?
- How can you develop policies and practices that support a fair and inclusive workplace?
- We'll explore these questions through lessons learned from two cases: *Dill v. IBM* and *Washington v. IBM*.



Dill v. IBM (W.D. Michigan March 26, 2025)

- Randall Dill worked as a consultant for IBM.
- For seven years, his reviews were stellar.
- Then, Randall was put on a performance improvement plan . . .
- Eventually, Randall's employment was terminated.



AMERICAN
PEOPLE'S
LITMUS
TEST

Dill continued . . .

Reuters

IBM must face white worker's lawsuit over diversity goals

By David Mervin

March 12, 2025 4:11 PM EDT Updated 4 days ago



- Randall sued for **race and gender discrimination**.
- He said IBM implemented a policy that incentivized management to **terminate white male employees** and seek a higher percentage of minorities and women in the workplace.

AMERICAN
PEOPLE'S
LITMUS
TEST

Dill continued . . .

- IBM moved to dismiss the complaint.
- The court denied that motion, noting these allegations:
 - IBM's policy provided a **bonus multiplier** for managers hiring diverse candidates.
 - IBM's CEO stated "**specific quotas**" for **minority and female employees** at a company meeting, and IBM Annual Reports listed specific representation goals.
 - The PIP tasked Dill with **wholly new tasks**, and therefore could have been pretextual.

AMERICAN
PEOPLE'S
LITMUS
TEST

Lessons from *Dill*

- The court listed the following ways to analyze “whether a diversity policy goes beyond mere aspirational goals” and violates Title VII:
 - Does the policy define **specific quotas** based on protected classes?
 - Does the policy “refer[] to any **caste system** designating a hierarchical preference for certain racial groups over others”?
 - Does the policy provide specific **plans for how to achieve diversity goals**?
 - Does the policy place managers under pressure to increase minority representation in the workplace (by, e.g., **compensating them** to do so)?



Washington v. IBM (D. Maryland – filed Oct. 2025)

- Zena Washington worked for IBM for 26 years.
- She alleges that she received positive performance reviews and was in a program designed to prepare employees for senior executive management-level positions.
- Then, Washington was terminated:

Plaintiff is an African American woman and former executive employee of Defendant, who lives in Maryland, and worked in Maryland and Massachusetts. On or about February 28, 2025, Plaintiff was terminated from her employment, ostensibly as part of a corporate reorganization. Plaintiff herein alleges that she was selected for termination, and not offered alternate placement with Defendant because of her race, African American. Herein, Plaintiff asserts that she is a member of a protected class, that she suffered an adverse employment action, and there is substantial evidence that establishes that the reason Defendant has given for her termination is not credible, and is pretext for racial discrimination.



Washington continued . . .

33. During a regularly scheduled question session held by IBM's CEO Arvind Krishna (hereinafter “Mr. Krishna”), when asked about IBM's posture with respect to the Trump administration's directives on DEI, Mr. Krishna stated “of course we will comply,” or words to the effect.

34. While IBM has made no other public statements about abandoning DEI, shortly after the inauguration of the Trump administration, and the dissemination of Executive Orders on reversing DEI efforts, an inexplicable exodus of Black senior executives occurred at IBM, which included Ms. Washington.

35. Plaintiff asserts that in order to appease the Trump administration, and to remain favored by the Department of War and other government agencies with large IBM contracts, Defendant removed several high profile African American employees, despite the fact that there was no performance-based reason to terminate their employment.



Washington continued . . .

- Washington's allegations include that IBM discriminated against her because of her race to **placate the Trump administration's hostility toward DEI**.
 - It's the same CEO!
- In late March, IBM filed a motion to dismiss.
- The motion to dismiss raises only **statute of limitations** arguments.

16a



What now?

IBM to pay \$17 million to settle US government probe over DEI

By Karishma Singh

April 10, 2024 3:21 PM EDT | Updated April 10, 2024



The logo of IBM, which is being used as a symbol of corporate diversity and inclusion, is shown on a laptop screen. The logo is a blue and white striped design.

17a



What employers should do:

- Review existing materials and programs to ensure legal compliance.
- Think about messaging—especially **public-facing materials**, which may create the highest legal risk.
- Think outside the box: The DEI acronym is under attack. Consider alternatives words to “diversity” and “equity” like fairness, belonging, respect, and tolerance.

SHRM

[Companies Are Dropping the D or E From DEI to Avoid Criticism](#)

Companies such as Toyota and Ford have modified DEI initiatives after being attacked. EQUALITY, October 28, 2024 at 7:10 AM EDT.

18



Harvard Business Review Tips

Diversity and Inclusion

The Legal Landscape Around DEI Is Shifting. Your Messaging Should, Too.

by Kentj Yoshino, David Glasgow and Christina Joseph



“DEI communications create legal risk when a statement suggests that the organization engages in what we call the ‘three Ps’ by conferring a **preference** on a **protected group** with respect to a **palpable benefit**.”

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What about affinity groups?

- Make sure affinity groups are inclusionary, not exclusionary.
- Watch out for benefits or training available *only* to members of certain protected classes . . .
 - In *Muldrow v. City of St. Louis*, a 2024 SCOTUS decision, the Supreme Court lowered the standard for “adverse action” for employment discrimination claims under Title VII discrimination from “material” or “significant” harm to “some harm.”

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Threading the Needle: Remote Work as an Accommodation

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When it comes to ADA accommodations:

- What does the law require?
- What have employees come to expect?
- How can you decide whether (and when) to grant remote work as an accommodation?
- We'll explore these questions through two cases: *Russo v. National Grid, USA* and *Jones v. Fairfax County School Board*.

20a



Russo v. National Grid, USA (E.D.N.Y., 2025)

- National Grid is an electrical utility provider in the Northeastern United States.
- The plaintiffs, emergency crew dispatchers, were allowed to work remotely during the COVID-19 pandemic. Their jobs are all done by computer and phone



21



Russo continued . . .

- As National Grid transitioned workers to a hybrid work schedule, the plaintiffs were **initially allowed to continue to work remotely**.
 - One employee had a back injury, diabetes, and a gastrointestinal condition;
 - The other employee had back and hip injuries and an anxiety disorder.
- In June 2022, National Grid said it **could no longer accommodate** the plaintiffs working from home because of the “**nature of their jobs.**”

20a



Russo continued . . .

- Plaintiffs sued under the Americans with Disabilities Act (ADA), claiming National Grid **failed to explain why their remote work requests could not be fulfilled**.
- A New York jury agreed and awarded the two plaintiffs **\$3.1 million dollars**.
- These were the same duties that the employees had been performing remotely during the pandemic . . . when it was convenient (or necessary) for the employer to allow them to do so.



Lessons from Russo

- If you have granted remote work before, you may have to again.
- It's critical to have **job descriptions** before an accommodation request is made which **specifically and reasonably explain** why working in person is **an essential function of a particular job**.
 - Consider if in-person work is required to perform well at work
- Large companies should conduct individualized assessments, rather than blanket denials



Lesson From Russo: When Dealing with the ADA, Think About if In-Person Work is Just Employer Preference



More lessons from Russo

- After the jury came back with its verdict, the plaintiffs' lawyer said:
"Employers, mainly large ones, do view disabled workers as a group seeking privilege, just like [National Grid's] lawyer said. They better look at this verdict and think twice."
- National Grid's takeaway from the case? Get a new lawyer!



Jones v. Fairfax County School Board (Fourth Circuit, 2025)

- Donna Jones worked as a resource teacher for an elementary school. Her job duties included **administering tests to students and co-teaching lessons**.
- In 2022, she developed a lung condition and took two leaves of absence for surgeries.
- But she **wanted to work remotely**, instead of taking leave. (Remember, employees are not entitled to the accommodation of their choosing under the ADA.)
- The school **denied her request**.



Jones continued . . .

- Jones then sued the School Board on the grounds that the School Board failed to accommodate.
- In response, on summary judgment, the School Board said she had to be **in-person to perform some of the essential functions of the job** – administering tests, co-teaching.
- And the District Court agreed.



Jones continued . . .

- Fourth Circuit Court of Appeals affirmed.
 - Essential functions of job are to test and co-teach (these require **in-person** interaction).
 - Jones **admitted** that she not could not perform such functions while teleworking.
 - A request for accommodation which enables the employee to perform **some, but not all**, of her essential functions while recovering from a short-term disability is **not reasonable**.
 - An employer is **not obligated** under the ADA to **reallocate** the disabled employee's essential functions to other employees.
 - A request to reallocate or modify essential job functions would not constitute a reasonable accommodation.



What employers should do:

- Think about and revise job descriptions
- Consider how a jury will evaluate the nature and type of job
 - Is it a job juries are knowledgeable about?
 - Is it a job jurors will feel strongly about?
- Consider if in-person attendance is critical *regardless* of job descriptions



Threading the Needle: Conducting an Employment Investigation



Conducting an Employment Investigation:

- What does the law require?
- Should different investigations be handled differently?
- How can you make investigations both efficient and thorough?
- We'll explore these questions through two cases: *Gray v. State Farm* and *Welch v. Heart Truss*.

