

# THINGS TO CONSIDER WHEN RECEIVING A COMPLAINT FROM THE ERD & EEOC

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May 1, 2008

- For employers faced with threats or insinuations of litigation, knowledge is power. The following is a checklist of questions designed to help an employer prepare for the defense of a lawsuit.

## I. What Law Am I Dealing With?

- Title IX - 20 U.S.C. § 1681: Prohibits discrimination on the basis of sex or blindness in institutes of education; protects students and employees.
- Title VII - 42 U.S.C. 2000-e et. seq. [employers with 15 + employees]: Prohibits discrimination on the basis of sex, race, religion, color, national origin, pregnancy, childbirth or conditions related to pregnancy or childbirth and prohibits retaliation for exercise of rights under Title VII.
- 42 U.S.C. § 1983: Actions may be brought for employment decisions which intentionally discriminate against members of specific "vulnerable" classes, through the Equal Protection Clause of the Fourteenth Amendment, some prior restraints on speech under First Amendment, alleged violations of right to privacy under Fourth Amendment, and "stigmatizing" termination under substantive due process clause of Fourteenth Amendment, adverse employment actions without notice and opportunity to be heard under procedural due process prong of Fourteenth Amendment, and rights against self-incrimination under the Fifth Amendment.
- 42 U.S.C. § 1981: Prohibits interference with employment contracts because of race.
- Fair Labor Standards Act: 29 U.S.C. § 201, et. seq. Governs wages and hours.
- Age Discrimination In Employment Act (ADEA) - 29 U.S.C. § 621-634 [employers with 20 + employees]: Prohibits discrimination of employees over 40 on the basis of

age.

- | Americans With Disabilities Act (ADA) [employers with 15 + employees] - 42 U.S.C. § 12101, et. seq.: Prohibits discrimination against and requires accommodation for "otherwise qualified" employees with disabilities.
- | Federal Family and Medical Leave Act (FMLA) - 29 U.S.C. § 2601 et. seq.: Leave is 12 weeks in 12 month period for one or more of (1) birth, adoption or placement in foster care of child taken within 12 months of same; (2) employee's serious health condition and (3) to care for child, spouse or parent with serious health condition.
- | Wisconsin Fair Employment Act (WFEA): prohibits discrimination based on age (over 40), race, creed, color, handicap, marital status, sex (including pregnancy), sexual preference, national origin, ancestry, arrest and conviction record, membership in armed forces, use or non-use of lawful products off employer's premises during non-working hours, printing and circulation of discriminatory employment policies, and retaliation for complaints.
- | Wisconsin Family and Medical Leave Act (WFMLA) - § 103.10, Stats.: Leave is six weeks in 12 month period for birth or adoption of child taken within 16 weeks of birth or placement; 2 weeks for employee's serious health condition and to care for child, spouse or parent with serious health condition; no more than 8 weeks for combination.
- | Secs. 59.26; 62.13; 62.50, Stats. (2001-02). – provides for state statutory employment rights of law enforcement officers.
- | Municipal Employment Relations Act - Sec. 111.70, Stats.: Governs collective bargaining rights.
- | Wisconsin Public Employee Health and Safety Act – Sec. 111.005, et. seq., Stats. Governs workplace safety issues.
- | Wisconsin Whistleblower Statute. §§ 230.01, Stats., et. seq., – prohibits retaliation for disclosure of certain kinds of information relating to "mismanagement"  
"Information" means information gained by the employee which the employee reasonably believes demonstrates:

(a) A violation of any state or federal law, rule or regulation.

(b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

Mismanagement is, in turn, more precisely defined in Wis. Stat. § 230.80(7):

"Mismanagement" means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. "Mismanagement" does not mean

the mere failure to act in accordance with a particular opinion regarding management techniques.

Hutson v. Wisconsin Personnel Commission, 263 Wis. 2d 612, 665 N.W.2d 212 (2003).

#### B. Can Co-Employees or Supervisors Be Liable?

- | Individual employees of employers may not be individually liable under ADA, Title VII or ADEA. EEOC v. AIC Sec. Invest., Ltd., 55 F.3d 1276 (7th Cir. 1995) (Title VII); Williams v. Banning, 72 F.3d 552 (7th Cir. 1995) (Title VII); Silk v. Chicago, 194 F.3d 788 (7th Cir. 1999) (ADA); Thelen v. Marc's Big Boy Corp., 64 F.3d 264, 267 n.2 (7th Cir. 1995) (ADEA).
- | But, individuals may be liable under Sec. 1981, the FMLA, and Sec. 1983. Freemon v. Foley, 911 F. Supp. 326 (N.D. Ill. 1995) (FMLA); Vakharia v. Little Co. of Mary Hospital, 917 F. Supp. 1282 (N.D. Ill. 1996) (Sec. 1981).

#### Discrimination And Retaliation Claims – Title VII, WFEA, Sec. 1981, Sec. 1983, ADA, ADEA

#### A. May The Alleged Acts Be Imputed To The Employer?

- | Entities may be liable for acts of "decisionmakers," defined as those with the authority to hire, fire, and take actions that materially and detrimentally affect the terms, conditions, and privileges of employment. Rogers v. Chicago, 320 F.3d 748, 91 Fair Empl. Prac. Cas. (7th Cir. 2003).
- | A decisionmaker is the person "responsible for the contested decision." Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997).

#### B. Was There An "Adverse Employment Action"?

##### As Defined In Statutes.

To fail or refuse to hire, to discharge, to "otherwise discriminate" with respect to compensation, terms, conditions or privileges, to limit, segregate or classify employees or applicants so as to deprive them of employment opportunities or adversely affect status, to deny training programs, to adjust results of employment related tests, to fail to accommodate, and to "otherwise discriminate".

- | Exception: Retaliation, to be actionable under Title VII (or other statutes), does not have to involve an adverse employment action. Aviles v. Cornell Forge Co., 183 F.3d 598, 605 06 (7th Cir. 1999).

To "Otherwise Discriminate" – Adverse Employment Actions.

- | An essential element to any discrimination claim is the occurrence of an "adverse employment action." *Herrnreiter v. Chicago*, 315 F.3d 742 (7th Cir. 2002); *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 691 (7th Cir. 2001); *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002).
- | The Seventh Circuit has defined an adverse employment action as "more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Traylor*, 295 F.3d at 788, discussing *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (citation omitted).
- | "Not everything that makes an employee unhappy" will suffice to meet the adverse action requirement. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (holding that poor evaluations alone do not constitute an adverse employment action); but see
- | Rather, an employee must show that "material harm has resulted from ... the challenged actions." *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 692 (7th Cir. 2001).
- | "Otherwise every trivial personnel action that an irritable, chip on the shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial." *Williams v. Bristol Myers Squibb Co.*, 85 F.3d 270 (7th Cir. 1996).
- | Standoffishness, unfriendliness and inapproachability not adverse employment action. *McKenzie v. Milwaukee County*, 381 F.3d 619 (7th Cir. 2004).

The cases that find the criterion satisfied can be divided into three groups:

- | Cases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including, of course, as the limiting case, termination of employment. See, e.g., *Simpson v. Borg Warner Automotive, Inc.*, 196 F.3d 873, 876 (7th Cir. 1999); *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Greer v. St. Louis Regional Medical Center*, 258 F.3d 843, 845 46 (8th Cir. 2001).
- | Cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted. See, e.g., *Flaherty v. Gas Research Institute*, 31 F.3d 451, 456 57 (7th Cir. 1994); *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 135 36 (7th Cir. 1993); *Collins v. Illinois*, 830 F.2d 692,

703 04 (7th Cir. 1987); *Rodriguez v. Board of Education*, 620 F.2d 362, 366 (2d Cir. 1980); *Torre v. Casio, Inc.*, 42 F.3d 825, 831, 834 35 and n. 7 (3d Cir. 1994).

