

Lawful Employment
August 8-9, 2020

TAB 1:

Agenda

TAB 2:

Reimbursement Memorandum

TAB 3:

Speaker Biography

TAB 4:

Winning the Employment Wars—*How to document your decisions and protect yourself-Documentation 2009 exhibits*

TAB 5:

Discrimination Claims Based on Race, Color, Religion, Sex or National Origin – *Title VII Revised*

TAB 6:

Sexual Harassment—*How to protect yourself from your appointees' wrongful actions.*

TAB 7:

Age Discrimination Employment Act —*ADEA Outline*

TAB 8:

Americans with Disabilities Act—*The importance of job descriptions*
ADA Outline revised

TAB 9:

Uniformed Services Employment and Re-Employment Rights Act
USERRA—*Protection of Reservists*

TAB 10:

Political Patronage—*To the victor belong the spoils—sometimes*

TAB 11:

Grievance Procedures

TAB 12:

FLSA Outline,FLSA Agreement,FLSA Overtime policy

Winning the Employment Wars

I. Three Goals.

A. To make employment decisions applying one criterion: what is best for the employer's office.

1. This means taking action without fear of reprisal by the employee.
2. To do so, the employer needs
 - (a) Knowledge of employment law, but more importantly,
 - (b) ***A system that allows management to justify decisions.***
3. Who is management?
 - (a) Anyone who participates in employment decisions—hiring, firing, disciplining, making assignments, or otherwise controlling the workplace.
 - (b) Most actions leading to suits are made by subordinates.
 - (c) The entire management team needs to know about the concepts in this program.

B. To prevent employees from filing suit.

1. Most employees will not file suit if they are treated fairly.
 - (a) But some employees lack a sense of accountability and use a lawsuit as a way to shift blame for their own failures to management.

Most lawyers will not take an employment case unless there is a pretty big chink in the armor.

- (a) The lawyer needs to find a legal pigeonhole—a viable theory—that applies to the facts of the case.
- (b) Our first job is to close up the pigeon holes that *might* exist.
- (c) Our second job is to show that the pigeon holes are closed.

C. To win the suits that are eventually filed.

1. In any suit, there are two audiences. You need to address them both.
 - (a) The Judge.

- i. Management's peer—a successful member of the establishment.
 - ii. Looks at the cold facts to see if the case fits in the legal pigeonhole selected by the lawyer.
 - iii. Looks at the paperwork of the lawsuit to see if all the technical requirements of the case are met.
 - (b) The Jury.
 - i. The employee's peers—a group composed of people who have, at some time, worked for someone as a subordinate.
 - ii. Looks at all the facts to see if the employer has treated the employee fairly.
 - iii. Looks at all the facts to see if the employee has treated the employer and the co-workers fairly.
- 2. The ammunition to win the fight.
 - (a) Evidence.
 - (b) Why does our country have a trained army at all times?
 - i. We don't know when an attack will occur.
 - ii. We don't know who will attack us.
 - iii. We don't know where the attack will occur.
 - iv. So we are ready all the time.
 - (c) Employers have to maintain evidence about all their decisions in order to be ready to fight unpredictable battles that may arise at unpredictable times.
 - (d) The answer is *DOCUMENTATION!*
- 3. The same ammunition is used in a different way to satisfy both the judge and the jury that you should win the case.

II. The Prima Facie Case.

- A. A prima facie case consists of allegations and proof of the elements of the charge against the defendant. This is true whether it is in a civil or a criminal case.
1. The pleadings must allege every element.
 2. The plaintiff must have some proof of every element.
 3. Example—a suit for battery (unlawful touching)
 - (a) The plaintiff must allege that 1) the defendant 2) touched him 3) without legal justification 4) causing damages.
 - (b) The plaintiff must prove each of these elements at trial.
 - (c) The following simple statement by a witness meets the prima facie case: "The defendant punched me and gave me a black eye."
 - (d) Effect of testimony? The case goes to the jury.
 4. Lesson—The plaintiff can easily make out a prima facie case.
- B. After the plaintiff makes out a prima facie case, the defendant then must produce evidence that refutes his liability.
1. This can be a simple denial. In the example above, the defendant could testify, "I did not hit him."
 2. The evidence can also be an "alibi." "I was in California when it happened."
 3. The evidence can raise a totally new defense. "Yes, I hit him, but we were in a prize fight so he consented to the touching."
- C. After the defendant makes out a defense, the plaintiff has the opportunity to refute the defense.
- D. The importance of documentation.
1. The scheme of proof in a case can easily turn into a "he said, she said" standoff. Both parties insist their side of the story is true.
 2. The winning side is generally the one who has some outside evidence corroborating his story.
 - (a) The evidence can be direct evidence of the event. In the example of a battery claim, it could be a photograph of the fight.

- (b) The evidence can also be circumstantial evidence of the event. Again, in the example of the battery claim, the defendant might produce a permit showing that a prize fight was authorized at the time and place of the alleged assault, as a way of showing that the plaintiff consented to be in the fight.

III. The Typical Employment Case—Discrimination.

- A. Discrimination claims are the most common employment claims. In this hypothetical case, we will consider one of the most common kinds of discrimination claims—the African-American plaintiff says he was fired because of his race.
- B. Prima facie case—direct evidence.
 - 1. Direct evidence of discrimination. Direct evidence is typically a statement attributed to the employer. In this hypothetical, the hiring officer may have said, "We have to get rid of that black guy—there are too many Blacks in the department."
 - 2. The burden then shifts to the employer to prove that race was not a factor in the termination of the plaintiff.
 - 3. There are hardly any cases involving direct evidence of discrimination. Very few people say they are going to discriminate against someone.
- C. Prima facie case—indirect evidence.
 - 1. This is the most common type of case.
 - 2. *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214-214 (4th Cir. 2007). "An employee demonstrates a prima facie case of race discrimination by showing that
 - (a) he is a member of a protected class;
 - (b) he suffered adverse employment action;
 - (c) he was performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action; and
 - (d) the position remained open or was filled by similarly qualified applicants outside the protected class."
 - 3. It is very easy to prove a prima facie case of racial discrimination. Here is the evidence that proved the claim in *Holland v. Washington Homes*:

- (a) The plaintiff established that he was African-American.
 - (b) The plaintiff was fired.
 - (c) The plaintiff received good job evaluations.
 - (d) The employer hired a white person to replace him.
4. With this evidence, the plaintiff has forced the defendant to come up with evidence proving that race was not a factor. What kind of evidence must the defendant produce? Again, the evidence is simple:
- (a) "Because Holland presented a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214-214 (4th Cir. 2007).
 - (b) Again, this burden of producing evidence is easy to meet. In *Holland*, the employer showed that the plaintiff's supervisor believed that the plaintiff had threatened a fellow worker.
5. Once the defendant produces evidence of a legitimate basis for the action, the burden shifts to the plaintiff again to prove, ultimately, that discrimination was the motive for the action, and that the reasons stated by the defendant are a pretext for discrimination. The plaintiff can do this in two ways:
- (a) He can argue that the reason offered by the defendant is simply unworthy of belief.

He can produce evidence inconsistent with the reason offered by the defendant.

6. Once the plaintiff puts his evidence of pretext on, the jury decides the case.

IV. The Effect of Good Documentation on Employment Cases.

A. No documentation

1. Plaintiff says he was the victim of discrimination, that he did not do anything wrong, and that the defendant is making up his reasons for firing him.

(a) ***IN MOST CASES, THIS IS THE ONLY EVIDENCE THE EMPLOYEE HAS UNLESS THE EMPLOYER GENERATES A DOCUMENT THAT SUPPORTS THE PLAINTIFF'S CLAIM!***

2. The employer says the plaintiff was a terrible employee and deserved to be fired.

(a) ***THIS SHOULD NEVER BE THE FULL EXTENT OF THE EMPLOYER'S CASE.***

3. Who wins? It's a toss-up.

B. Plaintiff's documentation.

1. *Holland v. Washington Homes, Inc.* The plaintiff received good evaluations. This was enough to satisfy the prima facie case, and shift the burden of producing evidence to the employer.

2. Suppose in *Holland*, the employer had offered as his defense that the employee was a poor worker.

(a) The good evaluation is probably enough to get the case to the jury.

(b) Judge analysis of these facts:

- i. The good evaluation is enough to get the case to the jury, because it creates a factual question between the plaintiff's and employer's versions of events.

- (c) Jury analysis of these facts:
 - i. The employer has not put the employee on notice of poor performance.
 - ii. Employer has documented good performance, but not bad. This makes it seem likely that the claim of poor performance is a fabrication.
 - iii. Employer looks, at the least, like an unprofessional, inefficient, organization.

C. Defendant's documentation.

- 1. Suppose in *Holland*, the employer had a number of corrective action memoranda.
- 2. Judge analysis: the evaluations still probably take the case to the jury.
- 3. Jury analysis:
 - (a) Employer put plaintiff on notice of problems.
 - (b) Evaluations do not reflect everything.
 - (c) The employer was not likely to have made up corrective action memoranda over the course of time. These contemporaneous documents are most likely genuine and reflect the real reason for the firing.

V. Documentation

A. Personnel Files.

- 1. Consider the personnel file the evidence room for employment actions.
- 2. Evaluations must be realistic. It is impossible to explain away good evaluations. Always note the bad with the good. There are no perfect employees.
- 3. Progressive discipline should be documented.
 - (a) Document oral warnings by yellow post-it notes that are dated and removed after their useful life.

Written warnings. The warning will refer to the oral discussions on the yellow post-it note. For example, it might begin, "As we discussed on April 3 and 15, 1999, lateness in reporting to work is a problem with your performance."

(b) Document each disciplinary step.

(c) Tell the employee the reasons for discipline.

B. Examples of documentation.

1. Job applications.
2. Interview notes.
3. Notes of corrective sessions with employee.
4. Attendance records.
5. Corrective action memos.
6. The employee's written and signed statement of his version of what happened.
7. Job descriptions.
8. Incident reports.
9. Examples of poor work.
10. Witness statements.
11. Photographs.
12. Logs.
13. Tape recordings.
14. Newspaper articles.
15. Internal affairs or police investigations.

The possibilities are endless.

