



Association of Clerks of the District Courts of Virginia

2023 SPRING CONFERENCE & ANNUAL MEETING

MONDAY, APRIL 3, 2023

WELCOME TOROANOKE



Housekeeping

- Restrooms
- Emergency exits





WELCOME

IMMEDIATE PAST- PRESIDENT
RICK KAHL

Association of Clerks of the District Courts of Virginia



LEADERSHIP PRESENTATION

VICTOR CARDWELL & THOMAS WINN III

WOODS ROGERS VANDEVENTER BLACK

Association of Clerks of the District Courts of Virginia



Victor O. Cardwell Woods Rogers Vandeventer Black

Victor Cardwell is Co-Chair of Woods Rogers Vandeventer Black's Labor & Employment Law Section. He is also Chairman of the firm's Board of Directors. He practices labor and employment law throughout the U.S., focusing on diversity, the Fair Labor Standards Act, and labor/management relations—including union organizing campaigns and union-avoidance techniques—and workplace violence. Victor has significant experience before state and federal courts and administrative agencies, including the National Labor Relations Board. He offers counsel to executive and human resources managers on a wide range of employer concerns—from harassment, sexual orientation/transgender, retaliation, and discrimination, to workforce reductions, handbooks and agreements, unfair competition, wage/hour compliance, health and disability, discipline/discharge, and employee leave.

Victor is the Immediate Past President of the Virginia Bar Association and serves on the Virginia State Bar's Board of Governors for its Diversity Conference. He was named to the Roanoke Law Foundation Fellows Program in 2018. Virginia Lawyers Weekly has recognized Victor as a "Leaders in the Law." He is regularly listed in industry rankings including Virginia Super

Lawyers and Best Lawyers in America for Employment Law – Management and Labor Law – Management, including being named Roanoke Lawyer of the Year. He is recognized by Martindale-Hubbell in Litigation and Labor and Employment and by Chambers USA as a leading attorney in the Labor and Employment practice. In 2019, Victor received the Martin Luther King "Drum Major for Justice" award issued by the local Roanoke chapter of the Southern Christian Leadership Conference.

Prior to joining Woods Rogers in 1991, Victor served as Deputy Associate Chief Counsel with the U. S. Department of Labor Benefits Review Board. He has served as a member of the House of Delegates of the American Bar Association, representing Virginia, and was appointed to the Human Rights Council of the Commonwealth of Virginia.





Thomas M. Winn III

Woods Rogers Vandeventer Black

Tom Winn is Co-Chair of the Woods Rogers Vandeventer Black Labor & Employment group. Tom's nationwide practice focuses on traditional labor/management issues, HR counseling, and employment litigation. Tom devotes much of his attention to labor/management relations and NLRB matters. Peers have commented that "he is one of the most recognized traditional labor lawyers in Virginia." He represents employers across the country in collective bargaining, grievances/arbitrations, NLRB litigation, union organizing and decertification campaigns, strike management, and other issues under collective bargaining agreements. Tom has extensive experience representing government contractors regarding collective bargaining, labor arbitrations, Service Contract Act compliance, and related issues. He regularly serves as chief spokesman in union negotiations and has handled more than 100 labor arbitration cases.

Outside traditional labor matters, Tom's practice embraces the full range of Labor and Employment issues ranging from discipline/discharge, workforce reductions, handbooks and agreements, discrimination, harassment, and retaliation,

wage/hour compliance, health and disability, employee leave and benefits, and unfair competition. He represents employers before state and federal courts and administrative agencies, including the NLRB, EEOC, DOL, and OFCCP. Tom, along with Patice Holland, prevailed against the EEOC in a jury trial of a Title VII sexual harassment claim, obtaining a defense verdict on all counts.

Best Lawyers in America® named Tom as the 2022 Roanoke Lawyer of the Year for Litigation — Labor & Employment and previously has named him Roanoke Lawyer of the Year for Labor Law-Management and Employment Law-Management. Tom is a Fellow in the Roanoke Law Foundation and a past member of the Virginia Bar Association's Board of Governors. He currently serves on the Governance

Committee for the VBA's Board of Governors and the Roanoke City Manager's Economic Advisory Panel.