These cases differ from those in the first category only in involving a future rather than present harm; the harm nevertheless is financial. They are to be distinguished from cases involving "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance.... [Such a transfer] cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." *Williams v. Bristol Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

2a. A variant of category 2 is where the employee's job is changed in a way that injures his career, just as in the cases in that category, except that there is no transfer. See, e.g., *Dahm v. Flynn*, 60 F.3d 253, 256 57 (7th Cir. 1994); *Chuang v. University of California Davis*, 225 F.3d 1115, 1125 26 (9th Cir. 2000).

- | Cases in which the employee is not moved to a different job or the skill requirements of his present job altered, but the conditions in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment an alteration that can fairly be characterized as objectively creating a hardship, the classic case being that of the employee whose desk is moved into a closet. See, e.g., *Smart v. Ball State University*, supra, 89 F.3d at 441 n. 1;

## Examples

- | *McKenzie v. Milwaukee County*, 381 F.3d 619 (7th Cir. 2004)(transfer with no reduction in pay or benefits not adverse employment action)
- | *Sitar v. Ind. Dep't of Transp.*, 344 F.3d at 727 (explaining that whether transfer is adverse action depends on how disadvantageous the change is).
- | *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir.1996) (holding that transfer that leads to reduction in pay or benefits is adverse action).
- | This category includes cases of constructive discharge: the employer has made the job unbearable for the employee. E.g., *id.*; *EEOC v. University of Chicago Hospitals*, 276 F.3d 326, 331 32 (7th Cir. 2002); *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998).
- | It also includes cases of harassment mistreatment of an employee by coworkers or supervisors that is sufficiently severe to worsen substantially his conditions of employment as a reasonable person in the position of the employee would perceive them. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 88, 118 S.Ct. 2275, 141

L.Ed.2d 662 (1998); *Hilt Dyson v. City of Chicago*, 282 F.3d 456, 462-63 (7th Cir. 2002). Categories 2, 2a, and 3 often overlap. See, e.g., *Collins v. Illinois*, supra, 830 F.2d at 703-04.

- | Isolation and even ostracism directed by a superior is not an adverse employment action unless an employer orders its employees to shun the plaintiff, and this activity causes material harm to the plaintiff. *Harris v. Firststar Bank Milwaukee*, 2004 WL 963058 (7th Cir.(Wis.))(unpublished)(intimidating comments, dirty looks, and increased scrutiny by her supervisors--even if true, do not constitute adverse actions by her employer); See *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 485 (7th Cir. 1996); accord *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 428 (8th Cir. 1998) (shunning is not an adverse employment action where the plaintiff did not allege that the ostracism resulted in a reduced salary, benefits, seniority, or responsibilities).
- | Criticism is not a materially adverse employment action. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996) (holding that poor evaluations alone do not constitute an adverse employment action).
- | Nor is close scrutiny, when there were disciplinary and performance problems. *Harris v. Firststar Bank Milwaukee*, 2004 WL 963058 (7th Cir.(Wis.))(unpublished); *O'Hara v. Ill. Department of Mental Health*, 120 F. Supp.2d 704, 709 (N.D. Ill. 2000).

#### Constructive Employment Decisions:

- | The claim that employer engaged in harassment, as opposed to an adverse decision, that forced resignation, or was in reality a demotion, etc. is a claim for a constructive adverse employment decision. *Rabinovitz*, 89 F.3d at 489.
- | The employer must intentionally make working conditions so intolerable that a reasonable person would be forced to resign/transfer, etc. *Saxton*, supra; *Lewandowski v. Two Rivers Public School Dist.*, 711 F. Supp. 1486 (E.D. Wis. 1989).
- | Conditions must be intolerable in a discriminatory way. *Rabinovitz*, 89 F.3d at 489.
- | Resignation is not an adverse employment action unless forced by harassment – such that resignation amounts to constructive discharge. *Ulichny v. Merton Community School District, et al.*, 93 F. Supp.2d 1011 (E.D. Wis. 2000) (aff'd).
- | As an initial matter, employee resignations are presumed to be voluntary. *Alvarado v. Picur*, 859 F.2d 448, 453 (7th Cir. 1998).
- | “Essentially, a plaintiff must show that she had no other choice but to quit”. *Yearous v. Niobrara Co. Memorial Hosp.*, 128 F.3d 1351, 1356 (10th Cir. 1997).
- | Former patrol officer's conduct in moving her residence to another city to live with

her husband was inconsistent with the continuation of the employer-employee relationship and, therefore, constituted voluntary termination of employment for purposes of the unemployment compensation statute; officer knew that she would be in violation of the residency requirement in the collective bargaining agreement and that the move was contrary to her employer's interests and would mean the end of her employment. *Klatt v. LIRC*, 669 N.W.2d 752 (2003).

### C. Is Plaintiff A Member Of A Class Entitled To Relief?

- | All employment discrimination laws except 42 U.S.C. Sec. 1981 apply to "employees," not independent contractors. *Ost v. West Suburban Trav. Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996); *Bratton v. Roadway Package Systems, Inc.*, 77 F.3d 168 (7th Cir. 1996); *Moore v. LIRC*, 175 Wis. 2d 561, 499 N.W.2d 288 (Ct. App. 1993) (WFEA).
- | If the issue is whether an individual is an employee or an independent contractor entitled to protection of discrimination laws, the "economic realities" test and the degree of control exercised over the details of the plaintiff's work determines whether the plaintiff is an "employee." *Ost*, 88 F.3d at 438; *Rogers v. Sugar Tree Products*, 7 F.3d 577 (7th Cir. 1993); *Moore*, 175 Wis. 2d at 569-71.
- | Unpaid volunteers may not be "employees." [*Hall v. Delaware Council on Crime and Justice*, 780 F. Supp. 241 (D. Del. 1992), *aff'd*, 975 F.2d 1549 (3rd Cir. 1992); *Neff v. Civil Air Patrol*, 916 F. Supp. 710 (S.D. Ohio 1996)]; *Haavistola v. Comm. Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993) (issue of whether volunteer firefighters were employees was issue of fact).
- | Note: The WFEA also prohibits discrimination by "other persons" against "any individual" where former's acts adversely affect latter's employment opportunities. *Jackson v. City of Milwaukee*, ERD Case No. 9230848 (LIRC 10/28/93) (plaintiff with service contract with third-party may be liable for its discrimination as to third-party's employees).
- | While class membership is usually obvious, plaintiffs making claims under the ADA must prove they are "qualified individuals with disabilities" – defined by a fairly complicated standard, and plaintiffs making claims under FMLA must show "serious medical condition."
- | Employers may require plaintiffs to submit to independent physical and mental examinations to test claims of disability under ADA, and serious health condition under FMLA. *Ali v. Wang Laboratories*, 4 AD Cases 520 (D.C. Fla. 4/25/95); see also *Morton v. Haskell Co.*, 5 AD Cases 272 (D.C. Fla. 9/12/95) (where mental impairment is alleged, physical exam is not appropriate).

### D. Was Act Taken Because Of Membership In Protected Class?

- | Title VII does not prohibit preferential treatment based upon consensual romantic

relationships. *Hennessy v. Penril Datacomm*, 69 F.3d 1344, 1353-54 (7th Cir. 1995), quoting EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (1/12/90).