3/4



Gray v. State Farm (Sixth Circuit, 2025)

- Monica Gray—a longtime State Farm employee—was friends with a co-worker named Sonya Mauter. Mauter needed an ADA accommodation, and Gray helped her navigate that process.
- Mauter's supervisor was named Joe Kyle. Kyle had pressured Mauter to go without the accommodation and told Mauter—wrongly—that she had no FMLA leave to take.
- Gray's more-relaxed supervisor had always taken a casual approach to timecards. But when that supervisor took a short vacation, Kyle saw his opportunity and stepped in as Gray's substitute boss.

3/4



Gray continued . . .

- Kyle was a . . . less relaxed boss. While subbing for Martin, he "pored over" Gray's records and found several irregularities. He reported those irregularities to HR.
- HR found additional inaccuracies. Eventually, Gray was interviewed by HR, and when she learned of the investigation and of Kyle's involvement, she claimed she was being targeted for helping Mauter secure leave.
- She asked, specifically, whether others were being investigated. That should have prompted a retaliation investigation.
 - HR . . . did **not** investigate.

3/4



Gray continued . . .

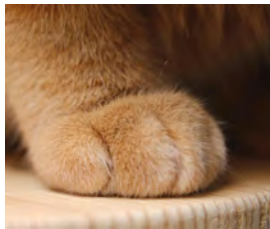
- State Farm fired Gray and Gray sued. Despite Kyle's role, the district court granted summary judgment, relying on State Farm's "honest belief" that Gray had committed misconduct.
- On appeal, a sharply divided Sixth Circuit reversed, in part because it found that Kyle had reported "true but selective information" and that State Farm had leaned on Kyle's "biased report" in *starting* the investigation.

31a



Lessons from Gray

- When the investigated employee speaks, **listen**.
- Just say **no** to disparate treatment.
- Read the room.
- When preparing investigation reports, identify **all** misconduct discovered.



31a



Welch v. Heart Truss (Sixth Circuit, 2025)

- Daniel Welch worked for Heart as a driver.
- Drivers are required to climb onto the bed of their truck to unload trusses – though only to secure straps, a crane does the unloading.
- In 2017, Welch fell off a load and injured his knee.
- In 2019, he aggravated the injury and filed a work comp claim.
- In 2020, he injured his ankle.

31a



Welch continued . . .

- When his boss, Bryan Johnson, asked him about his limp, Welch said that Heart Truss had “screwed him” on his knee claim and that it hurt to climb loads with three tears in his meniscus.
 - Welch added, “One day, coming soon, I’ll be unable to do my job at all, *then we’ll see what happens.*”
- After hearing this, plant Manager, Tom Gustafson reassigned Welch to the factory production line where he didn’t have to unload trusses, but **he also earned less.**



AMERICAN PEOPLE'S LETTERS

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Welch continued . . .

- Shortly thereafter, graffiti started appearing on trusses shipped to customers.
- Graffiti included smiley faces with devil horns and circles with dots, which caused one customer to call Heart Truss and ask whether the company considered it “appropriate to send products to their home to sit in their front yard with a pair of boobs on the front.”
- Gustafson did not and determined he’d fire whoever was responsible.

AMERICAN PEOPLE'S LETTERS

©12

Welch continued . . .

- Gustafson approached shift manager Tim Oberlin to see whether one of his workers was the artist.
- Welch overheard Oberlin asking a co-worker about the graffiti and allegedly said, “I did it.” He then downplayed it by saying, “What’s it hurting?”
- In the eventual litigation, the co-worker corroborated Oberlin’s story, but Welch denied having confessed.

AMERICAN PEOPLE'S LETTERS

©12

Welch continued . . .

- Gustafson informed his boss that Welch would be terminated for violating a shop rule, which prohibited defacement of company property.
- Before he could be fired, *and on the same day*, Welch claimed to experience another injury, this time to his right knee. Gustafson arranged transport to the workers compensation clinic where Welch was released to return to work. Welch was then fired.
- Welch sued for ADA discrimination and retaliation.

©14



Welch continued . . .

- Heart Truss argued that it fired Welch based on the *honest belief* that Welch had defaced the trusses.
- Welch took issue with the investigation, saying Gustafson did not:
 - Interview other witnesses; or
 - Cross reference the graffitied job numbers with Welch's assigned loads.
- The court sided with **Heart Truss**.

©14



Welch continued . . .

- "...the honest belief rule does not require an 'optimal' investigation that 'left no stone unturned.' . . . Rather, we ask only if Gustafson's decision was '**reasonably informed and considered**.' And here, we agree that it was, given that Welch has produced **no evidence that Gustafson had reason to disbelieve** Oberlin's report."



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Welch continued (or extrapolated) . . .

In other words, be “good enough.”

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What employers should do:

▪ **Conduct investigations you can honestly believe in.**

- Promptly document complaints and allegations.
- Interview relevant witnesses (including the accused).
- Preserve records of the decision-making process.
- Avoid rubber-stamping a supervisor’s version; verify it.
- Ensure the decision-maker doesn’t have any bias or axe to grind.
- If someone raises a concern about retaliation, investigate!

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Threading the Needle: Complaints

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When it comes to employee complaints:

- What kind of complaint should you investigate?
 - Spoiler alert: all good-faith complaints!
- What kinds of complaints are *specific enough* to trigger potential retaliation claims?
- How do you distinguish between an employee airing workplace frustrations and an employee raising potential discrimination, harassment, or retaliation concerns?
- Let's look at two cases: *Bajaj v. Turner* and *Russell v. Warmuth*.

10

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LITMUS

Bajaj v. Turner (D. Columbia, April 2025)

- Bajaj worked for the U.S. Department of Housing and Urban Development (HUD).
- At deposition, Bajaj testified that her problems at HUD began just a few months after she started, when she was "forced . . . to work with stalkers and bullies."
- At deposition, Bajaj also testified to those stalking and bullying behaviors.
- By way of example, she said one coworker followed her around everywhere she went, another coworker teased her about her grammar, another coworker made rude hand gestures, another coworker "was a business guy who didn't know anything," many coworkers walked past her office, and dealing with this gave her headaches, . . . etc.
- She also said one coworker compared and ranked people based on race and gender.

11

AMONG
PEOPLE
LITMUS

Bajaj continued . . .

- But while employed, she sent her boss an email complaint that read:

Kevin,

I tried to talk to you many times but every time you had some excuse and we never talked. You removed Samungala and Kabir (which George didn't want) and that didn't fix the problem and you thought it will go away.

You are insecure. You didn't even ask me why did I say to Eric that he is unprofessional? You started almost screaming at me in your email that I am petty and unprofessional without knowing what happened? Even included him in the email, Wow!! [A Person who comes to my cubicle, yells, screams, curses, intimidates is not unprofessional, right?]

I feel so helpless. I feel I am going through Mobbing. What that means is bullying of me by a group.

Eric's problem also started because of Shyni. I will never say anything without evidence.

The way you have started insulting/bullying/harassing me in front of the person I am talking about is proof enough that you encourage such hidden behavior and really know how to insult people and make them sick.

You have created a very stressful, insecure and unpleasant environment for me. The atmosphere you have created for me is very unhealthy.

You have become a threat for me. Your name also frightens me. You are not even a threat to be considered a risk for you. But you thought is also disgusting. You discriminate me all the time. You are being hostile towards me for no reason.

I had to take it out so that you know how your behavior makes me feel.

12

AMONG
PEOPLE
LITMUS

Bajaj continued . . .

- She later resigned and sued for race, sex, national origin, and age discrimination; failure to accommodate; hostile work environment; constructive discharge; and retaliation.
- HUD moved for summary judgment—here we will focus on the retaliation claim.



AMONG PEOPLE LITIGATE

Bajaj continued . . .

- The court granted the motion on the retaliation claim.
- Why? Just because her email said “discriminate” and “hostile” does not mean she was engaging in protected opposition.
- As the court noted, “nothing in the email identifies the allegedly discriminatory practice, nor does it identify the allegedly discriminatory classification or status.”
- “. . . the email reflects Bajaj’s general frustration with her workplace, her belief that she was being bullied, and her annoyance that Evans had failed to credit, or to take sufficient action with respect to, her complaints about Krapf and Dennis.”

AMONG PEOPLE LITIGATE

Lessons from Bajaj

11 To be sure, an employee need not cite to a particular statute or set forth a detailed complaint to satisfy the first element of a retaliation claim, and each retaliation claim must be evaluated based on the particular context and circumstances. Mere use of the word “discriminate” might suffice in some circumstances. If a male employee objected to a leave policy that applied only to new mothers, for example, it might be enough simply to assert that the policy “discriminates.” *Cf. Savignac v. Day*, 754 F. Supp. 3d 135, 174–177 (D.D.C. 2024). But, here, nothing in the email identifies the allegedly discriminatory practice, nor does it identify the allegedly discriminatory classification or status. To the contrary, read in context and without any reference to any protected classification or status, the email seems merely to complain that Evans has favored Krapf, Dennis, and others over Bajaj, believing what they say as opposed to crediting Bajaj’s version of events. But regardless of what Bajaj may—or may not—have meant, her email fails to identify a practice made unlawful¹¹⁸² by Title VII, the ADEA, or the Rehabilitation Act and, instead, focuses on office politics, unconnected to any protected classification.