Leadership Skill Building

Employment Laws Every Leader Should Know

Presented by: Victor Cardwell | Tom Winn

Clerks of the District Court of Virginia Spring Conference

April 3, 2023



Agenda

- 1. Employment Law 101
- 2. Legal Updates & Hot Topics
- 3. Lunch
- 4. Employee Health Issues
- 5. Managing a Difficult Employee

Employment Law 101

Federal Employment Protections

Federal Protections

Statutes

- Title VII
- Title IX
- ADA
- ADEA
- EPA
- GINA

- USERRA
- FLSA
- FMLA
- OSHA
- NLRA







Protected Classifications

- Race
- Color
- Religion
- NationalOrigin
- Sex (including orientation & gender identity)

- Pregnancy
- Age
- Disability
- Genetics
- Military Status

Do antidiscrimination laws apply to applicants?



Unlawful Discrimination

- Disparate Treatment
- Disparate
- Harassment
- Retaliation

Will cover more details in April 4 session

Fair Labor Standards Act (FLSA)

Department of Labor

Wages and Hours Worked

FLSA covers

- Minimum wage
- Overtime compensation
- Child labor prohibition
- Breaks for nursing mothers
- Exemptions

Illegal to retaliate against EE who reports concerns about wages or hours worked!

Classifying Workers

Non-Exempt

- Entitled to overtime pay
- Could be paid salary or hourly
- Could earn any amount p/wk.
- Could work in any field

Exempt

- Not entitled to overtime pay
- Must be paid a salary
- Must earn at least \$684 p/wk.
- Duties must fit into 1 of 8 categories

Breaks for Nursing Mothers

- Part of the FLSA
- Reasonable amount of time
- As often as needed
- Private, locked space free of intrusion
- Cannot be bathroom
- Not technically applicable to exempt EEs



Other Federal Protections

Workplace Safety

- Occupational Safety and Health Act (OSHA)
 - Establishes rules on workplace safety
- Numerous industrial standards
- "General duty" clause:
 - ER's responsibility to keep workplace free from recognizable hazards that are causing or likely to cause death or serious harm to employees

National Labor Relations Act

- Enforced by National Labor Relations Board (NLRB)
- Even without a union, EEs have a right to engage in protected concerted activity
 - "Protected concerted activity" (PCA) = one or more coworkers about working conditions.

Which of these are protected activity?

- 1. Two EEs talking in breakroom about a workplace safety hazard
- 2. EE circulating a petition by blast email to your department trying to get ER to recognize Juneteenth
- 3. An EE posting on Facebook that they can't stand ER's executive team and another EE liking that post

Virginia Employment Laws

Virginia Dept. of Labor & Industry (DOLI)

Virginia Employment Commission (VEC)

Classes protected by VA Law

- Age
- Disability
- Genetic information
- Race & Color (including hair and traits associated with race)
- Marital status

- National origin
- Religion
- Sex (including pregnancy, childbirth, and related medical conditions, including lactation)
- Sexual orientation & gender identity

Marijuana in the Workplace

ERs can and should ban intoxication and use of intoxicants in workplace as a matter of workplace safety

- Include reasonable accommodations for medical marijuana
 - Possible exceptions for some safety-sensitive positions regulated at the federal level (ex. DOT)

Minimum Wage



Virginia Overtime Wage Act

Ended 7-1-2022

- Went into effect 7-1-2021
- Changed hourly wage calc. for nonexempt salaried EEs

New law:

- ERs must comply with FLSA
- EEs may file FLSA claims in VA courts

NDAs and Sexual Misconduct

VA General Assembly passes new law

2-28-2023

- Bans pre-dispute agreements that cover up workplace sexual harassment and assault
- Applies to non-disclosure and non-disparagement agreements
- Expands 2019 law
- For current and prospective EEs
- Largely symbolic: mirrors federal law