- | Ambiguous negative comments made by co-employee in the context of failed personal relationship reflect personal rather than gender based harassment. *Galloway v. GM Service Parts Oper.*, 78 F.3d 1164 (7th Cir. 1996).
- | Company's sensitivity to ADEA liability, - i.e. requiring release of claims on discharge of older employee, does not itself imply discrimination. *Courtney v. Biosound, Inc.*, 42 F.3d 414 (7th Cir. 1994).
- | Decisions that are made for reasons independent of age but happen to correlate with age are not actionable. *EEOC v. Parker*, 41 F.3d 1073 (7th Cir. 1994).
- | Generalized hostile behavior not specific to class membership is not discrimination. "Title VII<sup>1</sup> proscribes only workplace discrimination on the basis of sex, race, or some other status that the statute protects; it is not a "general civility code" designed to purge the workplace of all boorish or even all harassing conduct. *Berry v. Delta Airlines*, 260 F.3d 803, 808 (7th Cir. 2001).
- | Standoffishness, unfriendliness and inapproachability not sufficient to create hostile work environment. *McKenzie v. Milwaukee County*, 381 F.3d 619 (7th Cir. 2004).

## E. Is There Evidence Of Discriminatory Intent?

- | "Direct evidence" consists of acknowledgement of discriminatory intent, or evidence that decision took place under circumstances permitting an inference of discrimination. *Rogers v. Chicago*, 320 F.3d 748 (7th Cir. 2003).
- | Evidence that "similarly situated" nonprotected employees received "systematically better treatment." *Smith v. Cook County*, 74 F.3d 829, 831 (7th Cir. 1996); *Taylor v. Canteen Corp.*, 69 F.3d 773, 780 n.2 (7th Cir. 1995); *EEOC v. Our Lady of Resurrection Med. Center*, 77 F.3d 145 (7th Cir. 1996) (one incident of more favorable treatment generally not enough to show discrimination.)
- | To show discrimination by comparative evidence - i.e., statistics showing historical pattern of failing to promote and terminating more older employees than younger employees, employees need to show more than a few comparison cases; must subject all of employer's decisions to age analysis. *Kuhn v. Ball State University*, 78 F.3d 330 (7th Cir. 1996).

## F. Do The Facts Substantiate Defenses?

### 1. Are Plaintiff's Claims Precluded?

- | Federal Arbitration Act may compel employees with contractual arbitration clauses to arbitrate discrimination claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)(ADEA); *Hoffman v. Aaron Kamhi, Inc.*, 927 F. Supp. 640 (S.D. N.Y. 1996)(ADA); but see *Turner v. IDS Fin. Services, Inc.*, 37 F.3d 1501 (7th Cir. 1994) (unpublished) (arbitration of Title VII claim not required under facts).
- | ERISA may preempt claims for discrimination as to fringe benefits [*Waukesha Engine Div. v. DILHR*, 619 F. Supp. 1310 (1985)] but may not. *Bucyrus-Erie Co. v. DILHR*, 599 F.2d 205 (7th Cir. 1977).
- | State agency and court determinations on reasons for adverse employment decision may have preclusive affect on later civil suit. *Harper v. Godfrey*, 45 F.3d 143 (7th Cir. 1995); *Waid v. Merrill Area Pub. Schools*, 95 F.3d 857 (7th Cir. 1996); *Humphrey v. Tharaldson Enterprises*, 1996 WL 517386 (9/12/96).
- | Any claim that disciplinary termination of firefighter or officer was discriminatory under Wisconsin Fair Employment Act (WFEA) had to be raised before police and fire commission (PFC), the agency with exclusive statutory authority to review disciplinary actions. *City of Madison v. DWD*, 262 Wis. 2d 652, 664 N.W.2d 584 (2003).

## 2. Did Plaintiff Exhaust Administrative Remedies?

- | Plaintiff must, under Title VII, the ADA and the ADEA, file discrimination charge with EEOC or DILHR Equal Rights Division as precondition to civil suit. *Gawley v. Indiana University*, 276 F.3d 301, 313-314 (2001); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 n.3 (7th Cir. 1993).
- | Plaintiff must have been issued "right to sue" letter from administrative forum. *Osborn v. Brach, Inc.*, 864 F. Supp. 56 (N.D. Ill. 1994); *Robinson v. Int'l Brotherhood of Elec. Workers*, 1989 U.S. Dist. LEXIS 8556 (N.D. Ill. 1989).
- | Parties not named in administrative charge may not be sued in civil action where not given notice and opportunity to participate in administrative forum. *Bright v. Roadway Serv.*, 846 F. Supp. 693 (N.D. Ill. 1994); see also *Johnson v. Cook County*, 864 F. Supp. 84 (N.D. Ill. 1994).
- | Claims not made in administrative charge are not actionable in civil action, unless claim is "reasonably related" to those specified. *Whitehead v. AM Int'l*, 860 F. Supp. 1280 (N.D. Ill. 1994).

## 3. Was There a Legitimate, Nondiscriminatory Reason For Decision?

- | Where the employer has proffered a legitimate, nondiscriminatory reason for its action, the court on summary judgment may proceed to a discussion of whether the plaintiff has established pretext. *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985).

- | To establish pretext, a plaintiff must come forward with some evidence suggesting that the employer lied about the stated reasons for its decisions. *Greenslade v. Chicago Sun Times*, 112 F.3d 853, 857 (7th Cir. 1997)
- | "Pretext . . . means a lie, specifically a phony reason for some action." *Russell v. Acme-Evans*, 51 F.3d 64, 68 (7th Cir. 1995).
- | To establish pretext, plaintiff must establish that: 1) the proffered reason is factually baseless; 2) it was not the actual motivation for the failure to hire; or 3) the proffered reason was insufficient to motivate the decision. See *Wolf v. Buss (American) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996).
- | If employer honestly believed its reason for discharging employee, employee could not meet his burden of showing pretext in discrimination action, and this is true even if employer's reason was foolish or trivial or even baseless. *Gordon v. United Airlines*, 246 F.3d 878 (7th Cir. 2001).
- | "The fact that [an] employer was mistaken or based its decision on bad policy, or even just plain stupidity, goes nowhere as evidence that the proffered explanation is pretextual." *Essex v. UPS, Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997).

### Sexual Harassment

- | Claims for harassment under Title VII, Sec. 1983 and 1981 are all subjected to the same basic analysis. *Eiland v. Trinity Hosp.*, 150 F.3d 747, 750 (7th Cir. 1998) ("... we analyze § 1981 and Title VII discrimination claims in the same manner..."); see also *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir. 1996).
- | Sexual harassment is defined generally as "unwelcome sexual advances, requests for sexual favors and other verbal and physical conduct of a sexual nature when:
  1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
  2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  3. Such conduct has the purpose or effect of unreasonably interfering with an Individual's work performance or creating an intimidating, hostile or offensive working environment.

29 CFR §1604.11(a).
- | "Sexual harassment is actionable under Title VII only if it is 'so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment'." *Clark County School District v. Breeden*, 121 S.Ct. 1508,

1509 (2001).

- | “[T]o be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Id.* quoting *Faragher v. Boca Raton*, 524 U.S. 775, 787 (1998).
- | Mere instances of incivility do not meet the “demanding” test for finding workplace hostility required to constitute a violation under Title VII. *Id.* at 788.
- | Relatively isolated instances of non-severe misconduct will not support a hostile environment claim. It is only a pervasive pattern of such statements, if sufficiently severe, that gives rise to an objectively hostile work environment. *Dey v. Colt Construction Co.*, 28 F.3d 1446, 1456 (7th Cir. 1994)(sexual harassment).
- | “Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.” *Breedon*, 121 S.Ct. at 1510, quoting *Faragher*, 524 U.S. at 788).