AMONG PEOPLE LITIGATE

Russell v. Wormuth (D. Kansas, Nov. 2024)

- Russell worked as a readiness manager in the logistics division of Irwin Army Community Hospital.
- His supervisor, MAJ Tamara Tran, openly complained that there were “no other women in supervisory positions,” assigned “gender-specific readings to discuss at . . . meetings,” and segregated meetings to discuss issues with men and women separately. She also assigned a female employee to replace her when she left on parental leave.
- Russell spoke with COL Sexton—a different supervisor—about MAJ Tran’s gender-segregated meetings and various “communication shortcomings.”

AMERICAN
PEOPLE
LITMUSE

Russell continued . . .

- Russell later testified that he didn’t “specifically stat[e] there’s a complaint” to COL Sexton.
- He testified that he said:
 - “there was a lack of communication between us”
 - “about the different meetings, types of meetings . . . [t]he male and female supervisors . . . [t]he meetings were counterproductive”
 - that splitting the Logistics Division up into male and female led to a “lack of communication” that was “counterproductive.”
 - that “it could lead to harassment” and was “inappropriate”
- He testified he did “not in those words” state that the behavior was harassing or discriminatory.

5/25

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PEOPLE
LITMUSE

Russell continued . . .

- Hospital moved for summary judgment arguing that Russell did not raise a complaint.
- Court did not grant summary judgment.
 - Plaintiff’s emphasis on counterproductivity and communication shortcomings parallel the “general complaints of workplace hostility” our Circuit [finds] insufficient as a report of discrimination . . . but a reasonable jury could conclude that plaintiff’s use of the word “inappropriate,” coupled with the context of his complaints about the gender-segregated meetings, gender-specific book assignments, and MAJ Tran’s comments about no females in leadership, congealed to constitute a discrimination report.

5/26

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LITMUSE

What employers should do:

- Review and investigate employee concerns—even if they are about general workplace hostility.
- Pay specific attention to complaints that name protected classes or highlight treatment based on or motivated by protected status.
- Think about potential retaliation claims . . . no set magic words are required.



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Thank you for attending



Thank You



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14th Annual Idaho Employment Law Seminar

“Don’t Be the Test Case” -- Developments in Accommodation Requirements Under the ADA, Title VII and the PWFA

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ADA Accommodation – the Basics

- The Americans with Disabilities Act requires reasonable accommodations as they relate to three aspects of employment: (1) ensuring equal opportunity in the application process; (2) enabling a qualified individual with a disability to perform the essential functions of a job; and (3) making it possible for an employee with a disability to enjoy equal benefits and privileges of employment
- It does not have to be the employee’s preferred accommodation
- The employer is required to engage with the employee to find a **reasonable** accommodation that allows the employee to perform the essential functions of the job and does not constitute an **undue hardship** on the employer

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ADA Accommodation – the Basics

- An accommodation is not required if it will cause the employer an "undue hardship"
- A showing of undue hardship requires more than generalized conclusions
- Undue hardship must be based on an individualized assessment of current circumstances that show that a specific accommodation would cause **significant difficulty or expense**



ADA Accommodation – the Basics

- Undue hardship focuses on the **resources** and circumstances of the particular employer in relationship to the **cost or difficulty** of providing a specific accommodation
- Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business
- Decided on a case by case basis
- Put yourself on the jury – a bunch of people who hate their boss – would they think the accommodation as unreasonable or an undue burden



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- Angel Tudor was a school teacher with a long **history of post-traumatic stress disorder (PTSD)** and anxiety that allegedly arose from sexual harassment and assault at a former workplace
- Tudor asserted that her disability caused problems with neurological function, a stutter, severe nightmares and impaired ability to perform daily tasks
- She claimed that the workplace was a trigger for her symptoms and had **sought and received an accommodation** allowing her to **leave the school's campus during her prep periods, twice a day, once in the morning for 15 minutes and once in the afternoon for 15 minutes**
- Tudor would use this off-campus time to collect herself and manage her symptoms



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- After a **change** in **school administration**, teachers were **prohibited from leaving campus during prep periods**
- Tudor **did so anyway** and was **disciplined for insubordination**
- After a period of FMLA leave, the school allowed Tudor one morning break off-campus and an additional break in the afternoon—provided that a librarian could cover her absence



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- Eventually, Tudor's **schedule changed** to include a morning prep period and an afternoon study hall, but **no other employee was available to cover** her afternoon study hall during her 15-minute break away from school.
- Tudor **took the breaks anyway** but said that knowing she was violating school policy worsened her anxiety
- She **brought suit** against the school district under the ADA for **failure to accommodate** her disability



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- During the discovery phase of the case, Tudor **admitted that she was able to perform the essential functions of her job regardless of whether she received an accommodation**, although "under great distress and harm"
- The District filed a **motion for summary judgment**, arguing that Tudor's ability to do her job without accommodation was fatal to her failure to accommodate claim
- The district court agreed and **granted the school district's motion**



What if the Accommodation is Not Necessary to Perform the Job?

- *Tudor v. Whitehall Central School District*
- On appeal, the Second Circuit disagreed, holding: "A straightforward reading of the ADA confirms that **an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation. Ability to perform the essential functions of the job is relevant to a failure-to-accommodate claim, but it is not dispositive**"
- The court noted that other circuit courts had arrived at the same conclusion (including the Ninth Circuit, which has jurisdiction over Idaho)



What if the Accommodation is Not Necessary to Perform the Job?

- Takeaways:
 - Employers are faced with the question – If an accommodation is not necessary to perform the essential functions of the job, how can you determine whether an employee is entitled to it
 - This decision suggests that the **reasonableness** of the requested accommodation is the most important factor in determining whether it must be provided
 - Employers should still prepare job descriptions for every position (even though necessity may become a secondary factor in the reasonableness analysis)
 - You want to be able to argue that "x" or "y" is an essential function of the job and if an employee can't perform the essential function with accommodation, they can be let go



ADA Accommodation – Our Old Friend, Work from Home

- On February 11, 2026, the EEOC and the Office of Personnel Management (OPM) published a guidance document entitled *Frequently Asked Questions from the Federal Sector about Telework Accommodations for Disabilities* (the Guidance)
- The Guidance was created specifically for federal employers to help them comply with the Americans with Disabilities Act (ADA) and Rehabilitation Act as they implement President Trump's directive for all federal workers to return to the office full time
- Although the Guidance was prepared with federal sector employers in mind, it nevertheless provides useful reminders for private sector employers grappling with return-to-office mandates



ADA Accommodation – Our Old Friend, Work from Home

- For example, the EEOC emphasizes the need for an individualized assessment for each employee who has requested or received a telework accommodation, rather than a "blanket approach"
 - An employer's reasonable accommodation obligations are highly fact-specific; what is required or effective for one employee with a disability may not be the same for another. Observing this, the EEOC urges federal employers to take the time needed to address each employee's situation individually.
- Relatedly, the Guidance speaks to the role of medical documentation in the interactive process, and what can be asked of the employee's health care provider
- It further advises that an employer need not ignore evidence contradicting an employee's claimed need for accommodation, but "should take care to base its decisions on the best available evidence. An agency should give due weight to contradictory evidence that is reliable. And it should discount contradictory evidence that is not reliable"
- The Guidance cautions, however, that "this is not a license to engage in fishing expeditions to undermine an employee's request for accommodation"



ADA Accommodation – Our Old Friend, Work from Home

- The Guidance allows for previously-issued telework accommodations to be continued, modified or rescinded based on the facts involved
- It also recommends periodically revisiting a telework accommodation to ensure that it is still effective or required, explaining that "reevaluation and modification of a reasonable accommodation are important steps in the interactive process"
- Accommodations may also be reevaluated when material changes occur, such as "a change in the employee's condition, a change in job requirements, a change in operational needs, a change in law, etc."



ADA Accommodation – Our Old Friend, Work from Home

- Finally, the Guidance addresses a few questions that will be familiar: What if an employee claims that in-person work causes them anxiety? What if they say their disability prevents them from making a lengthy or difficult commute?
- On the first question, the EEOC says that the law does not "create a general right to be free from all discomfort and stress in the workplace, including anxiety. Instead, the Act entitles disabled employees to a fair shot to do their jobs and enjoy the benefits and privileges of those jobs on comparable footing as their non-disabled peers"
- The question is "whether the symptoms impose a material barrier to the employee's ability to work in the office or enjoy a benefit or privilege of employment," and "common anxiety, without more, is unlikely to impose a material barrier"



ADA Accommodation – Our Old Friend, Work from Home

- On the second question, the Guidance notes that “where the length and means of the commute are outside the employer’s control, it is unreasonable to require the employer to excuse the employee from commuting”
- Usually, it is not the employer’s job to help an employee with a disability get to and from work, “assuming the employer does not offer such help to employees without disabilities”
- However, while eliminating the commute altogether may not be required, an employer may need to provide other accommodations, “such as flexible workplace scheduling, to enable the employee to accomplish their commute and access the worksite,” or telework for a limited period to allow the employee to relocate or find other means for their commute



16

ADA Accommodation – Can an Employer Force an Employee to Take an Accommodation

- Hypothetical:
 - An employee is having problems performing the job
 - Upon inquiry, the employer learns that the employee has recently become dependent on a pain medication for a recent shoulder surgery
 - Can the employer tell the employee or force the employee to get help



17

Remember *Muldrow*?