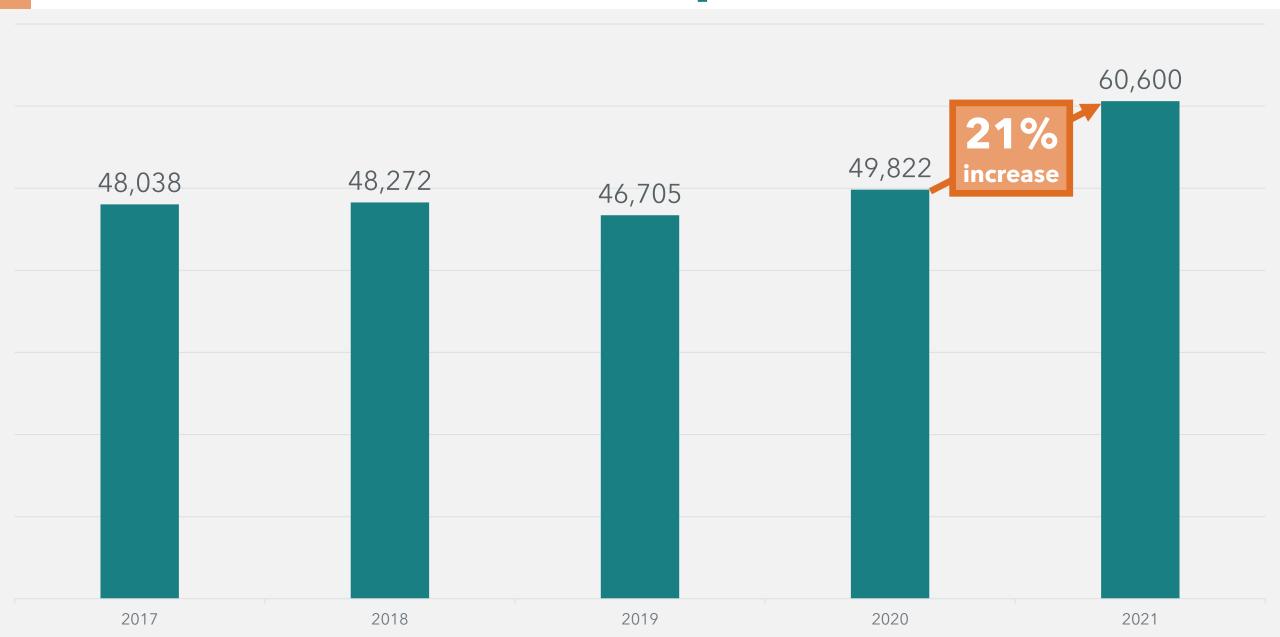
State Court Cases

- More cases being heard in state courts
- Less favorable to ERs than federal courts

Types of cases

- General retaliation
- Safety / whistleblower statute
- Bowman Claims (retaliation for refusing to participate in illegal activity)

VA DOLI Assistance Requests



Legal Updates & Hot Topics

Federal Legislation & Regulations

PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act effective 12-29-2022

- Extends FLSA pumping/nursing protections to exempt workers
- (Previously only applied to non-exempt)
- Exception for ERs with fewer than 50 EEs

Pregnant Workers Fairness Act

PWFA effective 6-27-2023

- Applies to ERs with 15+ EEs
- Requires reasonable accommodations for EEs with temp.
 limitations due to pregnancy, childbirth, or related medical conditions
- Closely modeled after ADA
- Does NOT require condition to meet ADA definition of disability
- Does require interactive process

VA's Existing Protections

Virginia Human Rights Act (VHRA)

- Provides similar protections to pregnant and nursing EEs
- Applies to ERs with 5+ EEs
- ERs must provide notice of the law, post it, and update handbooks

Non-Compete Agreements

FTC Proposes Rule Banning Non-Competes

1-5-2023

Open for public comment until 3-10-2023

- Written broadly
- Prohibits contracts that prevent workers from seeking or accepting employment or operating a business after leaving employment
- Does not affect non-disclosure, non-solicitation clauses
- VA already restricts non-compete agreements with certain "low-wage" EEs

VA's Existing Protections

Low-wage EEs can sue ERs seeking to enforce a non-compete

- "Low-wage" determined by VA Worker's Comp. Commission
- Also covered: Interns, students, apprentices, etc.
- Excluded: EEs whose earnings come wholly or mostly from sales commissions, incentives, or bonuses

EEOC

Hearing Disabilities

EEOC updates resource on hearing disabilities and hiring 1-24-2023

- Outlines pre- and post-job offer questions
- Examples of free or low-cost reasonable accommodations
- Handling safety concerns
- Anti-harassment and discrimination examples

Abortion Travel Benefits

Reported 11-14-2022

EEOC commissioner began discrimination probes against ERs with abortion travel benefits

- After SCOTUS 2022 Dobbs ruling, many ERs committed to cover EE travel for abortion procedures
- Some ERs implemented abortion travel reimbursement policy
- Commissioner charges allege pregnant and disabled workers not offered equivalent benefits
- Most ERs provide abortion access benefits through general health care travel policies

EEOC Proposes 5 Yr. Strategic Enforcement Plan

Eliminating barriers in recruitment and hiring

- Automated systems that target/recruit applicants, assist in hiring decisions
- Restrictive application processes
- Difficult to access/use online systems
- Screening tools with disproportionate impact on protected classes

Review your processes to spot unnecessary barriers.