C. Have the employee sign all records (except notes of oral reprimands) which document his problems.

D. Explain to employees the reasons for disciplinary actions, including firings.

MANAGEMENT TIP: *Forget about employment at will for a minute when you fire an employee. While it is true that all employees serve at the pleasure of the constitutional officer, it is good practice to explain why employment is terminated. If you wind up in court, it simply does not cut the mustard to explain that the employee was fired for no reason at all.*

- E. The convincing power of documents--if it is in writing, it must be true.
 - 1. Why would someone make up a story long before a suit was threatened?
 - 2. The belief that those in power must make a written record of certain events.

- F. Uses of documentation in court.
 - 1. Refresh recollection—cases come to trial months or years after the relevant events occur.
 - 2. Impeachment—to show a witness is lying.
 - 3. Statements of parties.
 - 4. Credibility.
 - (a) Notes which back up the witness' testimony.
 - (b) Contrast with the plaintiff who testifies from unaided memory.
 - 5. Prior consistent statements can be introduced if the plaintiff suggests that the officer is fabricating his testimony.
 - 6. Logs, journals, and records kept in the ordinary course of business.
 - (a) Clearly admissible into evidence.
 - (b) Powerful evidence that something happened.

Absence of entry.

- i. Nothing is more difficult than proving that something did not occur. Unless one videotapes an entire facility all the time, no one can testify from personal observation that an event did not occur.
- ii. The absence of an entry about an event can establish that the event did not occur. For instance, if prior assaults by inmate are not in the shift logs, it is evidence that the prior assaults did not occur.

- (d) The importance of stressing record-keeping by staff. If the records ordinarily contain entries by staff upon completing their tasks, the absence of an entry is evidence that the task was not completed.
 - i. For example, if a deputy sheriff does not document that he completed his rounds at a given time, it is evidence that he did not perform them. If an assault happened while he should have been alert, he can be held liable.
- (e) The peril of ignoring records.
 - i. Records not only document conduct, they also put the agency on notice of what has occurred.
 - ii. The failure to react to significant conditions can be a basis of liability.
 - iii. Many constitutional torts are based on the "deliberate indifference" standard of liability. Many state law claims are based on gross negligence. Ignoring problems written in black and white can be deliberate indifference or gross negligence.

Management tip: *Review records periodically to make sure that your staff is preparing records contemporaneously with the events they are documenting. Make sure that incident reports are prepared for unusual or dangerous events. Report all serious events to management in writing.*

Memorandum

To: Dep. Sean Mahoney

From: Sgt. Adrian

Date: April 1, 2001

Re: Getting to work late

I spoke with you twice last month about not showing up on time. You have to work on this. It creates a morale problem for the people you are replacing if you are late. This is the third time in two months. We all have problems that delay us sometimes but this is too much. I am recommending this memo go in your file for one year.

Sgt. Adrian

Received:

Sean Mahoney

Witnesses (if recipient refuses to sign)

Memorandum

To: Dep. Sean Mahoney

From: Sgt. Adrian

Date: April 30, 2001

Re: Late to work

Yesterday you were late to work again. I sent you a memo earlier explaining how important it is to be on time to work. When you are late, it keeps us from having a smooth transition from one shift to another, and it is unfair to the people you are relieving.

You are suspended three days from work starting immediately. Please show up at my desk at 0745 hrs. on May 3 and be prepared to discuss your plan to prevent this from happening again.

Sgt. Adrian

Received: _____

Witnesses (if recipient refuses to sign)

Dep. C. Kearney
Dep. J. Rogers

May 20, 2001

Deputy Sean Mahoney
999 Liquor Lane
Sotsville, Virginia

Delivered by Hand In Person

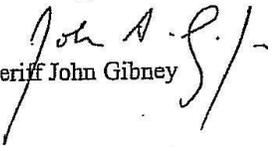
Dear Mr. Mahoney:

It has been brought to my attention that you have been late to work at least five times in the brief time you have worked at the jail. This conduct is unacceptable, and I have decided to terminate your appointment as a deputy sheriff.

Please talk with the quartermaster about turning in your equipment and uniform.

You have the ability to continue your health insurance at your own expense for a time. Enclosed is a memorandum explaining your continuing benefits.

Yours truly,


Sheriff John Gibney

EVALUATION

EVALUATION ON [REDACTED] as of 12-23-00

There are places on this evaluation that has "?" in the spaces - those are sections that I didn't have a chance to work w/ her personally on due to the fact that the night I was suppose to finish the evaluation [REDACTED] called in sick ref leg cramps. [REDACTED]

NOTES FOR DEVELOPMENT

COMMENTS: On a whole I think [REDACTED] is a great person, I just don't believe she is dispatcher material. She is very confident in handling jail procedures (ex. making rounds, + handling trustees)

She has the jail part down packed, but there is a lot of room for improvement as far as dispatching is concerned.

Speech + pronunciation is an important part of dispatching + she has a slight problem w/ that. [REDACTED] is very confident when it's just

the two of us in the office - but if any other dispatcher, matron, or deputy is in the office it seems like she forgets

Example - if she's talking on the radio
+ the phone rings instead of putting that
on hold, she'll say "Here, you take it."
Not realizing eventually she'll be by herself.

[redacted] is still not familiar w/ the DMV computer
keyboard, as far as which F key is for what
format. This is the end of the 3rd month + she is
still fumbling with the keyboard trying to find
the correct format.

WRITING SKILLS - handwriting is legible - very clear; not exactly sure
how to word things
ORAL EXPRESSIONS - very muffled. Sort of confused.

ADAPTABILITY - ?

ATTITUDE - does not have a good attitude toward dispatch.

Basically, an "I don't care"
APPEARANCE - average

COOPERATION - you have to ask her the same question over
over again to get cooperation or to see if she is even paying
DEPENDABILITY - attention to what you are saying.

ENTHUSIASM - Very little, if any enthusiasm.

INITIATIVE - ~~she~~ does take initiative in cleaning the office,
but other than that there is no initiative.

JUDGEMENT - Some decisions that were made ref. to calls were
not good. Takes a lot of calls personally but gives her own opin
KNOWLEDGE - knows how to do it but when put in the position
to do it sometimes she gets nervous.

LEADERSHIP - ?

ACCEPTANCE OF CONSTRUCTIVE CRITICISM - Does not take constructive
criticism - very good. Has a tendency to "blow up".

Like stated before you have to ask her over &
over again if she understood what you just
said. Sometimes she'll say "yeah" or shake her head
Afterwards she will have an attitude for a while.
Or if you correct her on something she did wrong,
she'll say "Oh, I knew that!"

BASIC COMPUTER KNOWLEDGE FOR DISPATCHERS

KNOWLEDGE OF RADIO LOG CODE SHEET

VA. 10 28

O.O.STATE 10-28

VA.10-27 BY S.S. #

VA. 10-27 BY NAME

O.O.STATE 10-27 -

Q.T. (VA.DRIVERS TRANSCRIPT)

K.Q. (O.O.STATE DRIVERS TRANSCRIPT)

29 CHECK ON SUBJ.(ACCESS IF WANTED) knows how to run 10-22.

CRIMINAL HISTORY QUERY has run QH for deep, took a little time, but she did it correctly.

CRIMINAL HISTORY (ACCESS IN STATE OR O.O.STATE)

ENTRIES INTO NCIC, VCIN has entered articles wanted persons in CIN, NCC

FILES: GUNS, ARTICLES, WANTED PERSONS, MISSING PERSONS, VEHICLES LICENSE & BOAT ENTRIES

KNOWLEDGE OF MAINTAINING A HIT FILE LIST Has created a hit file.

CONFIRMATION REQUEST familiar w/ YQ + YR

FAMILIARIZE REFERENCE FORMATS 225-750 ON DISPATCH ROLLADIX. 10-4

FAMILIARIZE WITH ROLLADIX IN GENERAL - still learning at this time.

SP-187 FIREARMS FORM & FORMAT ?

29 CHECK ON PATT TICKETS ?

LICENSE SUSPENSIONS Did license suspension for Trooper on 12-22-00 Did a good job.

SEX OFFENDER FILE LIST familiar.

CRIME SOLVERS FORM familiar.

Leas System - Has Leas down packed.

^ In phone ans. Skills answered appropriately + in polite ending

Dictaphone Operation ?

Professionalism on job needs improvement

NEW DISPATCHER TRAINING CRITERIA

- General knowledge of roles and responsibilities of a Dispatcher ^{Yes}
- Ability to perform DMV, NCIC/VCIN procedures effectively ^{Hesitant}
- Ability to relay information in a timely manner ^{Getting better. Explained to her. to log in}
- Ability to clear information, and enter information ^{as soon as she gets it. Has entered & cleared info.}
- General knowledge of the keyboard ^{Still learning}
- Radio communication skills - ^{auto herself + has been corrected several times}
- General knowledge of the keys. (jail keys) - ^{Yes}
- Importance of handling jail keys - ^{Yes}
- Familiar with routine checks, and log in the events - ^{Yes}
- Familiar with report writing ?
- Display safety and security of the institution - ^{Yes}
- Ability to change over females - ^{Yes}
- Aware of importance of medical information, and log in procedure ?
- Awareness of where files are kept. ^{Yes.}
- Aware of chain of commands ^{Yes.}
- Follow Instructions ^{At that time, but if you aren't constantly reminding her she doesn't do it. Has had problems w/co-workers.}
- Work well with other co-workers ^{arrives overtime.}
- Persistence. Arrive on time to begin work - ^{Does not accept very good.}
- Accepts and learn from constructive criticisms

Additional Comments:

Ref. [redacted] [redacted]
Knows 10 Code & Leas System ref enter. warrants Dys
Observed clearing wanted files for me Dys.
Familiar with set offender file a code books
Clear giving out info on radio

SAT machine operation ?

Investigative Report
12/28/2000
Alleged Unprofessional and
Inappropriate Behavior by an Officer

On 12/28/00, I requested Cpl. [REDACTED] presence while I talked to detainee R. [REDACTED] about a request form that was submitted to me. [REDACTED] stated that she needed to talk to me about a concern she had with this detainee and Cpl. [REDACTED].

[REDACTED] advised me that she was concerned with an incident that took place on Tuesday, 12/26/00 at approximately 0830 hrs. She stated that Cpl. [REDACTED] was working the I.N.S. Video Court when he asked her to bring detainee [REDACTED] to the Video room. [REDACTED] asked [REDACTED] if he was going to take the male detainees to the room and [REDACTED] stated that he would get them later. [REDACTED] said that the detainee advised her that she didn't have court on this particular date and [REDACTED] felt that it was unusual for him to take only one detainee to the video room when others were also scheduled to appear before a judge.