- Historically under Title VII (and all the federal anti-discrimination statutes), a plaintiff had to prove that their employer took “material” or “significant” adverse action against them based on their protected class
 - Discharge
 - Demotion
 - Other decisions that impacted employee pay and promotional opportunities



18

Remember *Muldrow*?

- Less **severe adverse actions** that did not significantly change employment status (e.g., reassignment) **did not usually qualify** as adverse action
- That changed in 2024 in the case *Muldrow v. City of St. Louis* decision, the U.S. Supreme Court expanded employee protections in Title VII discrimination cases by redefining what “adverse” employment action means
- Adverse action in Title VII discrimination cases includes all employment decisions that cause “**some harm**” on an employee
- Court said that reassignment tied to diminished responsibility and prestige was sufficiently adverse because it imposed “some harm” on the employee



19

Muldrow Creep

- The standard articulated in *Muldrow* has crept into the ADA



20

Muldrow Creep

- On July 21, 2025, the U.S. Tenth Circuit Court of Appeals applied the *Muldrow* **some-harm standard to a disability discrimination claim** arising under the ADA and Rehabilitation Act
- In *Scheer v. Sisters of Charity of Leavenworth Health System, Inc.*, an employee (Sheer) with job performance problems disclosed that she was experiencing “personal issues” and suicidal ideation
- The employer revised a Performance Improvement Plan (PIP) to include a **mandatory referral to the company’s employee assistance program (EAP)** for counseling



21

Muldrow Creep

- Sheer refused to receive EAP counseling and was discharged
- Sheer then sued
- The court, applying pre-Muldrow precedent, granted summary judgment to the employer because mandatory counseling did not cause a “significant change” to Sheer’s employment and therefore was not adverse action



22

Muldrow Creep

- On appeal, the 10th Circuit joined its sister circuits (1st, 5th, 6th and 11th) in holding that “**Muldrow’s some-harm standard** applies not only to Title VII claims, but also to **ADA claims**”
- The court **reversed and remanded** to the district court to evaluate Sheer’s claims under that lower standard



23

Ancillary Lesson from *Scheer v. Sisters of Charity*

- The sisters were too charitable
 - **Two rules** of employment law: (1) If it is not in writing, it did not happen; (2) No good deed of an employer goes unpunished
 - Scheer worked from 2014 to 2019
 - Within the first four years of employment she had **seven** corrective actions – all based on the same misconduct – failure to hit productivity targets
 - This the **easiest types of termination** – multiple purely **objective** failures
 - Decided to put her on a PIP
 - The day before the PIP was drafted, Scheer told other employees she was having suicide ideations



24

Ancillary Lesson from *Scheer v. Sisters of Charity*

- Sisters was too charitable
 - That prompted the PIP to include going to counseling, which was the whole basis of the lawsuit – she was fired for refusing to agree to get counseling
 - If had done the PIP or the term after **maybe the second or third disciplinary action**, not in a situation where get to potentially create new law
 - Related to this (maybe a third rule of employment law) – **poor performing employees rarely become high performing employees**



Religious Accommodation



Religious Accommodation Basics

- Under Title VII, an employer is required “to make reasonable accommodations to the religious needs of employees” unless doing so would create “undue hardship on the conduct of the employer’s business”
- Examples of accommodation could include modifications of clothing requirements, giving certain breaks during the day for prayer, not requiring an employee to work on days of worship
- And then 2021 happened
- An explosion of demands/lawsuits that requiring COVID-19 vaccines or masking violated religious beliefs



EEOC Takes Aim

- In August of 2025, EEOC issues press release – “200 Days of EEOC Action to Protect Religious Freedom at Work”
- “Title VII recognizes the reality that religious freedom is a fundamental right that transcends workplace policies,” said EEOC Chair Andrea Lucas. “During the previous administration, workers’ religious protections too often took a backseat to woke policies. Under my leadership, the EEOC is restoring evenhanded enforcement of Title VII—ensuring that workers are not forced to choose between their paycheck and their faith”



EEOC Takes Aim – COVID-19 Mandates

- “To date, the EEOC has recovered over \$55 million for workers impacted by these mandates—most recently, this week’s \$1 million settlement with Mercyhealth. During the Biden Administration, almost all of the agency’s important work enforcing Title VII in the wake of COVID-19 vaccine mandates happened both silently and too slowly. No longer. Under the Trump Administration, the EEOC is taking bold and aggressive steps to remedy the widespread civil rights harms during the pandemic”



EEOC Takes Aim -- Dress

- “The EEOC filed a lawsuit against CEMEX Construction Materials Florida after the company failed to accommodate to a mixture truck drivers request to wear a skirt. The employee, an Apostolic Christian, wore close-fitting skirts over her work pants and was in compliance with company policy; however, the company forced the employee to choose between wearing a skirt or losing her job”



EEOC Takes Aim – Social Media

- “The EEOC sued The Rock Snowpark after an employee was fired over faith-based social media posts which made no mention of the workplace or coworkers. Acting Chair Andrea Lucas previously stated, “While employers must remain alert to potential harassment in the workplace, religious statements made outside of work that do not reference or impact anyone in the workplace do not constitute unlawful harassment”



Tenants of the Church of the Flying Spaghetti Monster

- The FSM created the universe while drunk – that is why the earth is imperfect
- Heaven has a volcano of beer and is full of lovers just for you
- Hell is the same, EXCEPT, the beer is stale and the lovers have sexually transmitted diseases



Religious Accommodation – Bona Fide Religious Belief

- A bona fide religious belief is one that (1) is religious within the plaintiff's own scheme of things, and (2) is sincerely held
- Employers should not inquire whether those beliefs “derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible”
- A belief qualifies even if the belief is not textually mandated by the plaintiff's religion
- An employee's belief or practice can also be religious under Title VII even if the employee is affiliated with a religious group that does not recognize or share that individual's particular belief or practice



Religious Accommodation – Bona Fide Religious Belief

- Religious beliefs include not only theistic convictions but also non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views"
- Courts in the 9th Circuit have consistently stated that "religion includes "all aspects of religious observance and practice, as well as belief" but that "Title VII does not protect secular preferences such as medical, political, and social preferences." *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998).



Religious Accommodation – Bona Fide Religious Belief

- The EEOC has identified several factors that, singly or in combination, may undermine an employee's assertion that the belief is sincerely held: (a) the employee behaves in a manner markedly inconsistent with the professed belief; (b) the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; (c) the timing of the request is suspicious (e.g., follows a prior request for the same benefit on secular grounds); and (d) the employer otherwise has reason to believe the accommodation is not sought for religious reasons



What Information Can an Employer Ask for to Test the Veracity of the Religious Belief?

- Written materials describing the religious belief or practice – texts, statements from leaders
- The employee's own explanation of sincerely held religious beliefs and practices -- when the individual adopted the belief or practice and how he or she has adhered to the belief or practice
- Information from third parties about how the employee has adhered to the belief or practice from a religious leader, other believers, family members, friends, neighbors (those who have observed)



Bona Fide Religious Belief, Not so Fast My Friend

- Sherry Detwiler was employed at a medical center in Oregon
- When the Center required their employees to vaccinate, Detwiler requested a religious accommodation
- But the accommodations offered by the Center – that Detwiler wear PPE and submit to weekly nasal swab testing – did not satisfy Detwiler
- She claimed the substance used to sterilize the swabs was carcinogenic
- As a Christian, said Detwiler, she was required to protect her body from “defilement” because her “body was a temple” according to a Biblical passage and confirmed by prayer
- But when Detwiler and the Center ultimately could not arrive at an alternative accommodation, Detwiler was terminated
- Detwiler sued, claiming the Center failed to accommodate her religious belief



Bona Fide Religious Belief, Not so Fast My Friend

- The Ninth Circuit concluded Detwiler’s stated beliefs were not enough to allow the case to proceed
- A complaint of religious discrimination, said the Court, “must connect the requested exemption with a truly religious principle” through more than “broad, religious tenets”
- In Detwiler’s case, while her belief that her body is a temple might be a sincere religious belief, her belief that the testing swab contained carcinogenic material was “premised on her interpretation of medical research” and “far too attenuated” from the broad religious belief to recognize it as requiring protection under Title VII



Bona Fide Religious Belief, Not so Fast My Friend

- Other courts examining similar cases have viewed things differently
- For example, the Sixth Circuit has found that an employee need only plausibly explain that the refusal to vaccinate was an “aspect” of “religious observance,” “practice,” or “belief.”
- The Seventh Circuit found that religious vocabulary used may be sufficient to connect a medical concern with religious beliefs



Religious Accommodation – Undue Hardship

- Historically, employer had to show that the requested religious accommodation would impose “more than a de minimis cost”
- Pretty low burden and certainly lower than the required showing under the ADA
- Then in 2023 *Groff v. DeJoy* is decided
- The standard changes
- Employer must show that accommodating the worker’s religious beliefs would impose “substantial increased costs” in relation to the conduct of its business



Religious Accommodation – Undue Hardship

- Groff was a postal worker who did not want to deliver mail on Sunday because of his religious beliefs
- Post office ultimately denied the request because other employees were complaining that they had to keep on covering for Groff
- The Third Circuit said post office met its “more than de minimis” burden because not making Groff work on Sundays imposed a burden “on his coworkers, disrupted the workplace and workflow, and diminished employee morale.”