EEOC Proposes 5 Yr. Strategic Enforcement Plan

Protecting vulnerable workers and underserved communities

- Immigrant and migrant workers
- People with developmental/intellectual disabilities
- Individuals with arrest or conviction records
- LGBTQI+ individuals
- Temporary workers
- Older workers
- Individuals employed in low wage jobs, particularly teens
- Native Americans/Alaska Natives
- People with limited literacy or English proficiency

EEOC Proposes 5 Yr. Strategic Enforcement Plan

Advancing equal pay for all workers

- Pay secrecy policies
- Retaliation for asking about pay or sharing pay
- Reliance on past salary history to set pay
- Requiring applicants to specify desired/expected salary at application stage

Hot Topic: Pay Equity

- EEOC announced pay data collected in 2020 may be used to help focus its resources on identifying pay discrimination
- More states enacting pay transparency laws
- Are you still asking for pay history when hiring?

It might be time to schedule a pay equity audit!

EEOC Lawsuit

Inova Home Health

2-27-2023

EEOC claims:

- Inova hired male Post-Acute Care Coordinators (PACCs)
- Current female PACCs were paid less than new hires
 - No performance issues, excellent workers, more experience
- Female PACCs complained about pay discrimination
- Inova refused to adjust wages

EEOC seeking back pay and damages after conciliation failed

Scenario: New Hires

- Competitive salary for positions often higher than for previous hires
- Your existing female EEs now paid less than new hires who are male

- What do you do next?
- Wait for the women to complain?
- Fire the men and hire women instead?
- Reduce the men's pay?
- Increase the women's pay?

Department of Labor & OSHA

Independent Contractors (FLSA)

Proposed rule

10-11-2022

- Trump admin. rule from 1-7-2021 still in effect
- Return to totality-of-the-circumstances analysis
- Control factor analysis
 - scheduling, supervision, price-setting, ability to work for others
- Considering if the work is integral to the business

Highly-Compensated Overtime (FLSA)

US Supreme Court rules on OT exemption

2-22-2023

- Upheld salary requirement for high-earning professionals for OT exemption
- Case involved how salary rule should apply to highly compensated worker rule
- ER violated FLSA by classifying oil rig worker as OT-exempt executive but paying six-figure pay as day rate instead of on salary basis

If you've classified high-earning professionals as exempt, make sure you're paying them on a salary basis.

OSHA Enforcement Guidance Changes

- "Instance-by-instance citations" for high-gravity, serious violations for certain conditions
 - Lockout/tagout, machine guarding, permit-required confined space, respiratory protection, falls, trenching
- Citing violations separately and not grouping
 - Hoping increased number of citations will encourage compliance

National Labor Relations Board

Joint Employer Standard

Comment period on proposed rules ended

12-21-2022

- 2+ ERs would be considered joint if they <u>share or codetermine</u>
 matters governing essential terms and conditions of employment
 - Wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline, workplace health and safety, supervision, assignment, and work rules
- Will consider evidence of direct control, reserved / indirect control
- Could affect ERs using temp agencies, franchise model, or other indirect employment models

Takeaway: Review contracts and agreements, minimize control or right to control other companies' employees

Severance for Silence

NLRB Ruling

2-21-2023

- Board ruled ERs can't offer severance agreements that prevent EEs from making disparaging remarks about company
- EEs can't be prevented from disclosing terms of severance packages
- Applies retroactively (3-22-2023 memo)
- Ruling likely to be challenged in court

Have an attorney review confidentiality and non-disparagement clauses in your severance agreements.