#### Claims Against Supervisors

- | Where the alleged harasser is a supervisory employee, employers are vicariously liable for harassment by supervisors with authority to alter terms and conditions of employment where:
    - a. the supervisory employee has "immediate or successively higher authority" over the plaintiff;
    - b. the employee is subjected to unwelcome sexual harassment;
    - c. the harassment was based upon sex;
    - d. The harassment complained of affected a term, condition or privilege of employment - i.e., the harassment was sufficiently severe or pervasive that the employee's work conditions were altered and the employee was subjected to an abusive work environment.
- Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2003); *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 354 55 (7th Cir. 2002); *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998).
- | The employer may escape vicarious liability regardless of notice of the harassment of a supervisory employee only if:
    - a. the harassment did not culminate in a "tangible employment action" - i.e. is "hostile environment" rather than "quid pro quo" harassment;
    - b. the employer proves by a preponderance of the evidence that:

1. the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
2. the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

Parkins v. Civil Constructors, 163 F.3d 1027, 1032 (7th Cir. 1998); Murray v. Chi. Transit Auth., 252 F.3d 880, 889 (7th Cir. 2001); Faragher, 118 S.Ct at 2292-93.

- | Courts have construed "supervisory employee" to include (1) employees who hold such a high position in the company that they may be considered "alter egos" of the company; (2) the harassment violates a non-delegable duty of the employer; (3) the supervisor uses "apparent authority granted by the employer; or (4) the supervisor is aided in committing the harassment by the existence of his agency relationship with the employer. Burlington Industries, 118 S.Ct. at 2267.
- | The essence of supervisory status, for purposes of determining whether employer is liable under Title VII for hostile environment sexual harassment, is authority to affect terms and conditions of victim's employment, primarily consisting of power to hire, fire, demote, promote, transfer, or discipline employee; absent entrustment of at least some of this authority, coemployee is not supervisor. Parkins v. Civil Constructors of Ill., 163 F.3d 1027 (7th Cir. 1998).
- | If the conduct culminates in a "tangible employment action" -i.e., becomes quid pro quo harassment - the employee is not entitled to raise the affirmative defense of reasonable care and the plaintiff's failure to avail herself of corrective opportunities. Liability automatically follows. Burlington Industries Inc., infra.
- | A "tangible employment action" is equivalent to an "adverse employment action", "a significant change in employment status, such as hiring, firing, failing to promote, re-assignment with significantly different responsibilities, or a decision causing a significant change in benefits". Durkin, infra; Ellerth, 118 S.Ct. at 268.
- | Threats of adverse employment action alone are sufficient to create liability for harassment by supervisors with immediate or successively higher authority over employee; supervisor need not actually take threatened action. Ellerth, 118 S.Ct. at 2263 (1998).

## Co-Employee Harassment

- | If the conduct at issue is co-employee harassment, liability attaches unless both prongs of the affirmative defense are met.
- | First Prong: The institution of policies addressing sexual harassment is sufficient to prove an employer has taken reasonable care to prevent or correct harassment. Shaw v. Autozone, Inc., 180 F.3d 806, 811 (7th Cir. 1999); Burrell v. Star Nursery,

Inc., 170 F.3d 951 (9th Cir. 1999).

- | Second Prong: A plaintiff's failure to complain is generally enough to meet the second prong of the affirmative defense, unless prompted by a genuine fear of retribution by the employer, as opposed to co-employees.
- | To establish liability for co-employee harassment, which is generally hostile environment harassment, a plaintiff must prove that (1) the employee was the subject of unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment affected a term, condition or privilege of employment; and (4) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Shephard v. Comptroller Public Accounts*, 168 F.3d 871 (5th Cir. 1999); *Fenton v. Hasan, Inc.*, 174 F.3d 827 (6th Cir. 1999).
- | An employer is not liable for co employee sexual harassment when a mechanism to report the harassment exists, but the victim fails to utilize it. *Murray v. Chi. Transit Auth.*, 252 F.3d 880, 889 (7th Cir. 2001).

#### Same Sex Harassment.

- | Same sex sexual harassment is actionable under Title VII. *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003).
- | Same sex sexual harassment is actionable under WFEA. § 111.32(13), Stats.

#### Harassment Based On Other Protected Characteristics

- | Racial harassment is actionable. *Twisdale v. Snow*, 325 F.3d 950 (7th Cir. 2003).
- | Harassment based on religion is prohibited. *Venters v. City of Delphi*, 74 FEP Cases 1095 (8/97)(employer's remarks that employee needed to "save" herself to keep her job, unsolicited workplace lectures on appropriate Christian behavior, and intimate inquiries into social and religious life held actionable).
- | Same with harassment based on national origin. *Amirmokri v. Baltimore Gas and Elec. Co.*, 60 F. 3d 1126 (4th Cir. 1995).
- | Harassment based upon race, national origin or color cannot be inferred from inappropriate conduct that is "inflicted regardless of [protected class membership] is outside the statute's ambit," *Holman v. State of Indiana*, 211 F.3d 399, 403 (7th Cir. 2000), and an employer cannot be held liable for creating or condoning a hostile working environment unless the hostility is motivated by [the fact the employee is a member of a protected class]." See *Heuer v. Weil McLain*, 203 F.3d 1021, 1024 (7th Cir. 2000).

#### Sex Discrimination

- | Valid claim of disparate treatment requires showing of differential treatment from similarly situated members of nonprotected class, and that employer acted with discriminatory intent. *Stoner v. Dept. of Agr., Trade & Cons. Prot.*, 50 F.3d 481 (7th Cir. 1995).
- | Title VII does not prohibit preferential treatment based upon consensual romantic relationships. *Hennessy*, 69 F.3d at 1353-54, quoting EEOC Policy Guidance on Employer Liability under Title VII for Sexual Favoritism, EEOC Notice No. 915-048 (1/12/90).

### Pregnancy

- | Employers are not required to treat pregnancy-related conditions more favorably; but are required to use even-handed treatment without regard to pregnancy. *Piraino, infra*; *Hunt*, 104 F.3d at 1011.
- | Supervisor's expression of "surprise" at sales representative because he viewed her as "career woman"; president's comment that he did not like women in the field because they get pregnant; subsequent negative evaluations, denial of office space and termination subjected employer for liability for sex and pregnancy discrimination. *Hennessy*, 69 F.3d at 1347-1349.
- | Employers are not obligated to offer maternity leave; but are required to offer leave on same terms as leave offered for any other purpose. *Piraino, infra*.
- | Pregnant employee terminated because chronically tardy not entitled to relief because of inability to show other tardy employees received more favorable treatment. *Troupe, supra*.

### Sexual Orientation

- | WFEA prohibits discrimination on basis of sexual orientation. *Racine Unified*, 164 Wis. 2d at 594-595.
- | Title VII does not allow employment claims for sexual orientation discrimination. *Fredette v. BVP Management Assocs.*, 905 F. Supp. 1034 (M.D. Fla. 1995).

### Race/National Origin/Ancestry

- | "National origin" refers to place from which person's ancestors came. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); See also *Wallace II v. SML Pneumatics*, 103 F.3d 1394 (7th Cir. 1996).
- | "Ancestry" refers to ethnic heritage, or to country, nation, tribe, or other identifiable population to which a person's forebears belonged. *Cook v. Therapy & Support Services*, ERD Case No. 8852048 (LIRC 11/8/91).