Religious Accommodation – Undue Hardship

- The Supreme Court disagreed, stating that the “more than de minimis” standard was wrong and that employers had to show that requested accommodation would impose “substantial increased costs” in relation to the company’s operations
- The Court did not discount that effects on coworkers might be an appropriate consideration in weighing whether an accommodation imposes undue hardship, “but a court cannot stop its analysis” without examining whether the impact on coworkers has ramifications for the conduct of the employer’s business”



Post Groff – What Are We Seeing

- *Bordeaux v. Lions Gate Ent., Inc.*, (9th Cir.), a film production company's assertion that exempting an employee from COVID-19 vaccination would risk a ten-day shutdown and \$1.5 to \$3 million increase in production costs met the new standard of "substantial increased costs"
- *Smith v. City of Atlantic City*, (3rd Cir.), firefighters request to keep beard on religious grounds would not create an undue hardship because individuals in firefighter's position had not been called to fight fires in several decades and granting accommodation would not compromise city's ability to fight fires.
- *Hebrew v. Texas Dep't of Justice* (5th Cir.), court rejects prison's assertions that letting guard keep beard was a substantial cost because the beard could be used to hide contraband or could be grabbed by a prisoner in a fight – court notes that the prison "nowhere identifies any actual costs it will face—much less 'substantial increased costs' affecting its entire business" and the prison "simply identifies its security and safety concerns without regard to costs")





PWFA: it's not just about disabilities anymore—pregnancy must be accommodated too.



Pregnant Workers Fairness Act



On **December 22, 2022**, Congress passed the Pregnant Workers Fairness Act (PWFA)

On **April 15, 2024**, the EEOC issued its final regulations on PWFA enforcement.



Pregnant Workers Fairness Act

PWFA requires that employers with at least **15 employees** provide reasonable **accommodations** for pregnant applicants and employees that are needed for pregnancy, childbirth and related medical conditions.

- PWFA became **effective June 27, 2023**.



Duration of Leave and other Accommodations Under the PWFA

Unlike the ADA, the PWFA provides an express timeline for accommodation:

- **essential job functions must be modified** or eliminated on temporary basis, "**generally 40 weeks**" (absent showing of undue hardship).

**40
WEEKS**

Your baby is as big
as a...WATERMELON!



PWFA Medical Certifications

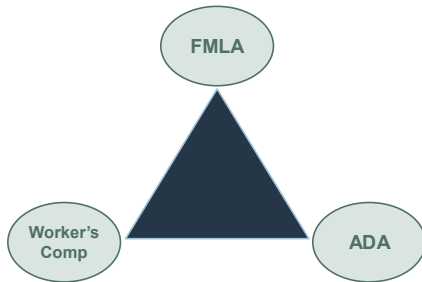
You cannot require a medical certification, and must grant, the following four accommodations:

- (1) keeping water near and drinking as needed; (2) extra time for bathroom breaks; (3) to sit or stand as needed; and (4) extra breaks to eat and drink as needed.

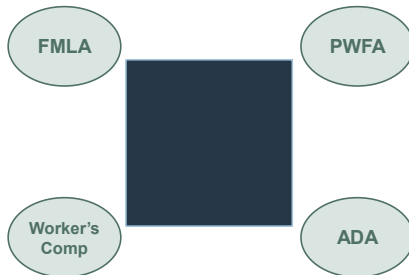
Although other types of accommodations may allow medical certification, **including leave**, when there is a known limitation and obvious need for accommodation, no medical certification may be requested.



Leave Requests – the Bermuda Triangle of Employment Law



The Bermuda Square?



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Thank You



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14th Annual Idaho Employment Law Seminar

Trends at the Idaho Human Rights Commission

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Rights Commission

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Sept. 22, 2026 | Boise Centre East

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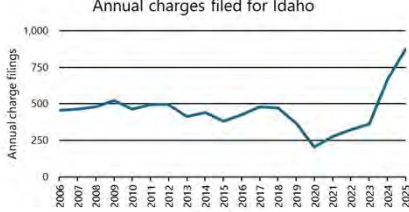
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20 Years of Filings with the Commission

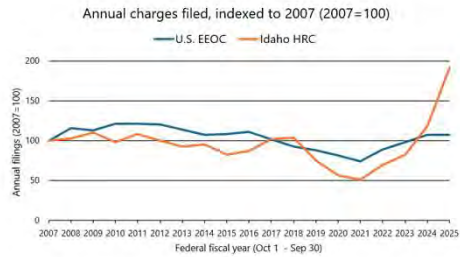
Annual charges filed for Idaho



Calendar Year	Annual charge filings
2006	450
2007	480
2008	500
2009	520
2010	500
2011	480
2012	450
2013	420
2014	400
2015	380
2016	400
2017	450
2018	480
2019	400
2020	250
2021	280
2022	300
2023	350
2024	650
2025	900

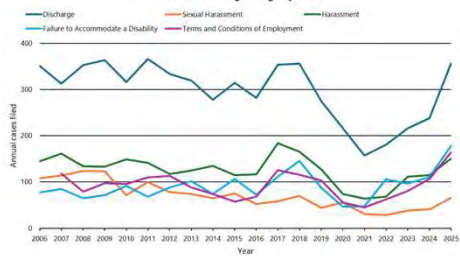
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Annual charges filed for the U.S. and Idaho, 2007-2025 (indexed to 2007)



AMERICAN PEOPLE'S LAWYERS

Annual Idaho charge filings by issue



AMERICAN PEOPLE'S LAWYERS

Cases managed and key issues raised	FY2022	FY2023	FY2024	FY2025
Total cases filed with the IHRC	312	386	498	685
Issues most frequently raised in administrative cases*				
Discharge (actual or constructive)	58%	56%	58%	52%
Sexual harassment	9%	10%	10%	9.6%
Harassment/intimidation**	22%	29%	28%	22%
Failure to accommodate a disability	34%	25%	27%	26%
Terms and conditions of employment	20%	21%	26%	24%

AMERICAN PEOPLE'S LAWYERS

Case resolutions	FY2022	FY2023	FY2024	FY2025
Total of administrative cases resolved	299*	348*	410*	489*
No probable cause findings	71.9%	77.9%	80.7%	80.8%
Mediations, settlements, successful conciliations	8.7%	9.77%	10.3%	8.79%
Conciliation failures	9.4%	1.72%	4.1%	2.86%
Non-jurisdictional; Notice of Right to Sue without findings; other**	10%	10.6%	4.9%	7.57%

ADMINISTRATIVE
PROCESS
LETTER 1

Basis totals and breakdowns	FY2022	FY2023	FY2024	FY2025
Total claims filed	312	386	498	685
Employment	298 (96%)	368 (95%)	468 (94%)	636 (93%)
Public accommodation	4 (1.3%)	7 (1.8%)	21 (4.2%)	24 (3.4%)
Housing	8 (2.6%)	10 (2.6%)	5 (1.0%)	23 (3.3%)
Education	2 (0.6%)	1 (0.3%)	4 (0.8%)	2 (0.3%)
Disability	109 (35%)	170 (44%)	209 (42%)	312 (46%)
Harassment	19 (17%)	52 (30%)	54 (26%)	57 (18%)
Failure to hire	3 (2.8%)	19 (11%)	17 (8.1%)	16 (5.1%)
Discharge	75 (69%)	93 (55%)	124 (59%)	163 (52%)
Accommodation	61 (56%)	95 (56%)	123 (58%)	179 (57%)

ADMINISTRATIVE
PROCESS
LETTER 1

Common Challenges – And How to Avoid Them



Frequent Causes:

Poorly trained supervisors
Bad actors
Unintentional conduct



Lessons Learned from Probable Cause findings:

Sometimes bad things happen; the response is what matters
Retaliation is often easier to prove than underlying causes
Government employers have additional considerations regarding due process, terms & conditions, other issues

ADMINISTRATIVE
PROCESS
LETTER 1

What's Changing at IHRC

-  Higher volume
-  Earlier merits review
-  More triage
-  Targeted investigations
-  Same legal standards



Streamlined Front End

-  Updated intake
-  Faster filing
-  Direct service contact
-  Earlier employer engagement
-  Cleaner issue identification



New Investigative Structure

- 3 Senior Investigator-Mediators
- 4 Civil Rights Investigators
- Senior-level early handling
- Complex cases transferred
- Deeper investigation where needed



What Respondents Should Do

- Respond early
- Address each issue
- Argument + evidence
- Explain bad facts
- Ask questions
- Avoid boilerplate



After the Investigation



The Bottom Line: HRC Trends

- More cases
- Earlier review
- Smarter triage
- Focused investigation
- Evidence matters
- Same substantive standards



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Thank you for attending



Thank You



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14th Annual Idaho Employment Law Seminar

Ask Us Anything (About Employment Law) ***Panel Discussion***

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14th Annual Idaho Employment Law Seminar

Managing Problem Employees

Michael Judd

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Paul R. Smith

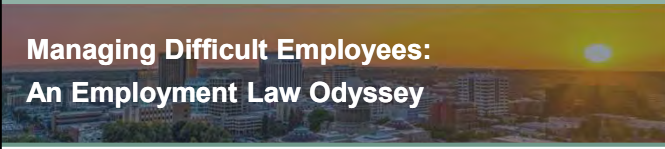
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14th Annual Idaho Employment Law Seminar

Managing Difficult Employees:
An Employment Law Odyssey



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Sept. 22, 2026 | Boise Centre East

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2

Does this sound familiar?