NLRB Challenging Precedents

Gen. Counsel Abruzzo targeted 53 issues for change, 14 left

- Bringing cases before board as vehicles to change past rulings
- After Abruzzo noted these issues at a conference, union attorneys may be motivated to file related charges
- Includes
 - Handbook rules
 - EE classification
 - ER's right to make unilateral changes in job terms
 - Intermittent strikes
 - Access to ER property

Employee Health Issues

Regs. Covering Employee Health

≥ 50 EEs within 75 miles **FMLA** ≥ 15 EEs Workers' ≥ 3 EEs Comp.

VA Human Rights Act
Virginians with Disabilities Act
VA Values Act

≥ 5 EEs

Family Medical Leave Act (FMLA)

FMLA Requirements

- 12 (or 26) weeks unpaid leave within 12 mo. period
- Reinstatement to same/substantially similar job
- Maintain benefits
- No interference with FMLA rights
- Notice of rights
- No retaliation

A lot of paperwork required by DOL-ensure you use their forms!

FMLA Eligible Employees

- 12 months employment (consecutive not required)
- 1,250 hours worked in past year
- 50 EEs within 75 miles

FMLA Reasons for Leave

- Birth / adoption / placement of child
- EE's own serious health condition
- Serious health condition of EE's spouse, parent, child
- Military caregiver
- Military exigency

Americans with Disabilities Act (ADA)

Americans with Disabilities Act

- Prohibits employment decisions based on disability
 - If individual can perform **essential functions** of job
 - With or without reasonable accommodation
- Requires ERs to reasonably accommodate disabilities
 - Unless it creates <u>undue burden</u> on ER
 - Or poses direct threat to health / safety of EE or others

ADA Definition of Disability

- Physical / mental impairment that substantially limits one or more major life activities
- Record of such an impairment
- Being regarded as having such an impairment

What is an Accommodation?

Essential functions (fundamental to the position)

EE performing all essential job functions

Reasonable accommodation

EE struggling w/ duty because of disability

Reasonable Accommodation Examples

- Acquiring or modifying equipment
- Changing when or how function is performed
- Making existing facilities accessible
- Providing leave
- Reassigning nonessential job functions
- Other creative solutions

Do not have to eliminate an essential function of job

Undue Hardship Under the ADA

Action requiring significant difficulty / expense:

- Nature & cost of accommodation needed
- Overall financial resources of facility
- Overall financial resources of covered entity
- Type of operations of covered entity, including composition, structure, and functions of workforce

Always determined on a case-by-case basis

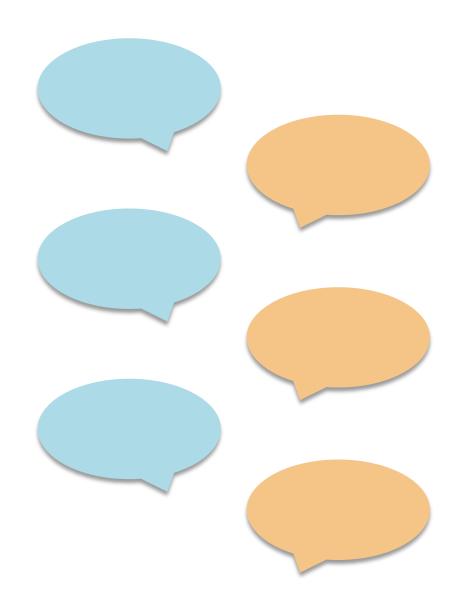
The Interactive Process

Information-gathering approach

- Intended to be flexible
- Communication between ER and EE

Evaluate each accommodation request

- Whether accommodation is needed
- If needed, whether accommodation will be effective
- If effective, whether providing will be undue hardship for ER