- | Employment decisions based on foreign accents or inability to speak fluent English may be national origin discrimination unless employer shows interference with job performance. *Carino v. Univ. of Okla.*, 750 F.2d 815 (10th Cir. 1984).
- | Height and weight requirements may discriminate where effect is disproportionate exclusion of applicants of certain nationalities. See *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980).
- | Employer's standardized cognitive ability test, which it knew, was easier for whites to pass than for Hispanics and African-Americans was discriminatory. *Melendez v. Illinois Bell*, 79 F.3d 661 (7th Cir. 1996) (continued use of test after pre-litigation investigation revealed disparate impact was discriminatory.).
- | Written examination used to screen applicants violates WFEA where exam has disparate impact on black applicants and was not valid performance predictor. *Turner & Poindexter v. Racine County*, ERD Case Nos. 7401054, 7605671 (LIRC 5/25/83).
- | Evidence that supervisors rarely lunched with Hispanic employees but regularly lunched with non-Hispanic employees held to be evidence of racial discrimination precluding summary judgment on discharge claim. *Perdomo v. Browner*, 67 F.3d 140 (7th Cir. 1995).
- | Where same individual hired and fired plaintiff, inference of non-discrimination is permitted. *Our Lady*, 77 F.3d at 152. ("The same hirer/firer inference has strong presumptive value").
- | Layoff selection methods based on seniority actionable where method has disparate impact on non-whites. *Lopez v. Milwaukee County*, ERD Case No. 8153039 (LIRC 11/4/86).
- | Comparative evidence, i.e., that employers take adverse employment action against disproportionate number of protected class members, is insufficient absent link between evidence and decision in question. *Sample v. Aldi*, 61 F.3d 544, 551 (7th Cir. 1995).
- | Reverse discrimination, or discrimination against members of same race, is not unlawful per se if intended to remedy past misconduct; but is highly suspect and must be justified by solid evidence showing remedial effect. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528 (7th Cir. 1997).

## Religion

- | Title VII affords protection for all aspects of religious observance and practice as well as belief, and imposes affirmative duty on employer to reasonably accommodate religious observances and practices. *Endres v. Indiana State Police*, 334 F.3d 618 (7th Cir. 2003); *EEOC v. Ilana of Hungary*, 108 F.3d 1569 (7th Cir. 1997).

- | Title VII prohibits religious harassment. *Venters v. City of Delphi*, 74 FEP Cases 1095 (8/97)(employer's remarks that employee needed to "save" herself to keep her job, unsolicited workplace lectures on appropriate Christian behavior, and intimate inquiries into social and religious life held actionable).
- | Removing teacher from substitute teachers list for interjecting religious beliefs into classroom does not violate Title VII. *Helland v. South Bend Community Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996).
- | Requiring employees to attend devotional services violates Title VII. *EEOC v. Townley Eng.*, 859 F.2d 610 (9th Cir. 1990).
- | Employee who, after taking religious vow, wore anti-abortion button showing photograph of fetus, was engaging in religious practice protected by Title VII. *Wilson v. U.S. West Comm.*, 860 F. Supp. 665 (D. Neb. 1994) aff'd 58 F.3d 1337 (8th Cir. 1995).
- | Title VII and WFEA require "reasonable accommodation" of employees' religious beliefs. § 111.337(1); 42 U.S.C. § 2000e(j).
- | Making up social security number for employee who refused to use social security number because of religious beliefs was not reasonable accommodation. *Hover v. Fla. Power & Light Co.*, 67 FEP Cases 34 (S.D. Fla. 1994).
- | Accommodation of schedules and dress and grooming may be required. 29 CFR § 1605.2; *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382 (9th Cir. 1984).

### Marital Status

- | Discrimination against married women constitutes sex discrimination under Title VII if different standards are applied to similarly situated married men. *Karp v. Roach*, 1990 U.S. Dis. Lexis 17618 (D.C. D. Col. 1990).
- | Rules prohibiting employees from extra-marital co-employee relationships do not discriminate on basis of marital status. See *Fed. Rural Elec. Ins. Co. v. Kessler*, 131 Wis. 2d 189, 388 N.W.2d 553 (1986).
- | Denying health coverage to married employees covered under spouses' policy violates WFEA. *Braatz v. LIRC*, 174 Wis. 2d 286, 496 N.W.2d 597 (1993).
- | But, rule does not apply to employees covered by benefit plans administered by the state. *Kozich v. Employee Trust Funds Board*, 205 Wis. 2d 363, 553 N.W.2d 830 (Ct. App. 1996) pet. to rev. denied.
- | Denying coverage to unmarried homosexual "spousal equivalent" not marital status discrimination. *Phillips v. Wis. Personnel Comm.*, 167 Wis. 2d 205, 482 N.W.2d 121

(Ct. App. 1992).

## Age

- | Employee must show employment action would not have been taken "but for" employee's age. *Mills v. First Federal Savings & Loan Am. of Belvedere*, 83 F.3d 833 (7th Cir. 1996).
- | Discrimination occurs where age is "substantial factor" in employment decision and "tipped the balance" in favor of decision. *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir. 1995)(jury instructions that stated age need be "a cause" held erroneous, warranting new trial).
- | Under WFEA, employers may make age related decisions as to retirement plans, insurance plans, and on various grounds, including ability to perform duties, exposure to physical hazards, and positions where knowledge to be gained is required for advancement to executive or managerial position. § 111.33, Stats.; *Johnson v. LIRC*, Case No. 95-2346 (Ct. App. 3/5/96).
- | Under ADEA, employer may have mandatory retirement age of 65 for certain executive and high policymaking positions. 29 U.S.C. § 631(c)(1).
- | While the ADEA allows discrimination where age is bona fide occupational qualification (BFOQ), and where decision is based on reasonable factors other than age (RFOA), the WFEA does not have BFOQ or RFOA exceptions. See *Johnson*, supra.
- | Consideration of economic factors alone, absent evidence that age factored into considerations, is insufficient to prove discrimination. *EEOC v. Parker*, 41 F.3d 1073 (7th Cir. 1994)(decisions which happen to correlate with age are not actionable).
- | Comments that plaintiffs "may not be able to keep up" and would have a hard time getting a new job because of age aren't evidence of discrimination where not linked to discharge decision. *Mills*, supra.
- | Expressions of concern about employee's age and health before reduction in force discharge may not show discriminatory intent where made in interest of retaining employee, although employee was ultimately discharged. *Courtney*, 42 F.3d at 419.
- | Not enough to show one younger employee received promotion employee sought; issue is whether age tipped the balance. *Kuhn v. Ball State University*, 78 F.3d 330 (7th Cir. 1990) ("The ADEA is not a merit selection program.")
- | Fact that discharged employee was hired when over 40 is indicative of employer's lack of discriminatory intent. *Wolf v. Buss (America) Inc.*, 77 F.3d 914 (7th Cir. 1996).

- | To make out prima facie case, employees need not show replacement by member of nonprotected class; need show employer sought a "substantially younger" replacement. *O'Connor v. Consolidated Coin Caterers Corp.*, 134 L.Ed.2d 433 (1996).