- You're about to discipline an employee.
- You have:
 - »Reviewed the facts
 - »Talked to the supervisor
 - »Gathered the documentation
 - »Decided discipline is appropriate
 - »Scheduled the meeting

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3

Does this sound familiar?

- The employee walks in.
- **HR:** "We need to talk about your attendance/performance/conduct."
- **Employee:** "Actually, I need to tell you something..."
 - ✂ "I think I'm being harassed."
 - ✂ "My supervisor has been bullying me."
 - ✂ "I've been having a medical issue."
 - ✂ "I need an accommodation."
 - ✂ "I've been treated differently from everyone else."
 - ✂ "I've talked to an attorney."
 - ✂ "This is retaliation."

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Managing Difficult Employees Without Creating a Lawsuit



- Every employment relationship is a journey
... Or should we say an **Odyssey**!
- Often, it's smooth sailing.
- Occasionally, you encounter a Cyclops.
- How do we navigate difficult employees without steering the company into a lawsuit?

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KNOW YOUR MONSTERS

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- The Attendance Problem
- The Constant Complainer
- The Harasser
- The Low Performer
- The Accountability Avoider
- The Insubordinate
- The “That’s Not My Job” Employee
- The Employee Who (allegedly) Knows Their Rights Better Than HR

[illegible]

- Odysseus encounters Polyphemus, and things go badly.
- The men enter the Cyclops's cave. Eat his sheep. Get trapped. Get eaten themselves.
- The accountability-avoiding employee essentially says: "I didn't eat the sheep. Someone else ate the sheep. Even if I did eat the sheep, Eurylochus made me do it."

[illegible]

- Characteristics:
 - Nothing is ever their fault.
 - Every problem has an external explanation.
 - They have an explanation for every criticism.
 - They dispute virtually every piece of feedback (maybe call it bullying).
 - They frequently blame supervisors or coworkers.
 - They often respond to discipline with accusations.



Scylla: The Employee Who Creates Multiple Problems at Once



- Some employees don't present one problem.
- They present **six problems simultaneously**.
 - Performance problem
 - Attendance problem
 - Interpersonal conflict
 - Inappropriate comments
 - "Creative" use of leave policies
 - Way too much cologne
- Which problem are we actually trying to solve?

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Charybdis: The Constant Complainer

- Avoid Scylla and you get Charybdis.
- The employee who:
 - Complains about the supervisor.
 - Complains about coworkers.
 - Complains about workload.
 - Complains about scheduling.
 - Complains about policies.
 - Complains about being treated unfairly.
- And eventually: "I'm being retaliated against because I complained."



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A Note on Constant Complainers...

- Not every complaint is protected activity.
 - My manager is a jerk and I don't think he's treating me fairly."
- But some are:
 - Complaints related to protected class (e.g., race, sex, disability, religion)
 - "I think my manager is treating me differently because I'm Hispanic."
 - Complaints related to FMLA, OSHA, worker's comp, etc.
 - Engaging with coworkers about wages and working conditions
- Every complaint should be **taken seriously enough to understand what the employee is actually alleging**.

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LITERATURE

The Sirens: The Employee Who Knows Exactly What to Say

- The Sirens don't necessarily attack the ship.
- They **lure the ship toward danger**.
- At precisely the moment discipline is being discussed...the employee suddenly raises:
 - » Harassment
 - » Discrimination
 - » Retaliation
 - » Medical condition
 - » Workers' compensation
 - » Wage issue
 - » Safety concern



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Other Creatures in the Sea

- **The Lotus Eaters**
→ Employees who seem to have lost interest in productivity altogether.
- **The Laestrygonians**
→ Aggressive employees who make the workplace miserable for everyone around them.
- **Aeolus**
→ The employee who somehow creates an enormous amount of workplace turbulence.
- **The Cattle of the Sun God**
→ Employees who violate obvious rules despite being explicitly told not to.



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**DIFFICULT EMPLOYEES WHO LEAD
TO LAWSUITS**

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Difficult Employees Who Lead to Lawsuits

- Difficult employees don't automatically create lawsuits.
- But certain circumstances make litigation much more likely.
- **The Four Major Scenarios:**
 1. **Surprise:** "I had no idea this was coming."
 2. **Inconsistency:** "You didn't treat everyone else this way."
 3. **Financial pressure:** "Maybe a lawsuit will get me a settlement."
 4. **Lack of accountability:** "I'm amazing. So, if I was fired, there must have been a nefarious reason."

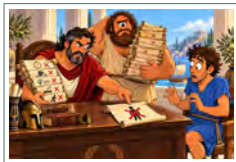


The Employee Who Is Surprised



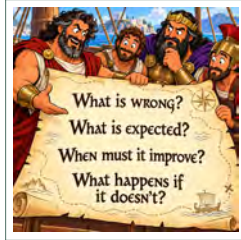
The Employee Who Is Surprised

- The employee thinks: "I thought everything was fine."
- The employer thinks: "We've been telling you this for six months."
- **Problem:** The employer's understanding and the employee's understanding may be completely different.
- **Key principle:** If termination is the first time the employee learns that their job is in jeopardy, you have probably waited too long.
 - » Exceptions obviously exist—serious misconduct, layoffs, restructuring, etc.



Avoid Surprise with Progressive Discipline

- Progressive discipline should answer four questions:
 - What is wrong?
 - What is expected?
 - When must it improve?
 - What happens if it doesn't?
- This is your "map" for the journey.
- More on PIPs later...



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Document the Journey



- The company needs a ship's log
 - If you end up in court, the judge/jury should be able to follow the voyage.
- It is not enough that you did it. You need to be able to prove that you did it.
- Train your managers!
- More on documentation later...

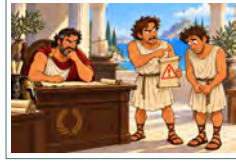
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The Employee Who Says, "You Treated Me Differently"

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“But You Didn’t Fire Bob”

- How about any employee saying:
 - » Other employees did the same thing and nothing happened”?
- This can be dangerous even when the employer’s decision was legitimate.
- Consistency is key.
- But, consistency does not mean every employee receives exactly the same discipline.
 - » Different circumstances may justify different outcomes.



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Let Athena Be Your Guide



- Odysseus often benefited from divine intervention: guidance from Athena.
- Athena was the goddess of wisdom and reason...
 - » And handbooks
- One key to consistency is having sound policies, especially:
 - » Progressive discipline
 - » Code of conduct
 - » Job descriptions
- Know your policies.
- Follow your policies.
- **Train your managers!**
- More on consistency later...

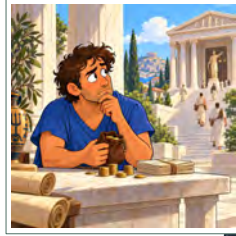
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The Employee Who’s Fallen on Hard Times

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When a Lawsuit Becomes a Financial Strategy

- Not every lawsuit is filed because the employee genuinely believes they were wronged.
- Sometimes the calculation is: "Maybe they'll pay me something to make this go away."