Scent Free

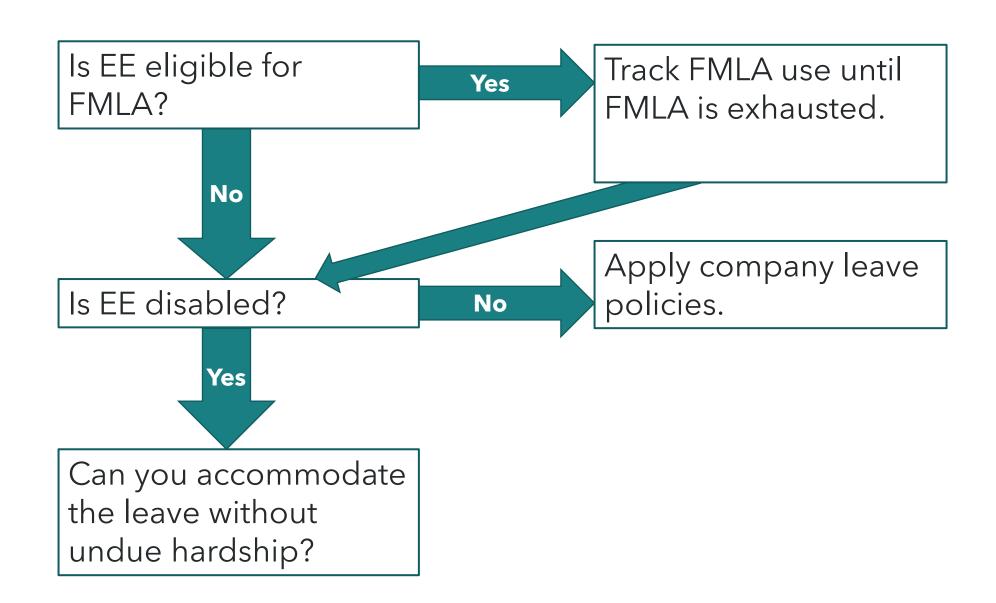
Anderson v. Gloucester Co. Sc. Bd. (EDVA)

3-10-2022

- Plaintiff claimed disabled due to reaction to scents
- At her request, school sent letter to parents asking them to be considerate
- Plaintiff claimed failure to accommodate because school didn't direct parents to stop children from wearing deodorant; school didn't bar kids from classroom

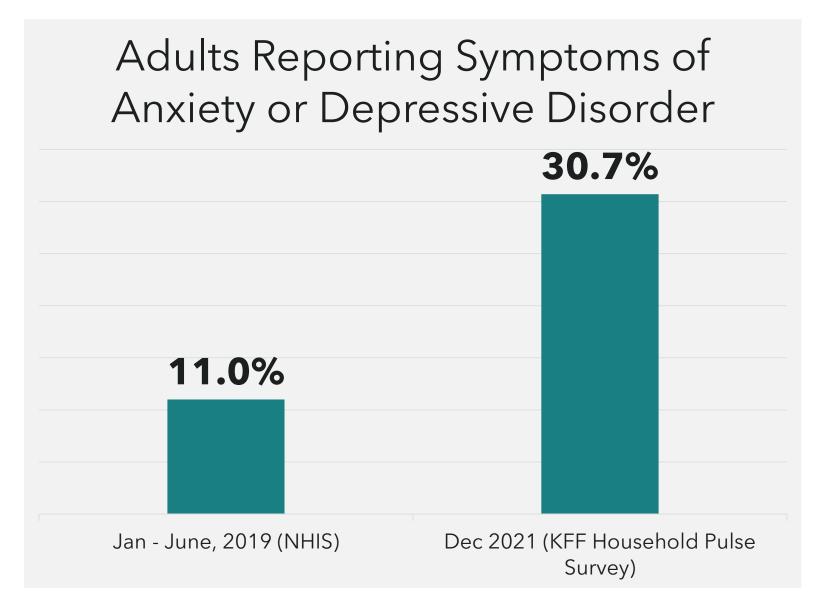
Court: demand for scent-free environment and request that parents change kids' detergent and deodorant not reasonable

Leave: A Very Bare Decision Tree



Employee Mental Health

After COVID



Mental Illness in VA

In Feb. 2021, 37% of VA adults reported symptoms of anxiety or depression

1,115,000 VA adults have a mental health condition

More than 3x pop. of Roanoke

Someone you work with is dealing with a mental health issue.