## Disability

- | To establish a claim under the ADA, a plaintiff must show that she is a "qualified individual with a disability," defined as a person who can perform the essential functions of the job with or without reasonable accommodation from the employer. 42 U.S.C. § 12111(8).
- | Intermittent, episodic impairments may not be disabilities. *Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995).
- | The ADA protects the employment rights of disabled persons who can work, while the Social Security Act provides income to disabled persons who cannot work. *Lee v. City of Salem*, 259 F.3d 667, 672 (7th Cir. 2001).
- | Disabilities might change over time, so that a person unable to work when she applies for disability benefits could later regain the ability to work for purposes of the ADA. *Lee*, 259 F.3d at 673.
- | Alternatively, a person might meet the legal definition of "disabled" under the Social Security Act, but nonetheless be functionally able to work if offered reasonable accommodation by the employer. *Id.*
- | A claimant's sworn statement in an application for disability benefits that she is "unable to work" would negate an essential element of the claimant's ADA case that she is a "qualified individual with a disability." See *Cleveland*, 526 U.S. at 806; *Lee*, 259 F.3d at 674.
- | But because of the possibility that the two claims may be reconciled, an ADA plaintiff must be given an opportunity to explain her seemingly inconsistent positions. *Id.* The explanation must be legally adequate, however; an ADA plaintiff may not simply disavow a prior claim of total disability. *Lee*, 259 F.3d at 674 75.
- | Conditions which result in inability to perform single, particular job are not disabilities under ADA [*Kubsch v. National Standard Company*, 13 A.D.D. 503 (N.D. Ind. 9/11/95)]; but may be handicaps under WFEA. *City of LaCrosse Police Comm. v. LIRC*, 139 Wis. 2d 740, 407 N.W.2d 510 (1987).
- | The inability to drive to work is generally not considered an inability to perform a major life activity. *Chenoweth v. Hillsborough County*, 250 F.3d 1328, 1329 30 (11th Cir. 2001); *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 643 (2d Cir. 1998).

- | Women experiencing physical conditions related to pregnancy that require medical attention may be disabled under ADA. *Kindlesparker v. Met. Life Ins. Co.*, 66 Empl. Prac. Dec. p. 43, 657 (5/8/95).
- | But, disability may not be found where physical conditions are not outside normal range of what would be expected for pregnancy. *Gudenkauf v. Stauffer Comm. Inc.*, 922 F. Supp. 465 (D. Kan. 1996).
- | Sexual preference, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders, compulsive gambling, kleptomania or pyromania, and current use of illegal drugs are not ADA disabilities. 42 U.S.C. § 12114(a).
- | Alcoholism is ADA disability but drinking on job, poor performance, etc. can be grounds for alcohol-related termination. 42 U.S.C. § 12114.
- | Major depression can constitute a disability under the ADA, but isolated bouts of depression do not. *Ogborn v. United Food And Commercial Workers Union*, 305 F.3d 763 (7th Cir. 2003).

#### Who Are Otherwise Qualified Individuals With Disabilities?

- | Individuals who cannot perform essential job functions even with accommodation are not qualified individuals with disabilities. *Doner v. City of Rockford*, 2003 WL 22345473 (7th Cir. 10/8/03)
- | Individuals who pose threat to health or safety of others despite accommodation are not otherwise qualified. See *EEOC*, 55 F.3d at 1283.
- | Nor are employees who display abusive or violent conduct toward co-workers. *Palmer v. Circuit Court*, 905 F. Supp. 499 (N.D. Ill. 1995), *aff'd* 117 F.3d 351 (7th Cir. 1997).
- | The "job relatedness" exception to the WFEA allows discrimination on basis of handicap where the handicap is "reasonably related to the individual's ability to adequately undertake the job-related responsibilities of employment." *Racine Unified*, 164 Wis. 2d at 604-605.
- | Employers may be liable for discriminating by relying on doctor's opinion about ability to perform job functions where opinion is baseless or contrary to law. *EEOC v. Texas Bus Lines*, No. H-95-3981 (D.C. Tex. 4/23/96).

#### Duty To Accommodate

- | Employee is entitled to have employer engage in interactive process to determine what accommodations are necessary. *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d

1130 (7th Cir. 1996); *Hunt-Golliday*, 104 F.3d at 1012.

- | Requiring employer to modify disabled employee's job duties and make physical modifications to workplace may not be unreasonable and would be a reasonable accommodation, under the Wisconsin Fair Employment Act W.S.A. 111.34(1)(b); *Crystal Cheese v. LIRC*, 264 Wis. 2d 200, 14 A.D. Cases 1033 (2003).
- | But, under the ADA, an employer need not create a position, and an employer need not bump an incumbent from a position to accommodate a disabled employee. *Pond v. Michelin N. Am., Inc.*, 183 F.3d 592, 595 (7th Cir. 1999).
- | Further, the ADA does not require an employer to abandon legitimate, nondiscriminatory company policies like job prerequisites, collective bargaining constraints, and seniority. *Winfrey*, 259 F.3d at 618.
- | Therefore, an ADA plaintiff must generally establish that his or her employer had a vacant position for which he or she was qualified at the time of discharge. *Rehling v. City of Chicago*, 207 F.3d 1009, 1014 15 (7th Cir. 2000).
- | Even when the interactive process has failed, the disabled employee retains the burden of showing that an accommodation existed, and that he or she did not receive it. *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir. 2002).

### Retaliation

- | Complaints of violation of discrimination laws cannot form basis for adverse employment action. *Campos v. City Of Peoria*, 55 Fed. Appx. 379 (7th Cir. 2003); *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995).
- | Allegations must be made in good faith and with reasonable belief that unlawful discrimination exists to be protected. *Dey v. Colt Const.*, 28 F.3d 1446 (7th Cir. 1994); *O'Patka v. Menasha Corp.*, 878 F. Supp. 1202 (E.D. Wis. 3/4/96).
- | Employee must establish adverse employment action would not have been taken "but for" protected expression. *Johnson v. Univ. of Wis. Eau Claire*, 70 F.3d 489 (7th Cir. 1995).
- | Alleged retaliatory conduct must be different conduct than original discrimination about which employee complained. *Johnson v. Town of Elizabethtown*, 800 F.2d 404 (7th Cir. 1986).
- | Employee need not file formal complaint; informal complaints to employer are protected. *Wenner*, 917 F. Supp. at 648-649.
- | Alleged retaliatory conduct occurring after termination of employment relationship is actionable. *Robinson v. Shell Oil*, 72 FEP Cases 1857 (1997).

- | Even "passive" opposition to discriminatory practices may be protected. McDonnell, supra.

## \_\_\_ Family And Medical Leave

- | "Eligible" employees are entitled to 12 weeks of leave for certain family and medical reasons during a 12-month period.
- | Employers may select one of four options for determining the 12-month period:
  - the calendar year;
  - any fixed 12-month "leave year" such as a fiscal year, a year required by state law, or a year starting on the employee's "anniversary" date;
  - the 12-month period measured forward from the date any employee's first FMLA leave begins; or
  - a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.
- | The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.
- | FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.
- | An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12-week FMLA leave entitlement.
- | Pregnancy disability leave or maternity leave for the birth of a child would be considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the employee in writing of the designation.
- | In most situations, the employer cannot count leave as FMLA leave retroactively. Remember, the employee must be notified in writing that an absence is being designated as FMLA leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work.
- | An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. The term "parent" does not include a parent

“in-law”. The terms son or daughter do not include individuals age 18 or over unless they are “incapable of self-care” because of mental or physical disability that limits one or more of the “major life activities” as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans With Disabilities Act (ADA).