She was also concerned that [REDACTED] was allowing [REDACTED] to use the telephone in the Booking area more than other detainees. At this point, I felt it necessary to advise the Chief of Security, Captain [REDACTED] about her concerns. [REDACTED] was directed to bring detainee [REDACTED] to the Captain's office, [REDACTED] and I were present when she was brought to his office.

The detainee was given information concerning the request form that she sent to me about her medical concerns. She was then asked if she was satisfied with the information that was given and she said, "yes". [REDACTED] then asked her how often she was allowed to make phone calls and she said almost every day. He asked her who approved the phone calls and she said the 4 to 12 shift. He asked her why she made so many calls on this shift and she said because the other shifts wouldn't allow her to make the calls. The detainee then asked [REDACTED] why he was asking her about the 4 to 12 shift and he stated that there was no reason and that he didn't have any more questions. She was then taken back to her housing area.

At approximately 1500 hrs., I was directed to report to the Medical Department, there I met [REDACTED], [REDACTED] and the Medical Supervisor. The detainee stated that she wanted to tell us something that happened to her, I asked her if we could record her statement and she said, "yes". She stated that on "Monday, 12/25/00 and Tuesday, 12/26/00, Cpl. [REDACTED] touched her on her breast, leg and kissed her on her forehead",

On Monday, she was brought to the Booking area to make a phone call and [redacted] called her to the Attorney's room and told her to sit down. She said he touched her on her leg, showed her his penis and said that his "stomach was big, but it wouldn't get in the way." She told him to stop and he said, "you're not going to have my job are you", she told him that she didn't feel comfortable by letting him touch her. She said he then told an officer to take her back to the housing area.

On Tuesday, she said that Cpl. [redacted] advised her that she had a Video Court hearing. [redacted] told [redacted] that she didn't have Court. [redacted] told her that Cpl. [redacted] was working the Court and he said that she was needed for Court. She said that she was handcuffed and leg-ironed and taken to the Video room. Once there, she said that [redacted] stated, "this is the only time that I can do anything, because there are no Big wigs here today", [redacted] asked him if she really had Court today and he said "no". She told him that she wasn't feeling good and she wanted to go back to her housing area. She said that he came up from behind her and grabbed her breast, touched her legs, then turned her around and kissed her on her forehead. She looked out the window and saw Captain [redacted] coming into the parking lot. She told him that [redacted] was coming into the building and he said, "I've fucked up now". He then turned the Video monitor on, as [redacted] came into the room and [redacted] was taking me out, he said to [redacted] that they didn't have to see me. He had me taken back to H-pod.

The detainee was asked if she had anything else to say, and she said "no." At this time she seemed upset and was concerned that she may be in trouble. She was advised that she was not in any trouble. She was allowed to remain in the Medical Department with LPN [redacted] until she had calmed down. She was then taken back to her housing area.

At approximately 1525 hrs, Cpl. [redacted] was confronted with the allegations and listened to the tape recorded statements about him. He denied any wrong doing. He was advised that he was on suspension pending the outcome of this investigation. He turned in his badge and I.D. and left the premises.

I immediately called The Johnson of the Immigration and Naturalization Service by his cell phone number and advised him that an allegation was made by detainee [redacted] on Cpl. [redacted]. I further advised him that [redacted] was suspended pending an investigation and that I would keep the Immigration Department abreast of everything that we found during the investigation.



Interview with Sgt. [redacted] 4 to 12 Shift Supervisor, revealed that he was observing Cpl. [redacted]'s behavior when dealing with the female inmates. An officer, [redacted], had previously mentioned that he was concerned with the way [redacted] showed favoritism to detainee [redacted]. He stated that she was allowed to come to the Booking area to make phone calls every Sunday, and on one occasion [redacted] made a comment that, "[redacted] is a cute little thing, ain't she?" He said that it upset him and wanted me to talk to him about it or monitor it for himself.

Interview with officer [redacted] revealed that he spoke to Sgt. [redacted] about Cpl. [redacted]'s behavior when dealing with detainee [redacted]. He also said that he told [redacted] about a comment that [redacted] made to him, saying: "[redacted] is a cute little thing, you know she goes for black," I didn't comment. I felt that this was not appropriate, as soon as, Sgt. [redacted] came back from break, I advised him of [redacted]'s comment. On Wednesday, 12/27/00, when I came on duty, [redacted] saw me and made the comment, "I think I fucked up", I never understood what he meant by that, so I told him don't worry about it, everybody messes up at one time or another.

Interview with officer V. [redacted] revealed that [redacted] told her to "bring [redacted] shorty up to booking to make a phone call". She asked him who he was referring to, and he said "the little L.N.S. girl." I brought her to Booking to make a phone call, the call didn't go through. He told me to bring her back at 2115 hrs. to call her attorney, I asked him, "what kind of attorney is at work at this time of night", he told me to bring her back at 2115 hrs, so I did what he said. On other occasions I have witnessed the two of them sitting in the attorney's office in Booking, but I never saw him touch her at anytime.

I conducted interviews with a number of the female population and nothing significant was found. They did however, express concerns about the Immigration detainees having access to the hall payphones and the local inmates not having access to them.

On Friday, 12/29/00 at approximately 0830 hrs, Cpl. [redacted] was called at home and asked to report to the Superintendent's office. At approximately 0930 hrs Cpl. [redacted] met with [redacted] (supt.), Captain [redacted] and myself ([redacted]), he was advised of the findings of the investigation and he admitted that he touched detainee [redacted] on the breast while she was in the booking area. He was told by Supt. [redacted] that he was terminated effective immediately

Investigative Officer [redacted] Lt.

Date 12/29/00

Superintendent [redacted]

Date 12-29-00

Office of the Sheriff
County of Haynes
Virginia

MEMORANDUM

TO: Captain Jones
FROM: Major Smith
SUBJECT: Unsatisfactory Job Performance
DATE: April 1, 2001
CC: Sheriff

On January 9, we met to discuss several areas of concern pertaining to your performance since being appointed to the rank of Captain in August of 2000. The specific points that were covered during the meeting are discussed below.

The first issue we discussed was your decision to relocate Ms. Griper's workstation without discussing it with her or me. Your actions in moving Ms. Griper's workstation were in direct violation of my instructions to both you and Captain Colleague to not get involved with the re-assignment of our clerical staff taking place at that time. I informed you that I was personally handling the assignments. Your actions created undue distress and upset the staff and required the Sheriff's and my time and attention to mediate and resolve the conflict. In fact, the whole situation could have been avoided if you had followed my instructions.

The issue of your not informing me of your absences from work was also discussed. On January 2, you took off from work without first informing me and receiving my approval. Prior to this incident, we had talked about this issue on two previous occasions, and each time I informed you about the requirement for obtaining prior approval to be absent from your duties.

Concerns about your interactions with jail staff were also reviewed. These concerns were brought to my attention by Inspector Gadget, who was hearing numerous complaints from subordinate staff and co-workers pertaining to your interactions with them. They described you as being harsh and unpleasant with them at times, and leaving them with feelings of being belittled in the presence of others. They also expressed concerns that you were causing confusion with changes in procedures. These actions created morale problems among the jail's staff.

Prior to the January 9 meeting, we discussed the need and importance for you to better communicate and to be diplomatic with subordinate staff, co-workers and superiors. Specifically, we discussed these issues after you canceled the Academy classes on November 20, 2000, without first discussing the situation with Major Ratfink or me. As a result of your canceling classes without

the authority to do so and because of the serious concerns that your conduct exhibited, Major Ratfink reprimanded you in his letter of November 24, 2000.

All of the actions to that point required that you be given specific guidance. The following expectations pertaining to your future performance were reviewed with you at the conclusion of the January 9 meeting.

- Full and complete compliance with all orders/instructions issued by your superiors.
- Deviation from orders or instructions issued without the express approval of the superior issuing the order will not be tolerated.
- There would be no changes of policies, procedures, rules, transfers of personnel, etc. without prior review and discussion with me, and approval by higher authority or me.
- Notify me of any absences and provide advance request for any planned leave.
- Practice diplomacy with subordinate staff, co-workers and superiors.
- Display a more respectful attitude towards subordinate staff and be tolerant of their opinions and feelings.
- Apologize to Ms. Griper for moving her workstation.

Since our meeting of January 9, additional issues and events have again caused me to continue to question your judgment, dependability and leadership. Because of continuing concerns expressed by jail staff regarding their treatment, the Sheriff became personally involved and he held a meeting with the Second Shift line staff on February 5. In turn, the Sheriff discussed with me his concern regarding the number of complaints voiced during the meeting about your leadership style and the apparent lack of trust and respect the staff have for you. The Sheriff also indicated his concern pertaining to either your inability or unwillingness to communicate with subordinates, co-workers and superiors in a clear, effective and timely manner. It is apparent that you have made no effort to overcome this situation as discussed with you on January 9.

Another issue of concern precipitated from a meeting that you held on February 12 with a number of inmates who were selected as "Tier Representative" from the various housing units. First of all, you never received prior permission to institute a "Tier Representative" program, and other jail senior staff were unaware that you were planning to establish an inmate council. Your failure to recognize the probable consequences of establishing an inmate council without prior planning, input and discussion with subordinate staff and your superiors resulted in the line-staff having to deal with additional stress and feelings that the inmates were given a greater voice in how the housing units were to be managed and operated. This is evident in the tone and common theme of the complaint letters that the Sheriff received from the jail's line-staff. Their letters expressed concerns about the wisdom and judgment of establishing a program that empowered the inmates to question the authority of the deputies working the housing units. I find that your action of instituting this program without my prior knowledge and approval is in direct violation of my instructions to you on January 9.

On February 13, you took the day off and again failed to obtain my approval or to leave a message advising of your absence. I find this particularly disturbing since you called me at home the evening before regarding a medical problem at Tier 4 and the probable need for overtime at the

hospital. During our telephone conversation, you had the opportunity to request the time off. The issue of your taking off and not informing me was addressed on January 9, and the importance of keeping me informed if you were not going to be at work. I am at a loss as to why you would not follow the instructions given to you regarding your time and attendance.

As an example of your failure to follow direction and provide necessary follow up, there is the unresolved situation pertaining to disciplinary action being instituted against Deputy Sheriff Bruce Haynes for carrying his firearm within the secure perimeter. The incident occurred on December 3, 2000, and shortly thereafter, I discussed with you the need to take disciplinary action (a letter of counseling/reprimand). After several weeks and having seen no disciplinary action being instituted, I questioned the status of the action, and you assured me that it would be forthcoming. That was on December 31, and as of today, I am still unaware if any action has been taken or will ever be taken. Again, the lack of response on your part in this situation is an issue of not complying with the instructions of a superior and calls into question your trustworthiness and reliability to follow up on given assignments. Again, I am at a loss as to why you have not followed up on the action I required you to take.