Definitions & Guidance

Psychiatric disability is one of the most common types of disability covered by the ADA

- Includes psychiatric disabilities, mental disabilities, mental illness
- Not all diagnosed conditions considered disabilities under ADA



Regarded As Disabled

West Meade Place

11-1-2022

Healthcare co. loses jury trial for disability discrimination

- EE fired after requesting intermittent leave to address anxiety disorder
- West Meade claimed she was unable to preform job duties
- Jury concluded West Meade fired EE because it regarded her as having a disability

Plaintiff awarded back pay and damages

Be Creative; Solve Problems

Corrective actions don't always fix workplace culture

- EAP
- Anger management
- EE mediations (people like to feel heard!!)
- Conduct civility trainings
- Facilitate apologies; team bonding activities

Support

Employee Assistance Program

- Is your program easy to access and understand
- Make sure EEs know about it

Affinity or Resource Groups

Can create a positive climate for EEs to support each other

Harassment/Discrimination/Bullying

 Be clear that EEs with psychiatric disabilities have same right to a respectful workplace as everyone else



Lunch Roanoke Ballroom A,B Noon-1:00





Return at 1:00

Roanoke Ballroom C,D

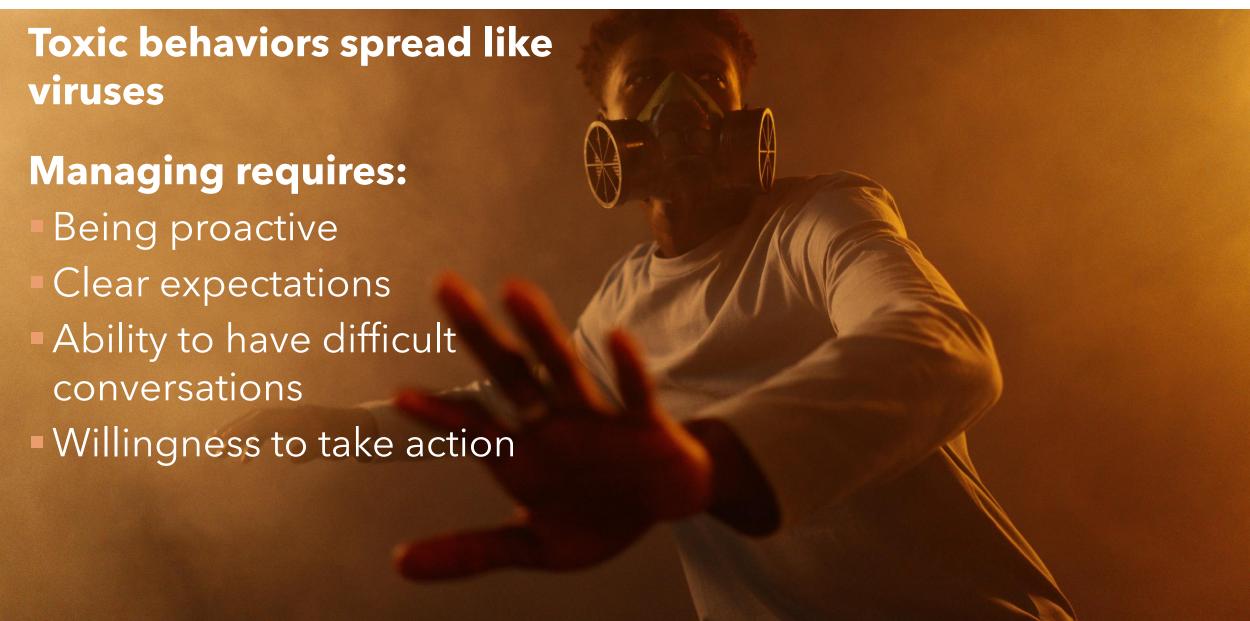
Leadership Presentation Continued

Victor Cardwell & Thomas Winn III

Woods Rogers Vandeventer Black

Managing a Difficult Employee

Toxic Workplaces



Common Disciplinary Situations

- Damage to company's public image
- Excessive absences / tardiness
- Incivility or harassing behavior
- Open insubordination
- Policy violations
- Poor work performance

Handling Disciplinary Issues

- Inform EEs in advance that certain actions will result in discipline
- Always consult with HR
- Give honest evaluations
- Maintain self-control
- Use progressive discipline policy

Practice

- Even-handed,
- Consistent
- Application of
- Reasonable Rules

Adverse Actions

Adverse Actions

Work-related actions that directly impact terms and conditions of employment

- Denial of promotion
- Refusal to hire
- Denial of job benefits
- Demotion, suspension, and discharge

ERs should be especially careful when making one of these decisions regarding EE who has engaged in protected activity

Other Adverse Actions

EEOC determined other actions might less clearly impact terms and conditions of employment, but are still adverse

- Work-related threats, warnings, reprimands
- Transfers to less prestigious / desirable work or locations
- Negative or lowered evaluations

Scenario: Team Lunch

EE filed a formal complaint with EEO office alleging she was denied a promotion by her supervisor because of her sex

- One week later, supervisor invited a few other EEs out to lunch; complaining EE not included
- Lunch was not a regular occurrence
- EE believed that her supervisor excluded her from lunch because of her complaint

Is this a materially adverse action?