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Potential Financial Motivations



- Lost income
- Difficulty finding another job
- Medical expenses
- Debt
- Family financial pressures

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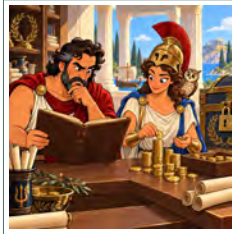
When a Lawsuit Becomes a Financial Strategy

- **Important:** Don't assume financial difficulty means someone will sue or commit misconduct.
- **But:** recognize that financial pressure can increase incentives for certain behavior.
 - » Expense irregularities
 - » Unauthorized payments
 - » Theft
 - » Embezzlement
 - » Improper reimbursements
 - » Manipulation of company accounts
 - » Misuse of company property

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Watch the Cash

- Ensure segregation of financial duties
 - » Separate custody of assets from accounting
 - » Check writers don't reconcile bank statements
 - » Two signatures on large checks
 - » Regular audits
- But: Be compassionate without becoming careless.
 - » Treat the employee like everyone else
 - » Maintain ordinary controls
 - » Document legitimate concerns
 - » Don't start treating the employee as dishonest merely because they are having financial problems
- **And train your managers!**



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The Employee Who Can't Take Accountability

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The Hardest Case: "I Did Nothing Wrong...Ever"

- Complain frequently
- Rarely improve
- Challenge every criticism
- Blame supervisors
- Blame coworkers
- Refuse to acknowledge mistakes
- Become insubordinate
- Appeal every consequence
- Eventually claim the termination itself was improper



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The Hardest Case: "I Did Nothing Wrong"

- The best time to manage a difficult employee is before they become one.
- Look for candidates who:
 - ✂ **Own their mistakes** rather than immediately explaining why someone else was responsible.
 - ✂ **Accept constructive criticism** without becoming defensive.
 - ✂ Can identify something they **could have done better** in a prior job.
 - ✂ Describe difficult supervisors/co-workers **fairly and objectively**, rather than portraying every former employer as incompetent or unfair.
 - ✂ Can explain a termination, disciplinary action, or failed project **without portraying themselves exclusively as the victim**.
 - ✂ Give specific examples of **how they responded to a mistake or setback**.



The Hardest Case: "I Did Nothing Wrong"



- **Red flag:** A candidate whose stories consistently follow the same pattern: **"I did everything right → someone else caused the problem → management treated me unfairly."**
- **Don't ask:**
 - ✂ "Are you good at taking criticism?"
- Everyone knows the "right" answer.



The Hardest Case: "I Did Nothing Wrong"

- **Instead, ask behavioral questions:**
 - ✂ Tell me about a time you received feedback that you initially disagreed with. What did you do?"
 - ✂ Tell me about a mistake you made at work that had consequences. What happened, and what did you learn?"
 - ✂ Tell me about a time your performance did not meet your manager's expectations. How did you respond?"
 - ✂ What is something a former supervisor would say you could have done better?"
 - ✂ Tell me about a conflict with a manager or co-worker. Looking back, is there anything you would have handled differently?"
 - ✂ "Tell me about a time you were wrong at work."



The Hardest Case: "I Did Nothing Wrong"



- So, hopefully we can identify and reject these folks during the screening process.
- But if we can't...we must manage them...**carefully**
- **One key problem:** The employer thinks it is managing performance.
The employee thinks the employer is persecuting them.

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Don't Argue Them Into Accountability

- One of the biggest mistakes: **Trying to convince the employee that they are wrong.**
 - » Odysseus doesn't stop the voyage to hold a six-hour debate with every monster.
- Instead: "We understand that you disagree. The expectation remains..."
- You don't need the employee to agree with the discipline.
- You need the employee to understand:
 - » What happened
 - » What is expected
 - » What must change
 - » What the consequence is
- **And train your managers!**



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HARNESSING THE FOUR WINDS

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The Four Winds that Will Guide You Safely Home

- Consistency
- Progressive Discipline
- Documentation
- Good Judgment



If one is missing, we could get blown off course!



The North Wind: Consistency



- Build consistency through:
 - » Written policies
 - » HR review of significant discipline
 - » Comparable discipline for comparable conduct
 - » Centralized documentation
 - » Periodic review of disciplinary decisions
 - » **Manager training**
- **Ask:** "Would we make the same decision if this employee had a different name, age, sex, race, supervisor, or protected activity history?"



The North Wind: Consistency

- What to consider before administering discipline:
 - » Severity of conduct
 - » Prior discipline
 - » Performance history
 - » Length of service
 - » Job responsibilities
 - » Whether the employee admitted wrongdoing
 - » Whether the employee corrected the problem
 - » Whether the employee was warned
 - » Whether there were mitigating circumstances
 - » Whether other employees committed comparable violations



The North Wind: Consistency

- Before sailing to the next harbor, check whether you've already made this voyage and what happened last time.
- The Comparator Question:
 - » Before terminating, ask: **"Who else has done something substantially similar?"**
- Then:
 - » Identify potential comparators.
 - » Determine whether the situations are actually comparable.
 - » Understand how those situations were handled.
 - » Identify legitimate reasons for different treatment.
 - » Document those reasons.
- **Don't discover your comparator problem after the lawsuit is filed.**



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The South Wind: Progressive Discipline

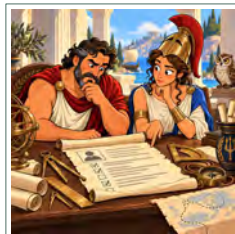


- Progressive discipline is not:
 - » Warning → Warning → Warning → Termination."
- It is:
 - » **Notice → Opportunity → Follow-up → Consequence**
- **Early Intervention:** Problems rarely improve through avoidance.

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The South Wind: Progressive Discipline

- The discipline should fit:
 - » The conduct
 - » The employee's history
 - » The circumstances
 - » The risk
- Remember to look at comparators: How have we handled similar situations in the past?



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The South Wind: Progressive Discipline



- Give them a destination.
- Performance expectations should include:
 - » **What:** What must change?
 - » **How:** What does successful performance look like?
 - » **When:** By what date?
 - » **Who:** Who is responsible for monitoring?
 - » **What happens next:** What are the consequences if improvement does not occur?

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The South Wind: Progressive Discipline

- Set clear expectations.
 - » Avoid: "You need to improve your attitude."
 - » Instead: "You are expected to respond professionally to coworkers and supervisors, including refraining from yelling, profanity, and disrespectful comments."
- **Specific beats subjective:** Employees need to understand what behavior must change.
- Don't set **unrealistic goals** or fail to follow up → Can look like a predetermined outcome (e.g., PIP is just checking a box before termination)



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The East Wind: Documentation

- Good documentation should tell the story without the HR manager standing in the room.
- **Common Problem:**
The file says, "Good employee."
The witnesses say, "Terrible employee."



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The East Wind: Documentation



- Good documentation:
 - » Specific
 - » Objective
 - » Timely
 - » Fact-based
 - Conduct, statements, observations
 - Avoid legal conclusions (e.g., harassed, discriminated, retaliated, hostile, etc.)

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The East Wind: Documentation

- Documentation should establish:
 - » What happened
 - » What expectations were communicated
 - » What the employee said
 - » What the employee was told to do differently
 - » The timeframe for improvement
 - » Follow-up
 - » Whether improvement occurred
 - » Consequences

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The East Wind: Documentation

- **Bad:** "Employee has a bad attitude."
- **Better:** "On August 14, during the staff meeting, employee interrupted the supervisor three times, raised their voice, and told the supervisor, 'You don't know what you're doing.'"



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The East Wind: Documentation



- Ask this:
"If I took your HR file and removed every email, note, and disciplinary document written **after** the termination decision, could I still understand why the employee was terminated?"

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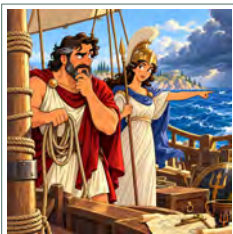
The West Wind: Judgment

- Even Odysseus had to make judgment calls.
- There isn't always a safe route.
- Sometimes you are choosing between Scylla and Charybdis.



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The West Wind: Judgment



- **Don't Tie Yourself to the Mast:** Policies don't replace judgment.
- Ask:
 - » Is this really a performance problem?
 - » Is this really misconduct?
 - » Are there other explanations?
 - » Is there a protected activity issue?
 - » Is the employee being treated consistently?
 - » Have we investigated sufficiently?
 - » Are we overreacting?
 - » Are we underreacting?
 - » Would we make the same decision again six months from now?

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The West Wind: Judgment

- Exercising good judgment **yourself** isn't enough...
- **Train your managers!**
- Some of the most difficult-to-defend lawsuits are due to **mishandling by managers**
- **Train them to:**
 - ✂ Issue spot
 - ✂ Bring in HR



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THE DANGER LURKING UNDER THE WAVES: RETALIATION

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And Then the Employee Says...

- HR: "We're going to issue you a final written warning."
- Employee: "Before we talk about that, I need to tell you that my supervisor has been harassing me."
 - ✂ OR: "I've been diagnosed with a medical condition."
 - ✂ OR: "I think I'm being discriminated against."
- **Now what?**



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Don't Panic. Don't Ignore It.

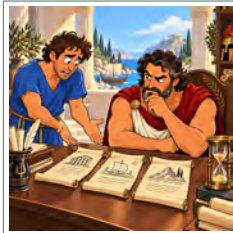


- Two bad reactions:
- **Bad Reaction #1:**
 - ✂ "Never mind. Forget the discipline."
- **Bad Reaction #2:**
 - ✂ "This is obviously bogus. Proceed with termination."
- Better:
 - ✂ **Pause. Assess. Separate. Document. Proceed carefully.**
- The complaint may be legitimate, protected, both, or neither.

