



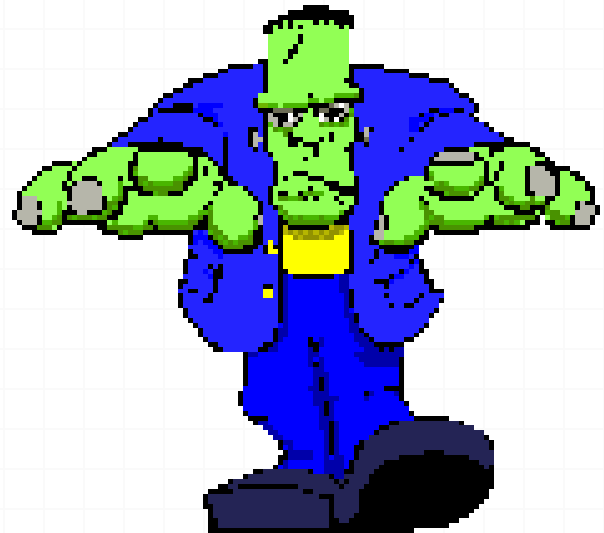
***HR Horror Stories  
from the Legal  
Trenches:***

***What HR Can Do NOW to Stop the Bleeding!***

***Susan R. Fiorentino, Esq.***

# 3 Recurring Themes

- Discrimination and Retaliation
  - Understanding and avoiding
- ADA issues of accommodation and testing
- DOL Audits in the workplace



# Discrimination Laws

- o Title VII of the Civil Rights Act of 1964
- o ADA
- o ADEA
- o PDA
- o PHRA



# TITLE VII of the Civil Rights Act of 1964

- o It shall be an unlawful employment practice for an employer -
- o (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's **race, color, religion, sex, or national origin**

# Proving Disparate Treatment Discrimination under Title VII

- o Employee Presents *Prima facie* case:
  - o In a protected category
  - o Qualified for position
  - o Suffered adverse employment action
  - o Circumstances that raise inference of discrimination
- o Employer presents “LNDR”
- o Employee demonstrates “Pretext”

# Do We Still Need So Many Laws??

- <https://www.youtube.com/watch?v=5b2MBilv7Po>
- Lessons from Wet Seal



# Test your knowledge:

- o Mary is the top sales leader for a major paper supply company. She has applied for a promotion. She learns that Matt, who has worked with the company two years less than Mary, is getting the job. When Mary asks her manager why she didn't get the promotion, he tells her that he is concerned that she is not able to give 100% to the job since she is also a mom.

# Can Mary sue under Title VII?

- o PFC:
  - o Protected category
  - o Qualified for position
  - o Suffered adverse action
  - o Inference of discrimination
- o LNDR
- o PRETEXT





# Best Practices:

- o DOCUMENT, DOCUMENT, DOCUMENT
- o KNOW THE LAW
  - o HAVE YOUR LNDR
- o TRAIN YOUR SUPERVISORS AND MANAGERS
- o BE HUMAN!!

# Title VII Anti-Retaliation Provision

- o “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter.”



# Retaliation in a Nutshell

- o An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination.

- o [www.eeoc.gov /laws/types/retaliation](http://www.eeoc.gov/laws/types/retaliation)

# Elements of Retaliation

- o 3 Key Concepts
- o Retaliation occurs when an employer takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**.

# Protected Activity

- o Opposition to practice believed to be unlawful
  - o Telling employer that you feel discriminated against;
  - o Threatening to bring a charge of discrimination;
  - o Refusing to obey discriminatory order;
  - o Participation in employment discrimination proceeding like filing charge, serving as witness for EEOC investigation or internal investigation

# Broad Reach of Anti-Retaliation

- Expansive standard under 2006 case of *Burlington Northern v. White*:
  - Would the challenged action dissuade a reasonable worker from making or supporting a charge of discrimination?
    - Context matters
    - Not “Petty slights”
- Occurs in both public and private employment settings
- Title VII
- ADEA
- ADA

# Test your knowledge

Mary decides to file a charge of discrimination with the EEOC. One week later, she's fired.