What if the lunch was a regular team occurrence?

Performance Improvement Plans (PIPs)

Overview

We like PIPs because they...

- Help EEs meet expectations
- Serve as documented written feedback
- Create a disciplinary record
- Are useful defense tools in litigation

Using PIPs Appropriately

Should only be used when:

- EE is *worth* the PIP
- Performance issues can be addressed w/ guidance
 - What is causing EE's poor performance?
 - Was EE successful with job duties in past?
- EE's mgr. committed to help EE succeed
 - Willing to provide guidance

It's simple: PIPs should be used to improve EE's performance, not as discipline

Suspect PIPs

- Inadequate time given for improvement
- PIP success is dependent on others
- No authority to execute
- No assigned supervisor to guide EE; inadequate coaching
- No feedback during process
- Undefinable, immeasurable, or unmeetable goals
 - Ex: "Improve relationship with peers by 150%"

PIP Contents

- Performance Issues
- Policies
- Expectations
- Management's role
- Measurements/metrics
- Deadlines
- Results
- Signatures

Disclaimers:

- At-will employment
- Successful PIP completion doesn't guarantee employment
- PIP may be amended, modified, extended, etc. at any time
- EEO statement

Retaliation

Protected Activities

- Good faith reporting:
 - Discrimination
 - Harassment
 - Retaliation
 - Workplace violence
 - Safety concerns
 - Concerns about pay or hours worked

- Requesting accommodations
- Raising medical issues
- Requesting break time to nurse
- Reporting favoritism, nepotism, policy violations, etc.
- Going to HR

Retaliation

What is Retaliation?

Any action to alter EE's conditions of employment because EE engaged in protected activity

What is Not Retaliation?

Negative action not retaliatory only because it occurs after EE engages in protected activity

Take Care in Handling Claims

- Any <u>perception</u> of adverse action against EE who makes a complaint or takes part in an investigation is a potential retaliation claim
- Essentially all major employment law statutes include retaliation provisions

VA Whistleblower Retaliation Protection

Protected

- Reporting violations of federal/state law (good faith)
- Refusal to engage in criminal or illegal acts
- Testifying in an investigation, hearing, or inquiry

Not Protected

- Disclosing info protected by law or legal privilege
- Knowingly making false statements; reckless disregard for the truth
- Disclosures that violate privacy protections of individuals

Cause for a Retaliation Claim

EE engaged in protected activity

ER took adverse action

Adverse action connected to protected activity

Timing

Departing from normal practices/procedures

Cumulative actions against complaining party

Changing explanations

Scenario: Performance Issues

You have an EE who is consistently late in the morning and often leaves early

- Coworkers often scramble to cover EE in morning and evenings
- Mgr. aware of issue for at least 1 year
- No written records of discipline, only verbal warnings
- Past performance reviews are "Exceeds Expectations"
- EE recently went to HR to complain about overhearing her supervisor telling a racist joke
- EE's performance review is next week

What are your next steps?

Defense to Retaliation Claims

Legitimate, non-retaliatory reasons

- Poor performance
- Misconduct (threats, insubordination, unexcused absences, dishonesty, abusive or threatening conduct, theft)
- Reduction in force or other downsizing

ER unaware of protected activity

 Without knowledge of protected activity, there can be no retaliatory intent, and therefore no causal connection

Practical Steps

Train supervisors

- Commitment to acting legally, ethically, and responsibly
- Retaliation and whistleblower claims

Before taking adverse action against EE who complained

- Review nature of complaint and resulting investigation
- Determine if internal procedures were followed, documented, and communicated
- Evaluate consequences





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Gafe travels to those heading home.
Otherwise, see you all tomorrow!

Association of Clerks of the District Courts of Virginia

THANK YOU

THANK YOU TO OUR SPEAKERS
AND TO YOU ALL FOR
SUPPORTING THE CLERKS
ASSOCIATION!