Since your promotion in August of 2000, your performance to date has clearly demonstrated that you are not capable of performing at the required level. This is particularly disturbing given that the areas that you have the most difficulty with are ones that are generic to your assigned responsibilities, such as providing clear direction to staff, securing permission from your superiors before initiating new programs, completing assignments and following the time and attendance policy. You have been employed with this office since 1979 and are well aware that following these practices are essential to the smooth operation of a para-military organization such as the Sheriff's Office. Of equal concern is the fact that, after being given specific guidance regarding these and other issues, there has been no effort on your part to change.

Your actions could lead to the conclusion that you are being grossly insubordinate. However, it is readily apparent that you are not capable of developing the strong working rapport and credibility with staff that is essential to meet this organization's mission and common purpose. Likewise, it is my observation and judgment that your progress and performance are unsatisfactory and unacceptable. Not only have you lost the confidence of your subordinate staff but, also, your co-workers, and superiors are expressing concern about your decisions, judgment and rapport. Accordingly, because you were placed on conditional status when you were promoted to Captain, I am recommending that you be demoted to the rank of Lieutenant and assigned to other duties in the Sheriff's Office, effective immediately.

Major Smith

I concur with the recommendation that demotion be effective _____.

Sheriff

Example of Poor Documentation

Annual Evaluation 1998

Deputy's Name: B. Haynes

	Excellent	Good	Needs Improvement	Unacceptable
Attendance	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Knowledge of Job	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Relations with Coworkers	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inmate Management	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Looks for Ways to Improve Dept.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relations with Public	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Performs Assigned Duties on Time	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Quality of Work	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments: New deputy. Still learning the ropes.
I expect all top ratings next year.
Recommend merit increase

Received and reviewed with Superior: B. Haynes

Evaluator: Lt. Cook

Approved: Sheriff Smith

Annual Evaluation 1999

Deputy's Name: B. Haynes

	Excellent	Good	Needs Improvement	Unacceptable
Attendance	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Knowledge of Job	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relations with Coworkers	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inmate Management	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Looks for Ways to Improve Dept.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relations with Public	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Performs Assigned Duties on Time	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Quality of Work	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments: Great progress. A 1st class deputy
after 19 months on the job
Recommend merit increase.

Received and reviewed with Superior: B. Haynes

Evaluator: LT - Cook

Approved: Sheriff Smith

Annual Evaluation 2000

Deputy's Name: Sgt. Mayner

	Excellent	Good	Needs Improvement	Unacceptable
Attendance	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Knowledge of Job	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relations with Coworkers	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inmate Management	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Looks for Ways to Improve Dept.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relations with Public	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Performs Assigned Duties on Time	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Quality of Work	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Comments: Special commendation for handling hostage situation.

Received and reviewed with Superior: B. Mayner

Evaluator: Lt. Cook

Approved: Sheriff Smith

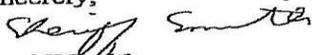
April 1, 2001

Sgt. Bruce Haynes
By Hand

Dear Mr. Haynes:

Your appointment with the Sheriff's Office is hereby terminated effective immediately. Please give your keys, firearm, and badge to the Deputy who delivers this letter to you. Please call Lieutenant Kathy Cook to arrange a time to return your uniforms and other equipment.

Sincerely,


Sheriff Smith

Avoiding Discrimination Claims Based on Race, Color, Religion, Sex or National Origin

I. Title VII is the name of the federal law governing discrimination based on race, color, religion, sex, and national origin.

A. Virginia has a similar law at Virginia Code § 15.2-1604. Both laws prohibit discrimination with respect to recruiting, hiring, compensation, promotion, and discharge on the basis of race, color, religion, sex, or national origin.

II. The prima facie case.

A. Direct evidence: typically, a statement by a decision-maker to the effect that we need to change the racial composition of the work-place, or a racial slur by a decision-maker.

B. Indirect evidence.

1. *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214-214 (4th Cir. 2007). "An employee demonstrates a prima facie case of race discrimination by showing that

- a. he is a member of a protected class;
- b. he suffered adverse employment action;
- c. he was performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action; and
- d. the position remained open or was filled by similarly qualified applicants outside the protected class."

2. How simple is it to prove the prima facie case? All the plaintiff had to show was:

- a. He was African-American.
- b. He was fired.
- c. He received good job evaluations.

- d. The employer hired a white person to replace him.

III. Disparate Treatment and Discriminatory Impact.

A. Disparate treatment

1. An individual suffers an adverse employment action because of his or her race, color, national origin, religion, or gender.
2. Most cases are “treatment” cases.

B. Discriminatory impact

1. A facially neutral practice or rule has an adverse impact on a group of applicants.
2. Example—height requirements.
3. Example—educational requirements.
4. To prevent “impact” claims, job requirements should be closely examined to insure that the criteria used are validated. This means that the practice or rule in question is truly “job-related.”

IV. Adverse Employment Action.

A. To prevail on a discrimination claim, a plaintiff must show an adverse employment action.

1. Note that this is *not* the rule in retaliation cases. In retaliation cases, a more relaxed rule is applied by the courts.
2. Retaliation is a difficult topic discussed in detail below in a separate section of this outline.

B. An adverse employment action is a discriminatory act that adversely affects the terms, conditions, or benefits of the plaintiff’s employment.

1. The mere fact that a new job assignment is less appealing to the

employee, however, does not constitute adverse employment action.

C. There must be some significant detrimental effect.

1. “Absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position.” *Boone v. Goldin*, 178 F.3d 253, 256-57 (4th Cir. 1999).

D. Examples of Adverse Employment Actions

1. Failure to hire.
2. Firing.
3. Demotions.
4. Failure to promote.
5. Paycuts.
6. Disciplinary matters such as suspensions.

E. A reassignment/transfer to a job at the same salary level can be the basis of a discrimination suit only if it results in a significant detrimental effect on the employee.

V. Practices that can lead to trouble.

A. Discrimination includes advertising indicating a preference or limitation for a certain race, color, religion, sex, or national origin. 42 USC § 2000e-2.

1. In seeking bi-lingual employees, it is impermissible to advertise for “Hispanic” employees.
2. It is permissible to advertise for employees who are fluent in Spanish.

- B. There is no such thing as “benign” discrimination.
1. A violation can be found for “reverse discrimination” against, for example, whites or males.
 2. Preferential treatment NOT allowed even where the workforce is imbalanced.
- C. Replacements for fired workers.
1. The replacement of an employee in one racial group with an employee in a different racial group is one possible element of a prima facie case.
 2. The hiring of another member of the protected class can be evidence that the employer did not discriminate.
 3. Similarly, if an employee is hired and then fired shortly thereafter by the same person, this creates the appearance that discrimination is not the reason for the employer’s action.
- D. Mixed motive cases.
1. A violation can be found even if discrimination was not the only factor in the decision, as long as it was a motivating factor. 42 USC § 2000e-2(m).
 2. If the employee can demonstrate that discrimination was a factor in an adverse employment action, the burden of proof shifts to the employer to demonstrate that the same action would have occurred regardless of the discrimination.
 3. If the employer establishes that it would have taken the same action, the employee is not entitled to reinstatement, but still can recover damages.
- E. The use of different cutoffs for applicants in the protected groups.

- F. It is also a violation to retaliate against an employee who opposes discriminatory practices or participates in “protected activity” such as filing a charge with the EEOC or *giving testimony adverse to* the employer. 42 USC § 2000e-3. The anti-retaliation provisions apply to formal *and* informal complaints. They apply without regard to whether the complaint has merit as long as the employee has a good faith belief that the employer has violated Title VII. Unreasonably disruptive or inappropriate conduct is not protected.

VI. Defending your decisions.

- A. BFOQ (bona fide occupational qualification)
1. NOT available on the basis of race.
 2. Usually seen in cases involving gender.
 3. Construed very narrowly by courts.
 4. Cannot be based on customer preference (flight attendants).
 5. Courts have upheld cases where an employer discriminated on the grounds of conventional decency/privacy, e.g., labor and delivery nurses and restroom attendants. However, the privacy of prisoners has usually fallen to goals of Title VII except in the context of strip searches or pat-downs.
 6. Can be based on authenticity. In a law enforcement context, the employer may use only women for certain undercover assignments. 29 CFR 1604.2
 7. Height/weight tests for police officers have been invalidated.
- B. Job-related and business necessity. 29 CFR 1607.4.

1. Can be raised in cases involving applicant testing where the test is neutral on its face, but has an adverse impact by race, sex, or national origin. Adverse impact generally is found when a race, sex, or ethnic group is selected at a rate that is less than eighty percent of the rate for the group with the highest selection rate.
2. Test must be useful in serving the employer's legitimate goals.

C. Seniority system

1. Permitted when legitimate.
2. Often seen in layoff or RIF cases.

D. Merit system

1. Seen in cases where tests are used for promotion.
2. Such systems have been upheld in law enforcement cases.

E. Incentive System

Discrimination in pay is permitted when pay is based on quality or quantity of production.

F. Location

Discrimination in pay is permitted when based on location (different cities).

G. Good cause

1. Lack of education or experience is a defensible basis for refusal to hire. One court has held that failure to speak English clearly was a basis for finding an employee not qualified where part of the employee's job was to explain building code standards to the public.

MANAGEMENT TIP: Set out in writing what the minimum qualifications for a position are before recruiting for candidates.

With respect to promotions, this may include minimum ratings on the employees most recent performance evaluation--for example, “satisfactory or above.”

2. Lack of education or experience also is a defensible basis for preference in training opportunities.

MANAGEMENT TIP: You must be able to demonstrate that the persons selected for training were more qualified than those not selected. For example--seniority, length of employment with your office, experience in law enforcement, evaluations, desire to attend.

3. Poor performance, or violation of rules is a defensible basis for discharge.

MANAGEMENT TIP: Set out in writing all of the reasons for which an employee can be discharged. Include a catch-all reason that covers “other conduct detrimental to the office.”