- | FMLA permits one to take leave to receive “continuing treatment by a health care provider,” which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis.
- | Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.
- | The 12 months do not have to be continuous or consecutive; all time worked for the employer is counted.
- | The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave, are not included.
- | As a rule of thumb, the following may be helpful for estimating whether this test for eligibility has been met;
  - | 24 hours worked in each of the 52 weeks of the year; or
  - | over 104 hours worked in each of the 12 months of the year; or
  - | 40 hours worked per week for more than 31 weeks (over seven months) of the year.
- | The employee does not have to provide medical records. The employer may, however, request that, for any leave taken due to a serious health condition, the employee provide a medical certification confirming that a serious health condition exists.
- | Subject to certain limitations, an employer may deny the continuation of FMLA leave due to a serious health condition if the employee fails to fulfill any obligations to provide supporting medical certification. The employer may not, however, require return to work early by offering a light duty assignment.
- | Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, the employer may not restrict activities. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

- | It is unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under this law. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies. Under limited circumstances, an employer may deny reinstatement to work - but not the use of FMLA leave - to certain highly-paid, salaried ("key") employees.
- | In addition to denying reinstatement in certain circumstances to "key" employees, employers are not required to continue FMLA benefits or reinstate employees who would have been laid off or otherwise had their employment terminated had they continued to work during the FMLA leave period as, for example, due to a general layoff.
- | Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.
- | Employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated "12 month period" no longer have FMLA protections of leave or job restoration.
- | Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.
- | It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.
- | The FMLA requires that employees be restored to the same or an equivalent position. If an employee was eligible for a bonus before taking FMLA leave, the employee would be eligible for the bonus upon returning to work. The FMLA leave may not be counted against the employee. For example, if an employer offers a perfect attendance bonus, and the employee has not missed any time prior to taking FMLA leave, the employee would still be eligible for the bonus upon returning from FMLA leave.
- | On the other hand, FMLA does not require that employees on FMLA leave be allowed to accrue benefits or seniority. For example, an employee on FMLA leave might not have sufficient sales to qualify for a bonus. The employer is not required to make any special accommodation for this employee because of FMLA. The employer must, of course, treat an employee who has used FMLA leave at least as well as other employees on paid and unpaid leave (as appropriate) are treated.
- | In all circumstances, it is the employer's responsibility to designate leave taken for an FMLA reason as FMLA leave. The designation must be based upon information

furnished by the employee. Leave may not be designated as FMLA leave after the leave has been completed and the employee has returned to work, except if; the employer is awaiting receipt of the medical certification to confirm the existence of a serious health condition; the employer was unaware that leave was for an FMLA reason, and subsequently acquires information from the employee such as when the employee requests additional or extensions of leave; or, the employer was unaware that the leave was for an FMLA reason, and the employee notifies the employer within two days after return to work that the leave was FMLA leave.

### The Equal Pay Act

- | The Equal Pay Act prohibits sex-based wage discrimination, and requires proof "(1) that different wages are paid to employees of the opposite sex; (2) that the employees do equal work which requires equal skill, effort, and responsibility; and (3) that the employees have similar working conditions." *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543, 548 (7th Cir. 1991).

### Constitutional Claims Related To Employment

#### First Amendment

- | Generally speaking, public employment cannot be conditioned on a basis that infringes an employee's constitutionally protected interest in freedom of expression. *Delgado v. Jones*, 95 Fed. Appx. 185 (7th Cir. 2004) (unpublished); *Connick v. Myers*, 461 U.S. 138, 142 (1983).
- | The state nevertheless has additional interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of citizens in general. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).
- | The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. *McGreal v. Ostrov*, 368 F.3d 657 (7th Cir. 2004); *Waters v. Churchill*, 511 U.S. 661, 675 (1994).
- | As an employer, a governmental agency must have the "prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Connick*, 461 U.S. at 151.
- | To be protected by the First Amendment, (1) the speech by a government employee must be on a matter of public concern, and (2) the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause

to the interest of the state, as employer, in promoting efficient and effective public service. *Waters*, 511 U.S. at 668; *Williams v. Seniff*, 342 F.3d 774 (7th Cir. 2003).

- | Even termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong. *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2347 (1996).
- | And a plaintiff cannot prevail in a claim of retaliatory discharge if the decision to terminate her would have been reasonable even in the absence of the protected conduct; the protected conduct does not as a matter of law insulate the employee from termination based on unprotected conduct. See *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977); *Conner v. Reinhard*, 847 F.2d 384, 393 (7th Cir. 1988).
- | Speech on matters of public concern has been defined as speech relating to any matter of political, social, or other concern to the community. *Connick*, 461 U.S. at 146.
- | *Pickering* contemplates a highly fact specific inquiry into a number of interrelated factors: (1) whether the speech would create problems in maintaining discipline or harmony among co workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform [his] responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision making; and (7) whether the speaker should be regarded as a member of the general public.

*Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933 (7th Cir. 2004);  
*Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002); *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000).

- | The Seventh Circuit has stated "our inquiry must also take into account 'the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?'" *Fruin*, 28 F.3d at 651.
- | A police officer appeared on a television newscast in disguise and shared his views concerning another officer's allegation of sex discrimination within the police department; the court found that *Kokkinis* had no knowledge of the incident; rather, he had a personal dispute with the Police Chief, and the Police Chief was embarrassed by the broadcast and believed that the department as a whole was placed in a negative light. The Chief also received phone calls complaining about the interview. The court held that the *Pickering* balancing test weighed in favor of the defendants because "[d]eference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement." *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999).

- | The keeping of a journal that documents personal grievances is purely personal, unprotected speech. *McKenzie v. Milwaukee County*, 381 F.3d 619 (7th Cir. 2004).
- | In an organization such as a police department, discipline and respect for the chain of command are critical to accomplishing the entity's mission of maintaining order and public safety. See *Dill v. City of Edmond*, 155 F.3d 1193, 1203 (10th Cir. 1998) (stating that in the context of law enforcement the government has a " 'heightened interest ... in maintaining discipline and harmony among employees.' " (citation omitted)); *Tyler v. City of Mountain Home*, 72 F.3d 568, 570 (8th Cir. 1995) (commenting that paramilitary character and mission of police departments results in greater latitude in discipline and personnel matters than a normal government employer).
- | A police officer's position contains a duty of loyalty and confidence. *Klunk v. County of St. Joseph*, 170 F.3d 772, 776 (7th Cir. 1999); *Upton v. Thompson*, 930 F.2d 1209, 1215 (7th Cir. 1991) (commenting on need for loyal deputies for elected sheriff to promote public confidence in law enforcement).
- | Revealing confidential inmate medical records in context of publicizing illnesses allegedly caused by medical procedures performed without latex gloves held to be sufficient reason for termination irrespective of degree of public concern on issue of medical supply shortage. *Devine v. Board of Commissioners*, 49 Fed. Appx. 57 (7th Cir. 2002).
- | Confidential employees and political affiliation. *Carlson v. Gorecki*, 374 F.3d 461 (7th Cir. 2004).

#### Fourth Amendment –Privacy

- | Although searches by government employers of their employee's private property may be subject to the Fourth Amendment protection for "unreasonable searches" [*O'Connor v. Ortega*, 480 U.S. 709, 715 (1987)], workplace searches do not require warrants or a prior finding of probable cause typically required under the Fourth Amendment. *Gossmeier v. McDonald*, 128 F.3d 481 (7th Cir. 1997), citing *Ortega*, 480 U.S. at 719-26.
- | Instead, the test is whether the search is "reasonable under all the circumstances, . . . balancing the public, governmental and private interests at stake . . .". *Gossmeier*, 128 F.3d at 490, quoting *Ortega*, 480 U.S. at 725-26.
- | This requires evaluation of (1) the presence of a legitimate expectation of privacy; (2) the legitimacy of the justification for the search; and (3) the reasonableness of the nature of the search. *Gossmeier*, *infra*.
- | The plaintiff's Fourth Amendment rights are implicated only if the conduct at issue infringes "an expectation of privacy that society is prepared to consider reasonable."