Can Mary now file an additional charge of RETALIATION against the company?

- complain under the law
- suffered adverse action
- causal connection between the two

# What HR Can do now...

- o TRAIN YOUR SUPERVISORS AND MANAGERS
  - o McClatchy case
  - o Handbook policy



# Some ADA Basics

- o Employer cannot discriminate against a **qualified individual** with a **disability** in the terms and conditions of employment.
- o Employer must provide **reasonable accommodations** for person with known disability.

# Americans with Disabilities Act

- Disability discrimination occurs when an employer **treats a qualified individual with a disability** who is an employee or applicant unfavorably because she has a disability.



# What Constitutes a Disability?

- o Physical or mental impairment that **substantially limits a major life activity**
  - o ADAAA regulations define these terms broadly
- o **Major life activity** are those things which are commonly done every day (hearing, seeing, walking, breathing, sleeping, thinking)
  - o Working is a special category of major life activity
  - o ADAAA Expanded the list of major life activities

# Who is “Qualified”?

- o To be qualified for the position, an employee must be able to perform the essential functions of the job, with or without a **reasonable accommodation**.
- o Essential functions are the fundamental duties of the job
- o ADAAA instructs that “consideration shall be given to the employer’s judgment as to what functions of a job are essential”
- o Prepared, written job description before advertising or interviewing applicants for the job shall be considered evidence of the essential functions of the job

# Is *THAT* a Reasonable Accommodation?

- o Modifications to the job that would allow the employee to perform the essential functions (duties) of the position
  - o Doesn't require undue hardship
  - o Changes to work schedules, assistive equipment, job restructuring, transfer to open & available position - usually reasonable
  - o eliminate an essential function, create a new job, violate contract or agreement - usually not reasonable

# It's All About the Interactive Process!

- o From *Taylor v. Phoenixville* case
- o Employer and employee must both engage in an interactive process to communicate with each other to determine whether or not there are accommodations that can be made to the job to allow the employee to continue performing the essential functions of that job.
- o No “magic words” necessary.
- o **Individualized** assessment needed!
  - o *REILLY v. UPPER DARBY TOWNSHIP*

# ADA Hypos:

- o John's job requires that he lift up to 20 pounds. John returns from a 12-week medical leave and tells you that he can't lift 20 pounds.
  - o Can you fire John?
- o Lately, you notice that your assistant, Mary, is chronically late for work. You are about to fire her when she tells you she is clinically depressed.
  - o Can you still discipline Mary?

# Medical tests

- o EEOC guidelines

- <https://www.eeoc.gov/policy/docs/accommodation.html>

- o Pre-Offer

- o Can you perform EF of job with or without a RA?

- o Post-offer but Pre-Employment

- o Everyone may be sent for physical exam

- o Current employees

- o Only based on need: Does employee pose a risk to herself or others in the workplace?



# Dreaded DOL Audit!

- WHO is auditing?
- WHAT is being audited?
- WHY are they auditing?
- WHERE will it occur?
- WHEN will it occur?



# Before the audit...

- ESTABLISH sound wage and hour policies
- SELF-AUDIT
  - Review compliance with FLSA and state laws
    - Overtime
    - FLSA status of employees

# During the audit...

- Prepare employees
  - Managers
  - Hourly workers
- Designate a team
- Prepare documents
- Consider outside counsel to navigate process

# After the audit...

- o Findings of the auditor
- o Closing Conference
  - o Back wage findings
  - o Negotiating a settlement

# Best Practices

- o BE Courteous
- o Cooperate
- o BE Prepared
  - o Documents copied in advance
  - o Employees informed but not coached
- o SHOW your commitment to employees

Questions?



# Susan R. Fiorentino, Esq.

- o Susan Fiorentino, Esq., is Assistant Professor at West Chester University where she serves as Coordinator for the Master of Science in Human Resource Management program. She maintains a limited law practice, providing employment law counseling to clients. She is actively engaged in the HR community and lectures frequently to HR groups. Ms. Fiorentino received her J.D. degree from Villanova University School of Law.
- o Contact her at [sfiorentino@wcupa.edu](mailto:sfiorentino@wcupa.edu)