III. Religion. 29 CFR § 1605.2.

- A. You must accommodate employees’ religious practices and beliefs subject to undue hardship.
- B. Undue hardship can be shown for anything above minimal cost with respect to adjusting work schedules, imposing on co-workers, or disrupting the work routine. Hardship may be more easily shown by entities that provide safety services to the public.
- C. Undue hardship cannot be justified on the mere assumption that many more people with the same religious practices as the person being accommodated may also need accommodation.
- D. Methods of accommodation include: voluntary substitutes and swaps, flexible

scheduling, lateral transfer, or change of job assignments.

MANAGEMENT TIPS: Publicize a policy regarding accommodation and the availability of voluntary swaps, and provide a bulletin board or similar means for employees to announce swap opportunities. Allow employees seeking accommodation flexible arrival and departure times, floating holidays, or the use of lunch time in exchange for early departure.

E. Employer is not required to violate a seniority system to accommodate an employee.

IV. Sex. 29 CFR § 1604.

- A. You may not refuse to hire a woman based on stereotypes or the preference of co-workers, clients, or customers.
- B. Seniority systems. You may not implement a separate seniority lists based on sex where discrimination results.
- C. Fringe benefits. You may not discriminate in the regard to providing fringe benefits, even if the cost to provide benefits to one sex is greater than providing the same benefits to the other sex.
- D. Marital status. No-married and no-spouse (including live-ins) rules permitted as long as they are applied to both sexes.
- E. Pregnancy. Employer may not discriminate against applicants or employees by means of a written or unwritten policy. Disabilities caused by, or related to, pregnancy or childbirth must be treated as disabilities related to any other medical condition.
- F. Strength tests. Courts have generally found these invalid in the absence of legitimate physical demands. Employer must be able to clearly show the

necessity for the employee's performance of the job.

V. National Origin. 29 CFR 1606.1.

- A. Prohibits discrimination based on individual's (or ancestor's) place of origin or because the individual has the physical, cultural, or linguistic characteristics of a national origin group. This includes marriage to, or association, with members of protected groups.
- B. Courts have struck down as discriminating against Hispanic applicants height and/or weight requirements implemented by law enforcement agencies.

VI. Pre-Employment Inquiries.

- A. You may ask about convictions and, once known, weigh that information against job responsibilities.
- B. You may not require a photograph attached to an application.
- C. You may not ask about an applicant's *native* language, but you may ask which languages the applicant speaks *fluently*.
- D. You may ask if the applicant is a U.S. citizen and, if not, whether he/she has a legal right to remain in the U.S.
- E. Inquiries into availability to work are permitted within limits.

MANAGEMENT TIPS: Before an offer is made, you may tell the applicant the normal work hours and, after making it clear that the applicant need not indicate any absences needed for religious practices, ask the applicant if he/she is otherwise available to work those hours *as long as* you have a legitimate interest in knowing the availability of applicants prior to selection. After an offer is made, you may ask the applicant if he/she needs any accommodation for religious practice reasons.

F. EEOC Uniform Guidelines on Employee Selection Procedures

1. Employer must maintain records of applicants for hire and promotion by race, sex, and ethnic group to determine whether a selection device is having an adverse impact on members of a protected group, the number of persons hired, promoted, and terminated for each job by sex, race and national origin, and the selection procedures utilized (whether standardized or non-standardized).
2. If you have 100 or more employees, contact the EEOC for EEOC reporting forms.
3. The records must be maintained separately from the applications themselves.

VII. Retaliation

- A. It is also a violation to retaliate against an employee who opposes discriminatory practices or participates in “protected activity” such as filing a charge with the EEOC or *giving testimony adverse to* the employer. 42 USC § 2000e-3. The anti-retaliation provisions apply to formal *and* informal complaints. They apply without regard to whether the complaint has merit as long as the employee has a good faith belief that the employer has violated Title VII. Unreasonably disruptive or inappropriate conduct is not protected.
- B. The prima facie case. In order to establish a prima facie case of retaliation, a plaintiff must prove three elements:
 1. that she engaged in a protected activity;
 2. that her employer took an adverse action against her; and

3. that there was a causal link between the two events.
- C. In retaliation cases, the plaintiff need not show an employment action such as termination or demotion. Rather, the anti-retaliation provision covers any employer actions that would have been materially adverse to a reasonable employee or applicant. A retaliation plaintiff only needs to show that the challenged action well might have persuaded a reasonable worker not to make or support a charge of discrimination.
- D. The Problem and the Answer
1. The problem is that the plaintiff has already done something that can easily be understood to be a cause for vengeance—he or she has griped about mistreatment in the work place. When something adverse happens to the employee, his first reaction is to assume it is in retaliation. This reaction is often not unjustified, because the atmosphere can be difficult after a complaint is registered. And, it is a reaction that juries intuitively understand.
 2. The answer is documentation. A poor employee will always hang himself. To avoid a successful retaliation claim, the employer must thoroughly document the new misconduct, or the changed conditions, that led to the adverse action.
- E. A case study in successful retaliation litigation: *Briggs v. Watson*.
1. Kerri Briggs was a deputy sheriff in Portsmouth, Virginia. The former sheriff asked her to join him on a trip to Atlantic City. She declined, and eventually he fired her. She filed a sexual harassment suit against the

former sheriff.

2. During the suit, Sheriff Watson defeated the former sheriff in an election, and took his place. He rehired Briggs into his department. His reward: she added him as a defendant in place of the former sheriff, who no longer met the definition of an “employer” under federal discrimination laws. No good deed goes unpunished.
3. When the Sheriff learned that the ungrateful deputy had sued him, he said, “It will cost her her job. If she wants to pursue it, she can pursue it as a civilian.” These fateful words were said to a reporter, who dutifully reported them in the Virginian-Pilot newspaper.
4. Eventually, the parties settled the first lawsuit that had started against the former sheriff.
5. After the settlement, Sheriff Watson transferred the plaintiff from a position as a process server to a job as a correctional officer. Process servers received cars for their personal use, and only worked day shifts. After her transfer, Briggs lost the car and had to work on shifts. Shiftwork disrupted her child care schedule. Four months after the transfer, Sheriff Watson fired her. She sued for retaliation.
6. The Sheriff won the case, in a trial before a jury. How did he pull this off?
Documentation!
 - a. The settlement of the first case required him to transfer her immediately to a position funded by the Compensation Board. Almost all his vacancies, and almost all his comp board positions, were in the jail. He was able to establish that he was required to transfer her because of

the settlement agreement, and he showed that the first available compensation board position was in the jail.

b. While working in the jail, the plaintiff was served with a criminal show cause summons related to a child support dispute with the father of her child. The Sheriff's rules required that all employees must report all summonses to internal affairs. The Sheriff's exhibits at trial included the show cause summons and the written policy requiring her to report it.

c. The plaintiff allowed inmates to use the telephone after they were supposed to be turned off. The Sheriff introduced an exhibit showing that phones must be turned off at 10:00 p.m. He also introduced a log book showing that she had made an entry showing that she had turned the phones off.

d. The telephone calls at the jail were digitally recorded. The Sheriff's staff found a recording of a call from Briggs' floor at 12:38 a.m. The Sheriff played the recording at trial. There were two important elements to the recording. First, the inmate told his girlfriend that they had a "sweet deputy" who allowed them to talk on the phone after it was supposed to be off. Second, the plaintiff could be overheard in the background—at 12:38 a.m.—telling the inmate to wrap up his call so she could turn the phone off. Thus, the Sheriff could prove conclusively that she had allowed the phones to be on *and* had falsified the log book.

e. The Sheriff introduced a termination letter that explained precisely why the deputy was terminated.

7. **This evidence fell into the Sheriff's lap.** The Sheriff did not set out to

fire the deputy. He received a complaint about a late-night call, and an impartial investigation led to Briggs. This process demonstrates the cardinal principal that bad employees will hang themselves. A deputy told the Sheriff after the trial that the deputy had bragged, "He can't touch me." She was wrong.

Avoiding Sexual Harassment Claims

- I. There are two types of sexual harassment.
 - A. Quid pro quo. Sexual favors demanded in return for employment benefits; or under threat of adverse employment action.
 - B. Hostile work environment. Oppressive atmosphere of sexual innuendo or intimidation which is encouraged or tolerated by the employer.
- II. Whether the claim is quid pro quo or hostile work environment, the plaintiff must prove that the behavior was unwelcome and that it affected a term or condition of employment.
 - A. What is unwelcome?
 1. When the conduct is outrageous, this is not an issue.
 2. Often becomes an issue in cases where sexual innuendo is prevalent in the workplace.
 3. Plaintiff's participation in sexual innuendo does not waive his/her protection from harassment.
 4. Unwelcome is not the same as involuntary. A sexual encounter can be voluntary and still unwelcome.
 5. The fact that the conduct is unwelcome must be communicated to the actor. In one case, the fact that the sex was unwelcome was communicated when the actor had to force the victim to the floor. Some showing of resistance is necessary.
 - B. What does "affect a term or condition of employment" mean?
 1. In quid pro quo cases, the change in the terms or conditions of employment usually is clear, such as a failure to promote.
 2. In hostile work environment cases, the hostile environment is the

altered condition of employment.

III. What type of behavior qualifies as sexual harassment?

A. Quid Pro Quo.

1. Need not culminate in a sexual encounter. Violation can be established as long as there is pressure, threat, or demand for a sexual encounter.
2. Invitations to social functions extended to all employees on occasion permitted.
3. One court has held that even a “well-intentioned compliment” can form the basis of a sexual harassment lawsuit.

B. Hostile Work Environment. The plaintiff must prove that the behavior was **“so severe or pervasive”** as to alter the terms or conditions of employment, that actually offended the victim, and that a reasonable person would find it offensive.

1. So severe *or* pervasive as to alter the terms or conditions employment. Beyond sexual assault, courts will consider the offensive behavior’s frequency, severity, threatening nature, and/or humiliating nature, etc. *See Attachment A* for examples of severe or pervasive behavior.
2. Subjectively offensive to the victim. Psychological injury not required. Employee’s work need not be impaired.
3. Offensive to the reasonable person. Courts consider the community-based norm for the workplace.

C. Paramours

1. Preferential treatment of a paramour by a supervisor is not a violation.
2. However, allowing employees to compete to be the paramour to obtain preferential treatment can be a violation because the granting of sex for preferential treatment is a condition imposed on one gender and not the other.
3. Ended love affair where the jilted supervisor terminates the subordinate. Courts have held that this type of termination is not based on the subordinate's gender, but the subordinate's rejection of the supervisor, and therefore is not sexual harassment.

D. Harassment of male by female

Where harassment is on the basis of sex, the gender of the harasser is irrelevant. However, the case may be harder to prove where the environment is male-dominated.