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Retaliation Is Often Easier to Allege

- The employee may argue:
"I complained → the company investigated → I was disciplined."
- Even when the employer believes:
"You were disciplined because you were doing a terrible job."
- The temporal sequence can create a difficult factual issue.



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Retaliation Is Often Easier to Allege



- **The critical question:**
 - ✂ Can we demonstrate that the employment decision was based on legitimate reasons that existed independently of the protected activity?
- Look at:
 - ✂ Discipline trajectory
 - ✂ Intervening Incidents
 - ✂ Severity
 - ✂ Comparators

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Retaliation Avoidance Checklist

- When new protected activity arises:

1. **Identify the complaint:** What exactly did the employee allege?
2. **Document timing:** What performance/conduct problems existed before the complaint?
3. **Preserve existing documentation:** Don't suddenly create a paper trail.
4. **Investigate when appropriate:** Don't ignore potentially serious allegations.
5. **Separate decision-making where practical:** Consider whether the person investigating the complaint should also make the disciplinary decision.
6. **Maintain consistency:** Ask whether the same discipline would have occurred absent the complaint.
7. **Document the legitimate reason.**

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THE FINAL VOYAGE: TERMINATING THE DIFFICULT EMPLOYEE

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The End of the Journey

- Eventually, the company may decide: **The relationship isn't working.**
- Before termination, ask these 7 questions:
 1. **What is the legitimate reason?**
 2. **Can we prove it?**
 3. **Has the employee been told? Will this come as a surprise?**
 4. **Have we treated comparable employees consistently?**
 5. **Is there any recent protected activity?**
 6. **Have we investigated outstanding complaints?**
 7. **Would we make the same decision tomorrow?**
- If the answer to any of these questions is "I'm not sure": **Stop and investigate before proceeding.**



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The Termination Meeting

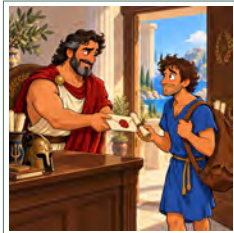


- Keep it:
 - » **Short, Direct, Professional, Respectful**
- Don't:
 - » Re-litigate the entire employment relationship
 - » Debate every accusation
 - » Get drawn into an argument
 - » Make statements you don't need to make
 - » Introduce new reasons unnecessarily
 - » Allow the meeting to become a negotiation over whether the employee is "really" a good employee

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The Termination Meeting

Suggested approach: "We've made the decision to terminate your employment effective today. The reason for the decision is [brief reason]. Here is information regarding your final pay and benefits."



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When Odysseus Finally Gets Home



- The goal isn't to have a perfect employee-management relationship.
- The goal is to reach the end of the employment relationship with:
 - » A legitimate reason
 - » A fair process
 - » Consistent treatment
 - » Good documentation
 - » No unnecessary drama
 - » No unnecessary legal exposure

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When Odysseus Finally Gets Home



And hopefully nobody has to fight a Cyclops on the way out.

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LET'S BRING IT HOME (TO ITHACA)

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The Five Rules of the Employment Odyssey

1. Try to avoid surprising employees.
2. Be consistent—but recognize that consistency doesn't necessarily mean identical outcomes.
3. Give employees a clear opportunity to improve when appropriate.
4. Document the journey, not just the destination.
5. When "protected activity" appears, don't panic—but don't ignore it.

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Thank you for attending



Thank You



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14th Annual Idaho Employment Law Seminar

Common Mistakes and Horror Stories ***Panel Discussion***

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Sept. 22, 2026 | Boise Centre East

Legal Disclaimers and PDF Handbook

This presentation is based on available information as of September 22, 2026, but everyone must understand that the information provided is not a substitute for legal advice.

This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

The names (and some facts) of the stories to be told have been changed to protect the innocent (or the guilty).



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Acting Without Legal Counsel

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1

Takeaways

- Get legal advice before executing a risky termination
- Get legal advice before you deny an ADA accommodation or FMLA leave
- Never answer an Idaho Human Rights Commission/EEOC charge on your own—get help from an experienced employment attorney
- Get legal review on key legal documents, e.g., noncompete and severance agreements



Failing to Contemporaneously Document Basis for Discipline / Termination



Takeaways

- Documentation is key to good human resource risk management – if it is not documented, it did not happen
- It matters to agencies, judges, and juries
- Contemporaneous documentation records our legitimate, non-discriminatory intent – we never want to rely on testimony alone in a jury trial
- Failing to address performance concerns out of a desire to “be nice” does not help the employee; it only serves to surprise them when they are terminated



Takeaways

- Repent of the sin of failing to properly document earlier by creating a summary at time of termination, that is communicated to the employee
- State the reason for the termination in the termination letter; it does not matter that Idaho is an at-will state
- Heed the adage "no good deed goes unpunished." Giving employees too many chances can come back to bite you.
- One or two warnings (preferably based on objective criteria) and then termination is usually the best course of action



7

Conducting a Hasty Investigation



Takeaways

- Always conduct a prompt, thorough, documented investigation
- Make sure your interviews include both the complainant and respondent
- Separate fact gathering and conclusion reaching phases
- Commit the complainant's account to writing
- Involve a competent investigator



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Failing to initiate and engage in the ADA's interactive process

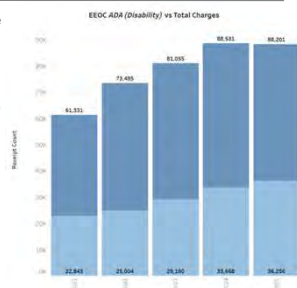
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ADA claims are on the rise.

Year over year, the EEOC receives more claims for disability discrimination, including failure to accommodate, than any other form of discrimination (although retaliation number one overall)

Of the 88,201 total charges of discrimination in 2025, 36,256 alleged disability discrimination—about 41% of all charges filed nationally

That's a record number of disability discrimination claims!

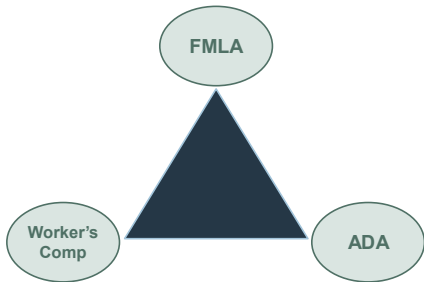


Takeaways

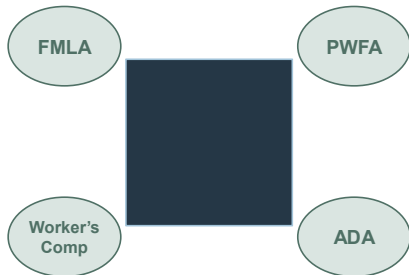
- Your efforts (and documentation) should show effort to accommodate, not to deny accommodation.
- Train your managers to understand when employees may be triggering the ADA process, i.e., tell managers to contact you when an employee tells them that something about their health is impacting something about their job.
- Train your manager to not grant or deny accommodations on their own. Always involve HR.
- Be mindful of overlapping leave and accommodation rights, including those arising under FMLA and PWFA.

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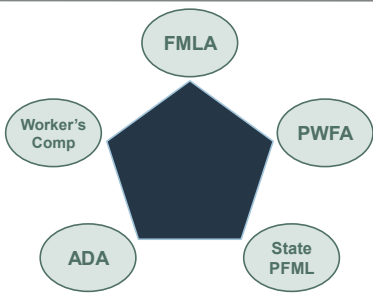
Leave Requests – the Bermuda Triangle of Employment Law



The Bermuda Square?



For multistate employers: the Bermuda Pentagon?



Non-Competes: What Works, What Doesn't

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England? Or Vendr?



England Logistics. A competitor hired away a handful of executives and England Logistics sued to immediately halt the move.

Vendr. A competitor hired away a young SaaS sales executive and Vendr sued to immediately halt the move.

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England Covenants . . . Seem to Work



England Logistics. "The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant."

. . .

"[G]iven the nature of this company and its wide-ranging operations, the geographic restrictions were reasonable."

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Vendr Covenants . . . Do Not



Vendr. "Utah law does not permit an employer to restrict a conventional employee through a noncompete agreement." . . .

"Sanders held a junior position during his employment with Vendr. As one of forty buyers, Sanders does not appear to have a unique position. . . . Vendr, however, requires all its employees to sign noncompete agreements. . . . Such a practice appears to be against Utah law."

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Lessons Learned from *England* and *Vendr*

Takeaways

- As *England* reflects, courts remain willing to enforce even broad non-competes
- But that analysis is intensely fact-specific, and if an employer wants quick relief, evidence needs to be gathered almost immediately
- Factors to consider: employee seniority, scope of prohibition, scope (both time and geography), definition of competitor, access to confidential company information



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Overlooking Section 7 of the NLRA

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Takeaways

- Ensure your policies do not prohibit discussion of wages, benefits, and other terms and conditions of employment
- Do not discipline employees for discussing wages, benefits, and other terms and conditions of employment
- Do not tell employees that they must keep their rate of pay confidential
- Include this on your termination checklist
- Update your handbook on evolving NLRB rulings

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