Ortega, 480 U.S. at 715, citing U.S. v. Jacobsen, 466 U.S. 109, 113 (1984).

- | The issue of whether an employee has a reasonable expectation of privacy is resolved by use of the following two-part test: (1) did the plaintiff have a subjective expectation of privacy in matters subject to the search; and (2) if so, whether that expectation of privacy is objectively reasonable. *Schowengert v. U.S.*, 823 F.2d 1328 (9th Cir. 1987); *Chicago Firefighters Union, Local 2 v. City of Chicago*, 717 F. Supp. 1314, 1318 (N.D. Ill. 1989).
- | The operational realities of the workplace may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor. *Ortega*, 480 U.S. at 717.
- | Public employees' expectations of privacy in their offices, desks and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. *Ortega*, 480 U.S. at 717.
- | Some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. *Ortega*, 480 U.S. at 718.
- | In *Gossmeyer*, the Seventh Circuit held that the plaintiff did not have a reasonable expectation of privacy in office storage units as a matter of law under circumstances indistinguishable from those in this case. The plaintiff's employer searched the plaintiff's office storage units, including cabinets, and the plaintiff's desk. The Seventh Circuit held that there was no reasonable expectation of privacy because most of the contents were work related and the units were therefore "part of the workplace" within the employer's control. *Gossmeyer*, 128 F.3d at 490. The court reasoned:
  - | The cabinets were not personal containers which just happened to be in the workplace; they were containers purchased by [the employee] primarily for storage of work-related materials. [The employee] herself stated that she bought them because of a lack of storage space. Also, [another employee] had at least a key to the [unit] . . . [The employee] had no constitutionally-protected privacy interest . . . These items were part of the 'workplace' not part of [the employee's] personal domain.  
  
*Gossmeyer*, 128 F.3d at 490.
- | In searches conducted by public employers, the invasion of the employee's legitimate expectation of privacy is balanced against the government's need for supervision, control, and the efficient operation of the workplace. *Ortega*, 480 U.S. at 719-20.
- | The reasonableness standard is met as long as both the inception and the scope of the search are reasonable. *Id.*

- | Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider `whether the ... action was justified at its inception' [Terry v. Ohio, 392 U.S. at 20], second, whether the search `was reasonably calculated in scope to the circumstances which justified the interference in the first place.'" Ortega, 480 U.S. at 726; Gossmeyer, 128 F.3d at 490.
- | A search is permissible in its scope when "the measures adopted are reasonably related to the objective" that prompted the search. Ortega, 480 U.S. at 426.
- | As long as the search does not extend to places in which work materials would not be found, the search is appropriate. Gossmeyer, 128 F.3d at 491.
- | County employee who refused to submit required real-property disclosure form was unable to demonstrate likelihood of success on privacy violation claim; employee did not have protected privacy interest in information regarding finances or ownership of real estate. Overstreet v. Lexington-Lafayette Urban County Gov't, 305 F.3d 566, 19 I.E.R. Cas. (BNA) 527 (6th Cir. 2002).
- | Public employees have substantive due process right in the confidentiality in his medical records that could only be overcome by a sufficiently strong state interest. Denius v. Dunlap, 209 F.3d 944, 16 I.E.R. Cas. (BNA) 654 (7th Cir. 2000).
- | Professor who downloaded child pornography images lacked privacy expectation in the downloaded files because of employer policy barring use of its systems to access obscene materials. U.S. v. Angevine, 281 F.3d 1130 (10th Cir. 2002)
- | Employee had no Constitutional right of privacy in laptop, but had right to sue under state law invasion of privacy claim relating to surveillance. Muick v. Glenavre Elecs., 280 F.3d 741 (7th Cir. 2002).
- | Employee allowed to proceed with action against supervisors for searching private papers she had prepared in connection with a discrimination complaint. Stewart v. Evans, 275 F.3d 1126 (D.C. Cir. 2002).
- | Interest in a drug-free workplace is insufficient to justify drug testing. Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989).
- | Firefighters had reduced privacy interest in lockers given City's interest in regulating potential on-duty use of drugs or alcohol. Chicago Firefighters Union, Local 2 v. City of Chicago, 717 F. Supp. 1314 (N.D. Ill. 1989).

#### Fifth Amendment – Garrity Rights

- | Oddsen v. Board of Fire and Police Commissioners, 108 Wis. 2d 143 (Wis. 1982), and cases cited therein.

#### Fourteenth Amendment – Due Process

- | Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Fourteenth Amendment. *Alexander v. Dept. Health and Family Services*, 263 F.3d 673 (7th Cir. 2000).

## Property Interests In Employment

- | Property interests are not created by the Constitution; they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Mitchell v. Glover*, 996 F.2d 164, 167 (7th Cir. 1993); quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).
- | “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . .”. *Roth*, 408 U.S. at 577.
- | Employees with civil service protection, union contracts or statutory “for cause” employment protections have property interests in continued employment that may not be taken without notice and an opportunity to be heard. *Alexander v. Dept. Health and Family Services*, 263 F.3d 673 (7th Cir. 2000).
- | Probationary officers do not have a protected property interest in employment such that they are entitled to notice and an opportunity to be heard before termination. *Hussey v. Outagamie County*, 201 Wis. 2d 14, 548 N.W.2d 848 (Ct. App. 1996) (claim by probationary employee for termination without due process).
- | Even where municipal employees have protected property interests in employment in general, they do not have constitutionally protected interests in specific job assignments absent statutory or contractual restrictions on their employers’ right to alter those assignments. *Gustafson v. Jones*, 117 F.3d 1015, 1020 (7th Cir. 1997)

## Liberty Interests In Employment

- | To establish an infringement of a liberty interest, a plaintiff must prove that:
  1. she was stigmatized by her employer’s conduct;
  2. the stigmatizing information was publicly disclosed; and
  3. she suffered tangible loss of other employment opportunities as a result of the disclosure.

*Strasburger*, 143 F.3d at 356; *Harris v. City of Auburn*, 27 F.3d 1284, 1286 (7th

Cir. 1994).

- | True but stigmatizing statements do not support this claim, nor do statements of opinion, even stigmatizing ones. *Strasburger*, 143 F.3d at 356.
- | Labeling someone incompetent does not sufficiently stigmatize them to implicate a liberty interest. *Lashbrook v. Oerkfitz*, 65 F.3d 1339 (7th Cir. 1995); *Griswald v. Alabama Dept. of Ind. Relations*, 903 F. Supp. 1492, 1499 (M.D. Ala. 1995) citing *Musnon v. Friske*, 754 F.2d 683 (7th Cir. 1985).
- | “Liberty is not infringed by a label of incompetence or a failure to meet a specific level of management skills, which would only affect one’s professional life and force one down a few notches in the professional hierarchy.” *Lashbrook*, 65 F.3d at 1348.
- | Nor are liberty interests implicated by charges of the inability to get along with others. *Sullivan v. School Bd. of Pinellas County*, 773 F.2d 1182, 1187 (11th Cir. 1985).

#### Fourteenth Amendment – Equal Protection

- | In addition to what is required to prove discrimination under other statutes, an equal protection claim requires proof of an additional element that the defendant acted with discriminatory intent. *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000); *Jackson v. City of Columbus*, 194 F.3d 737, 751 52 (6th Cir. 1999). Regarding the fifth element, Singh must show that the defendants “acted [or failed to act] with a nefarious discriminatory purpose,” and discriminated against her because of her membership in a definable class (because she is Indian, of color and of a specific race). *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996).



1 Where applicable, Title VII is intended to refer to all harassment and discrimination claims, including those brought under Sec. 1981 and Sec. 1983.