E. Same-sex harassment

1. This can be the basis of a violation where the harassment was based on the victim's sex.
2. Harasser need not be homosexual.

F. "Non-sexual" sexual harassment

1. Language or conduct need not be sexual in nature to be in violation of the law. Sexual harassment means that members of one sex are treated differently than members of the other sex.
2. However, conduct or language which is not sexual may be held to a higher standard.

IV. Employer liability

A. Supervisors

1. Where there has been an adverse employment action, such as discharge, denial of promotion, denial of training opportunity, or denial of choice assignment, the employer is strictly liable. This is based on the theory that the supervisor has been aided by his position in causing the harm.
2. Where no adverse employment action has occurred, employer can defend itself by showing that it:
 - (a) Exercised reasonable care to prevent and correct promptly the sexually harassing behavior; and
 - (b) The victim unreasonably failed to take advantage of preventive or corrective opportunities or avoid harm otherwise.

See *Attachment B* for examples of adequate/inadequate discipline.

B. Co-workers. Employer can be liable for sexual harassment between co-workers only where it:

1. Knew or should have known of the sexually harassing behavior. Actual knowledge not required.
2. Failed to take immediate and appropriate corrective action.

C. Non-employees. Employer can be liable for sexual harassment by non-

employees depending on the degree of control it has over the harasser. A correctional facility is permitted to ban sexually explicit materials in order to reduce sexual harassment of correctional officers regardless of whether such materials have caused problems in the past or whether they may cause such problems in the future.

Attachment A

**Examples of behavior found by courts to be severe or pervasive enough
to state a hostile work environment claim**

- Two sexual assaults within a three day period (not pervasive but sufficiently severe).
- Slapping plaintiff on the buttocks and threatening to do it again.
- Calling the plaintiff “Syphilis,” commenting on her appearance, monitoring her bathroom time, and hitting her once on the arm.
- At least one vulgar comment in combination with graffiti about the plaintiff that remained on the wall for two years.
- Slapping plaintiff on the buttocks, repeatedly asking her out and following her in the car when she refused to go, allowing her to overhear male employees talk about their sexual exploits, in combination with graffiti about the plaintiff on the walls.
- Magazines of nude women and the repeated placement of replicas of erect penises on plaintiff’s desk.
- Spying on female employees for a period of more than one year while they showered.

**Examples of behavior found by courts NOT to be severe or pervasive enough
for purposes of a hostile work environment claim**

- Five potentially sexually offensive remarks over a period of three years.
- Being asked out on a date on two occasions by two different co-workers.
- Being required to hug the manager before receiving plaintiff’s weekly paycheck over a period of two weeks.
- Two instances of being called an obscene word and one obscene gesture over a two year period.
- One inappropriate joke and one instance of touching.
- Four invitations for a date or affair followed by an angry reaction.
- Advances on two occasions in combination with an attitude of condescension, impatience, and teasing.
- One off-color joke, in combination with a conversation about a strip bar during which the plaintiff was asked if she had ever been to a different strip bar.
- Being asked why plaintiff had married so young when she “could have fun with guys like him” and whether her husband satisfied her.
- Suggestive gestures on four or five occasions.

Attachment B

Examples of discipline found by courts to be adequate

- Where an investigation was inconclusive as to whether a manager had placed his hands on plaintiff's breasts on one occasion, a strong warning to the manager was found to be adequate discipline.
- Where plaintiff mentioned to the vice president that another employee was asking her out and that it bothered her, the vice president's response in confronting the employee plaintiff's allegations, telling him to "stop whatever it was that he was doing to irritate" plaintiff, and transferring plaintiff *at her request* when she complained that the harassment had not stopped, was found by the court to be adequate.
- Where offender grabbed co-worker on her face, pulled her to him, and kissed her on the mouth, an official reprimand and warning, two months' suspension from duty, and reassignment upon return to duty was found to be adequate where the offensive conduct stopped.

Examples of discipline found by courts to be inadequate

- Holding occasional meetings to remind employees of the employer's sexual harassment policy was an inadequate response to four years of "malevolent" and "outrageous" harassment.
- Where an order to apologize, postponing a merit increase, and verbally reprimanding the harasser did not end the harassment, more stringent discipline was required.
-

Avoiding Age Discrimination Claims

I. The law prohibiting age discrimination in employment is called the Age Discrimination in Employment Act or the ADEA.

A. The ADEA prohibits an employer from failing or refusing to hire, discharge, or otherwise discriminate with respect to compensation or the terms or conditions of employment (such as leave, vacation, etc.) against persons over 40 on the basis of age.

1. Recruiting. Prohibits advertising for a position with any preference or limitation based on age.

MANAGEMENT TIPS: Do not use the terms *age 25 to 35, young, college student, recent college graduate, boy or girl*. 29 CFR § 1625.4. Do not direct ads at *persons who cannot or do not intend to return to school or college*. At least one court has upheld the use of *returning veterans, junior executive, junior secretary, first job and excellent first job*. State on your application that age is not being asked for an illegal purpose and that the ADEA bans discrimination against those at least 40 years of age. 29 CFR § 1625.5

2. Hiring. 29 CFR § 1625.5
3. Compensation.
4. Harassment. Courts have not yet found age harassment to be actionable.
5. Transfer. In general, no discrimination found with respect to a transfer in the absence of a decrease in pay, benefits or lost opportunities.
6. Termination. You are not safe from liability by replacing a protected worker with another protected worker, e.g., a 41-year old hired instead of a 52-year old. The 52-year old may still be able to prove discrimination based on age. 29 CFR § 1625.2..

II. Defending your decisions

A. Bona fide occupational qualification (BFOQ)

Generally, this is a losing argument. 29 CFR § 1625.6. However, there is a statutory BFOQ defense for law enforcement with respect to:

1. Maximum hire age; and
2. Mandatory retirement age of no younger than 55

29 U.S.C. § 623(j). "Law enforcement officer" under the ADEA includes employees assigned to guard individuals incarcerated in *any* penal institution. 29 U.S.C. § 630(k).

MANAGEMENT TIP: Make sure that the maximum hire age or mandatory retirement age is authorized by state or local law and was in force back in March, 1983.

B. Reasonable factors other than age

1. An employer's decision to terminate more expensive workers, even when work product not related to experience, generally found to be in violation of the ADEA because of correlation with age. 29 CFR § 1625.7.
2. A reduction-in-force (RIF) can justify discharging protected employees as long as it is not a pretext to get rid of older employees.

MANAGEMENT TIPS: Prior to the RIF, develop a clear and age-neutral policy specifying how layoff decisions will be made in order to avoid the appearance of being haphazard and subjective in your decisions. Be careful about later hiring younger, less expensive workers. One younger hire might not be suspicious, but don't establish a pattern of doing this. In selecting layoffs, you do not have to fire a younger worker first in the absence of a contractual right (often found in unions) to "bump" a worker with less seniority.

C. Seniority systems

1. It is permissible to have a system where length of service is the primary criterion for allocation of employment opportunities and prerogatives. 29 CFR § 1625.8.

MANAGEMENT TIP: If you have a seniority system, inform all employees about it and apply it uniformly to all employees, regardless of age.

D. Employee benefit plans

1. It is permissible to reduce benefits for protected workers to achieve approximately equivalent costs for older and younger employees. 29 CFR § 1625.10.

MANAGEMENT TIPS: Make sure that the terms of the plan have been accurately described in writing to all employees, and that benefits are being provided in accordance with the plan. Finally, make sure that the plan states that the benefits are reduced to achieve equal cost.

E. Voluntary retirement options

These plans are generally permitted as long as employees have sufficient time to consider the option, all the information needed to make an informed decision, and are under no duress to take the option.

F. Employee Waiver

Waivers, often seen in conjunction with voluntary retirement options, are generally permitted as long as the employee had knowledge that he/she was waiving his/her right to recover under the ADEA, and he/she made the decision to do so voluntarily. 29 USC § 626(f). 29 CFR § 1625.22.

MANAGEMENT TIPS: Ensure that the waiver:

(1) is written in plain language so that it is understood by the average person;

(2) states that claims under the ADEA arising up to the date of the waiver's execution are being waived;

(3) states that the employee is advised to consult with an attorney prior to executing the waiver; and

(4) if the waiver is part of a voluntary retirement program, include the positions involved and the ages of the reduced and retained classes.

Ensure that the employee is receiving something of value above and beyond that to which the employee is already entitled.

Give the employee at least 21 days (45 days for a group) to consider the waiver.

Give the employee at least 7 days to revoke the agreement.

G. Good cause

It is permissible to discharge an employee for poor performance, violation of company rules, etc.

MANAGEMENT TIPS: Regularly document each employee's performance from the date of hire. When the employee's performance becomes substandard, issue him/her a warning in writing and give him/her a probationary period of 30 days or more to show improvement.

Tell the employee how to improve his/her performance. Do not make comments about an employee's age or plans for retirement.

III. Keeping records 29 CFR § 1627.3.

- A. Records required to be kept for three years include payroll records containing each employee's name, address, date of birth, occupation, rate of pay, and compensation earned each week.
- B. Records required to be kept for one year from the "personnel action" include:
 - 1. Applications and resumes and any other form of inquiry submitted in response to an advertisement for a job opening;
 - 2. Records pertaining to the failure or refusal to hire;
 - 3. Records pertaining to promotion, demotion, transfer, selection for training, layoff, recall or discharge;
 - 4. Job orders submitted to an employment agency;
 - 5. Employment or aptitude test records;
 - 6. Physical exam results; and
 - 7. Advertisements for openings, promotions, training programs, or opportunities for overtime work.
- C. Keep a copy of each employee benefit plan, seniority system, and merit system for the duration of the plan/system plus one year after its termination.

Avoiding Disability Discrimination Claims

I. The law that prohibits discrimination on the basis of disability is called the Americans with Disabilities Act (“ADA”). It prohibits:

- A. Discrimination in recruiting, hiring, compensation, assignment, promotion, transfer, layoff, or other terms and conditions of employment; 29 CFR §1630.4.
- B. Discrimination in social and recreational activities sponsored by the employer; 29 CFR § 1630.4.
- C. Participation under a contract which subjects qualified applicants or employees to prohibited discrimination; 29 CFR § 1630.6.
- D. Discrimination on the basis of association with an individual with a known disability; 29 CFR § 1630.8.
- E. Administration of employment tests in a fashion that a job applicant disabled by sensory, manual, or speaking skills cannot demonstrate his/her skills in that area *unless* the test is for measuring such skills. 29 CFR § 1630.11.

II. The ADA prohibits an employer from discrimination against any “qualified individual with a disability.”

- A. Who is a qualified individual? Someone who, with or without reasonable accommodation, can perform the essential functions of the job. 29 CFR § 1630.2
 - 1. What is reasonable accommodation? Architectural assistance such as ramps and handlebars, communication assistance such as hearing aids and computers, or modified work schedules. 42 USC § 12111.

MANAGEMENT TIPS: Analyze the particular job involved and determine its purpose and essential function. Consult with the disabled individual to learn how he/she can be reasonably accommodated. Identify potential accommodations and assess the effectiveness of each to enable the individual to perform the essential functions of the job. Consider the individual’s preference. Select and implement the accommodation that is most appropriate for you and the disabled individual.

- 2. What is an essential function of the job? Courts will look at such factors as the amount of time spent performing the function, what others in the same job do, and what others in the same job have done in the past. 29 CFR § 1630.2. Also, written job descriptions can help prove what is an essential function of the job. In one case, an employer was able to terminate a corrections officer with learning disabilities because he did not have the communication skills set forth in the position’s job description.

MANAGEMENT TIP: With employee input, revise your job descriptions annually to reflect current essential functions and have

the employee sign indicating agreement with the description.

- (a) An employer is not required to reallocate the essential functions of the job. For example, an employer is not required to hire a sighted reader to read identification cards so that a blind applicant can be hired as a security guard whose primary task is to read identification cards. In one case, a city was permitted to demote a police detective who could not drive or see out of one eye. The court held that the city did not have to accommodate him by assigning another detective to accompany him on investigations.
- (b) If an individual rejects a reasonable accommodation and cannot, as a result of that rejection, perform the essential functions of the job, the individual will not be considered “qualified.” 29 CFR § 1630.9(d).

B. What is a disability? 29 CFR § 1630.2

- 1. A physical or mental impairment that substantially limits a major life activity (example: amputation);
- 2. Having a record of such an impairment (example: history of cancer or heart disease); or
- 3. Being regarded as having such an impairment (example: controlled diabetes or epilepsy).
- 4. Temporary, non-chronic conditions such as a broken limb or the flu are not disabilities.
- 5. Specific conditions that are not considered disabilities under the statute or regulations: age (although certain age-related diseases such as osteoporosis might be covered), environmental, cultural, or economic disadvantage (such as lack of education, financial problems), homosexuality/bisexuality, pregnancy (although certain complications resulting from pregnancy may be considered disabilities), current illegal use of drugs, sexual behavior disorders such as pedophilia or exhibitionism, compulsive gambling, kleptomania, and pyromania. 29 CFR § 1630.3
- 6. Specific individuals that are considered disabled under the statute or regulations include persons with HIV infection (even if symptom-free), persons with a current alcohol problem, a past drug program, persons participating in a supervised treatment program, and persons wrongly believed to be currently engaging in the illegal use of drugs.
- 7. What is a major life activity? Examples include walking, seeing, hearing,

breathing, learning. 29 CFR § 1630.2

- a. One court has held that a worker who suffers from severe sleep apnea may be able to prove that he/she is substantially limited in the major life activities of breathing and sleeping.
- b. Substantially limited in the major life activity of working means that the employee's impairment generally forecloses the type of employment sought, not simply the demands of one particular job.

III. Defending your decisions

- A. No Disability. There is no substantial limitation on a major life activity.
- B. Direct Threat
 1. Employer may refuse to hire an applicant who poses a significant risk to the health or safety of others that cannot be eliminated by the modification of procedures or provision of auxiliary aids. 29 CFR § 1630.2
 2. Food handling. An employer may refuse to employ an applicant with an infectious or communicable disease if no reasonable accommodation would prevent the transmission of disease to others through the handling of food. 29 CFR § 1630.16.
- C. Business necessity
 1. When tests or other selection criteria screen out an employee with a disability, the employer must be able to show that the test is job-related and consistent with business necessity, and that performance of the job cannot be accomplished with reasonable accommodation. 29 CFR § 1630.15(b).

MANAGEMENT TIP: With any change in duties, make sure that you update a position's job description to reflect the job's essential functions.
 2. A law enforcement agency may be able to exclude applicants with a history of illegal use of drugs if it can show that the standard is job-related and consistent with business necessity. 29 CFR § 1630.3 appendix.
- D. Undue hardship
 1. If the applicant or employee is otherwise qualified, the employer must make a reasonable accommodation unless it can prove that the accommodation is an undue hardship. 29 CFR § 1630.2
 2. The employer must show that accommodation would be unduly expensive or disruptive. Disruption cannot be based on an employer's

fears or prejudices, or that providing an accommodation has a negative impact on morale.

3. Hardship becomes an issue only *after* the possibilities of accommodation have been determined. 29 CFR §1630.2

E. No discrimination

It is permissible to discharge an employee for a legitimate, non-discriminatory reason such as violation of a safety rule, theft, etc. 29 CFR § 1630.15. Be careful: the disability need not be the sole reason for your action against the employee. It need only be proven to be a motivating factor. **Have you enforced safety or theft rules against other employees in the past?**

F. Conflict with other federal laws

Employer may defend itself by showing that its challenged action was required by, or demonstrate that a given reasonable accommodation is prohibited by, a federal law that conflicts with the provisions of the ADA. 29 CFR § 1630.15

IV. Pre-employment inquiries

- A. You may ask about an applicant's ability to perform job related functions and ask the applicant to describe or demonstrate that ability. 29 CFR § 1630.14
- B. You may ask what would be an effective accommodation.
- C. You may NOT ask about the nature or severity of an individual's disability.
- D. Following a conditional offer of employment, you may conduct a medical examination or make inquiries about an applicant's medical history if
 1. All applicants at this stage are required to take the same exam or answer medical questions; and
 2. The results of the exam are not used to discriminate on the basis of disability; and
 3. The medical information must be kept confidential and maintained in separate medical files. 29 CFR § 1630.14.
- E. The ADA does not prohibit the use of drug screens. 29 CFR § 1630.3.

V. Post-hire inquiries. 29 CFR § 1630.14.

- A. You may NOT conduct a medical exam without demonstrating that it is (a) job-related and (b) consistent with business necessity.
- B. You may offer voluntary medical exams, such as blood pressure screenings or

weight control programs, as part of an employee health program.

VI. Use of Drugs, Alcohol, and Tobacco. 29 CFR § 1630.16.

- A. You may prohibit the illegal use of drugs and the use of alcohol by all employees at work.
- B. You may forbid employees from being under the influence of alcohol at work.
- C. You may forbid employees from engaging in the illegal use of drugs at work.
- D. You may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance or job behavior as you hold other employees, even if the unsatisfactory performance or behavior is related to the employee's use of drugs or alcohol.
- E. You may prohibit or restrict smoking at work.
- F. The ADA does not prevent you from testing to screen for the illegal use of drugs.

VII. Psychiatric Disabilities

The ADA allows an employer to provide a different level of benefits for mental disabilities as opposed to physical disabilities.

- A. What is a mental impairment? EEOC Enforcement Guidance on ADA and Psychiatric Disabilities ("EEOC ADA Guidance").
 - 1. Any mental or psychological disorder such as emotional or mental illness.
 - 2. This includes major depression, bipolar disorder, panic disorder, obsessive-compulsive disorder, post-traumatic stress disorder, and schizophrenia.
 - 3. Traits or behaviors such stress, irritability, chronic lateness, and poor judgment are not mental impairments although they may be related to mental impairments.
 - 4. As with physical disabilities, the mental impairment must substantially limit a major life activity to rise to the level of a disability.
 - 5. To be substantially limiting, the impairment must last more than several months. EEOC ADA Guidance. It must restrict the individual in comparison to the general population.
 - 6. Major life activities in the mental impairment context can mean being able to interact with others, concentrating, sleeping, being able to care for one's self. EEOC ADA Guidance.

- B. How do you handle questions posed by co-workers? You may not disclose any medical information or tell co-workers whether you are providing a reasonable accommodation. You may state that you are taking action for legitimate business reasons or to be in compliance with federal law. EEOC ADA Guidance.
- C. The employee (or a family member) must request accommodation, although he/she need not do so in writing or use the words “accommodation” or “disability.” Employee need only ask for an adjustment or change because of a medical condition. EEOC ADA Guidance.
- D. If the employee’s need for accommodation is not obvious, you may ask for reasonable documentation concerning the disability and clarification of the need for accommodation. You may ask the employee for a release to send a list of questions about the employee’s condition to his/her health care provider. EEOC ADA Guidance.
- E. Examples of reasonable accommodation in the mental impairment context include flexible scheduling, room dividers, soundproofing, visual barriers, relocation to a quiet area, communicating assignments verbally or in writing, providing additional training, or even reassignment. EEOC ADA Guidance.
- F. An employee who is insubordinate and screams obscenities, even though he/she does so because of a medical condition, is not qualified.
- G. You can refuse to hire someone based on his/her history of violence or threats of violence if you can show that the individual poses a direct threat. For example, evidence of a direct threat could include information from a reference that an employee had been fired recently for attempting to fight with a co-worker, punching a wall, and threatening his supervisor. EEOC ADA Guidance.

VIII. Relationship to Workers’ Compensation Laws

- A. Leave may be a reasonable accommodation.
- B. Light duty may be a reasonable accommodation.
- C. Representations made regarding ability to work may prevent recovery under ADA. Employee may be prevented from claiming he/she is qualified.

IX. Relationship to the Family and Medical Leave Act.

- A. Under the FMLA, leave is an entitlement if requirements are met. FMLA/ADA Fact Sheet. Employee entitled to unpaid leave of up to 12 weeks in a year. Under the ADA, leave may be a reasonable accommodation subject to the undue hardship defense. FMLA/ADA Fact Sheet.
- B. Upon return from FMLA leave, the employer must restore the employee to his/her former position or a position with equivalent status. FMLA/ADA Fact Sheet. Upon return from ADA leave, an employer must restore the employee to

his/her former position unless holding the job open would create an undue hardship. FMLA/ADA Fact Sheet.

Your Obligations to Members of the Armed Services

I. What is USERRA and what does it require me to do?

USERRA is the Uniformed Services Employment and Re-employment Rights Act. It prevents you from taking an adverse job action against an employee who is in the military.

The military service need not be the sole factor for there to be a violation, only a motivating factor. If an employee leaves for military duty, you must re-employ her as long as she returns within five years.

MANAGEMENT TIP: The exceptions to the five year rule nearly swallow the rule. Check with your lawyer before terminating or demoting someone out on military leave.

II. What kind of notice must the employee give me regarding the call to service?

The employee must give you advance notice (verbal is ok) unless the notice is impossible, unreasonable or precluded by military necessity.

III. Which job must I give the employee on his/her return?

The rules on job reinstatement are as follows:

1. You must reinstate the person to where he/she would be had he/she remained employed with you *provided that the person is qualified for that job.*
2. If the person is not qualified for an elevated job despite your reasonable efforts to make him/her qualified, then the person is entitled to the job he/she held when he/she went into military service.
3. If the person comes back with a service-related disability and is not qualified because of the disability for #1 or #2 above, then the person is entitled to a position which most closely approximates #1 or #2 above.

There are three exceptions to the rule of job restoration. You are not required to re-employ a person who has been absent due to military service if either

1. your circumstances have changed such that re-employment would be impossible or unreasonable; e.g. plant or store burns down; or
2. re-employment of the person would cause you undue hardship (difficult standard); or
3. the job the person left was a temporary one-time position.

IV. Do I have to keep the employee on our health plan?

An employee who is on military duty for **more** than thirty days has the right to stay on your health plan for up to eighteen months. You can, however, require the employee to pay up to 102% of the full premium (premium plus any administrative costs) (Similar to COBRA). An employee who is on military duty for **less** than thirty days has the right to stay on your health plan on the same terms as if he/she remained at work (for example, same co-pay split).

V. When must the employee report back to work?

For service of less than thirty days, the employee has to report back to work at the beginning of the next regularly scheduled work period on the first full day after release from service taking into account safe travel and 8 hours rest. For service of 30 days to 180 days, the employee must report back to work within two weeks from release of service. For service of more than 181 days, the employee must report back to work within 90 days from release of service. You may require proof of the date the employee was released from service, but this is NOT cause to deny the employee job restoration. Return the employee to work pending receipt of the documentation.

VI. What if the employee returns to work with a service-related disability?

You have the obligation to enable the employee to refresh or upgrade her skills so that she will qualify for re-employment.

VII. Can the employee use accrued paid leave while out on military leave?

Yes, but you cannot require the employee to do so.

VIII. What should I do if the employee applied for a promotion before she left?

Failing to consider the employee could be considered discriminating against her for her military service. Consider her for the promotion. If she is the successful candidate, put an acting employee in her place until her return. If she is not selected, make sure you document why you chose the successful candidate over the absent serviceperson.

IX. Should I continue to make pension plan contributions while the employee is gone?

Yes. The employee shall be treated as if there were no break in service for purposes of your pension plan. However, he is entitled to accrued benefits that are contingent on his contributions only to the extent that he makes such contributions. He may make the maximum payment upon re-employment for a period three times the tour of duty, up to five years. You must continue to make your employer contribution as you do for non-military employees.

The First Amendment, Office Politics And the Politics of the Office

The First Amendment affords Americans both the right to freedom of expression, including the right to express political views, as well as the right to freedom of association, including the right to join (or not to join) a political party. While these rights are broad, they are not absolute in the context of public employment.

Two issues frequently arise in this context—political patronage and freedom of expression, whether in oral speech or written form.

Political Patronage.

Political patronage is the practice of staffing governmental positions with political supporters of the currently elected officials. At one time, patronage was the rule of the road. In local governments all across our country, elected officials routinely fired people who had not supported them, and replaced them with loyal party functionaries. This practice is now largely illegal.

Supreme Court cases setting the general rule. The United States Supreme Court has provided a series of precedents that make clear that public employees' jobs enjoy First Amendment protection. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court held that public employers could not condition employment on the adoption of any particular political belief. The *Elrod* rule did have a few exceptions: policy-makers and confidential employees could be required to toe the party line.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the Court refined the test to make clear that most employees may not be subject to political patronage. The Court said that the test is not whether an employee is a policymaker or confidential, but rather whether the employer can demonstrate that the party affiliation is an appropriate requirement for the performance of the

public office involved.

Finally, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Supreme Court made clear the breadth of First Amendment protection afforded public employees. *Rutan* involved the employment of state workers. Illinois had experienced budget difficulties, and the governor implemented a hiring freeze. In order to fill any vacancy in state government, agencies needed to secure the “express permission” of the governor. Permission to hire was controlled by the “Governor’s Office of Personnel.” The Governor’s Office of Personnel approved the employment only of loyal Republicans.¹ Unhappy applicants filed suit, claiming that the Governor had violated their First Amendment rights.

The plaintiffs in *Rutan* had experienced a plethora of adverse employment decisions: they had been denied hiring, transfer, promotion, and recall after layoff. Although they had no contractual or property right to their jobs, the Court found this irrelevant. It held that there are some reasons “upon which the government may not rely” in making employment decisions. To hold otherwise would punish an individual for the exercise of a protected right.

Rutan confirmed that the only exception involves employees whose political loyalty “is an appropriate requirement for the effective performance of the public office involved.” Typically, those employees are policymakers and confidential employees. **Except for limited classes of employees in positions of confidence or in politically sensitive positions, political loyalty is not a permissible basis for any employment decision.**

Fourth Circuit Cases Define Broad Exceptions to *Rutan* for Sheriffs, but not for other public employers. As noted above, *Rutan* and its predecessors recognized exceptions to the rule—exceptions designed to recognize the need for political loyalty in certain sensitive

¹ While *Rutan* deals with the misdeeds of Republicans in Illinois state government, the Democrats in Chicago also had an unparalleled system of political patronage. *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008) (affirming criminal convictions against Democratic city officials for misuse of public funds in political patronage hiring scheme).

positions. The Court's logic is that the loyalty of high level employees to a chief executive or agency head and his or her goals and policies is essential to efficient and effective delivery of public services.

The Fourth Circuit has gone far in defining the exceptions to the *Rutan* rule, and has developed a body of case law that differentiates among types of lower level employees for purposes of First Amendment protection. So far, the cases involve deputy sheriffs, but the principles apply to Commonwealth's Attorneys, Clerks, Treasurers, and Commissioners of Revenue as well. *Jenkins v. Medford*, 119 F.3d 1156 n. 47 (4th Cir. 1997) (quoting *Wilbur v. Mahan*, 3 F.3d 214, 217 (7th Cir. 1993) ("A public agency would be unmanageable if its head had to appoint or retain his political enemies . . . in positions of confidence or position in which they would be making policy or, what amounts to the same thing, exercising discretion in the implementation of policy."). See also *Williams v. McDonald*, 69 F. Supp.2d 795, 799 (E.D. Va. 1999) ("Since deputies in the sheriff's department are appointed under the same statute as deputies in the Commissioner of the Revenue's office, the same constitutional protections apply to both.").

In a recent case, the Fourth Circuit seems to have retreated from the deputy sheriff cases. In *Fields v. Prater*, No. 08-1437 (4th Cir. May 21, 2009), the court held that a county could not use politics as a basis to refuse to hire the director of the social services department. The court held that most of the director's duties were prescribed by state statutes and regulations, so political affiliation was not a valid criterion to use in hiring the director. In other words, political loyalty was not an appropriate criterion for the position.

Which employees are you permitted to dismiss because of their political affiliation?

Deputies who can be dismissed because of their political affiliation or campaign activity are those who serve as policymakers, those who communicate the constitutional officer's policies to others (public relations staff, speechwriters, or legislative liaisons), and persons who are privy to confidential information within the officer's office. For people in these positions, loyalty to the constitutional officer is "an appropriate requirement for the job." *Id.* This rule has been applied to deputy sheriffs sworn to engage in law enforcement activities on behalf of the sheriff. *Id.* What is important here is not the job title, but the actual duties performed by the deputy. *Id.*

Which employees are you not permitted to dismiss based on political affiliation or campaign activity?

A constitutional officer cannot insist on political loyalty as a job requirement for those whose duties are routine and ministerial (as opposed to discretionary), those who have limited or no contact with the public (entry level jail personnel or receptionist), those who are not confidants of the sheriff, and those who do not advise him/her on political matters. *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000).

In these series of cases, the Fourth Circuit has emphasized that the critical component is the function of the employee. If the employee's tasks involve the exercise of discretion, contact with the public, and serving as a formal ambassador of the public officer, it is likely that political loyalty will be declared an important aspect of the job, and a politically-based employment decision will be permissible. In contrast, jobs that involve little discretion or no public contact are unlikely to demand political loyalty, and employees who fill these jobs will have broad First Amendment protection.

Thus, in *Jenkins*, the Court held that deputies who exercise street-level law enforcement responsibilities are not protected by the First Amendment, because their jobs require loyalty to

the Sheriff. In contrast, *Knight* involved a jailor who did not have contact with the public, and whose decisions did not reflect adversely on the Sheriff. Although her job involved some discretion, she was protected from discharge by the First Amendment.

Keep in mind that even those employees who enjoy First Amendment protection still can be dismissed for performance-based reasons, whether their poor performance is politically motivated or not. **You must keep a written record of every employee's performance in case you later need to defend your position that a dismissal was not politically motivated. No record is the same as a good record.**

Free Speech

The First Amendment forbids the government from taking action based on one's free speech. For instance, the government cannot make it a criminal offense to state beliefs contrary to government policy, contrary to one's employer's political beliefs, and contrary to common sense. There is a constitutional right not only to be stupid but also to prove it to the world.

The First Amendment of the Constitution says, literally, that "Congress shall make no law .abridging the freedom of speech.." This simple provision has been read expansively. It applies, not just to Congress, but to all branches of state and local government. It protects, not just speech, but expressive conduct such as dance. It deals, not just with laws, but with practices that may discourage speech. In this last context, it raises employment concerns. As a general matter, public employees may not be punished for public speech. They may not lose their jobs for expressions of their views, no matter how wrong-headed those views may be.²

Not all speech by public employees is protected. Rather, only speech made as a private

² Note that the rule is entirely different in private employment. The First Amendment applies only to public entities, not private employers. For this reason, a private employer can punish or terminate employees who make public statements with which the employer disagrees. But the government may not criminalize those same statements. For example, Major League Baseball severely disciplined former Braves pitcher John Rucker for racist statements that appeared in *Sports Illustrated*. The police, however, could not have arrested Rucker for making those same statements.

citizen on matters of legitimate public concern enjoys first amendment protection. If speech touches upon a matter of legitimate public concern, then the employer must show an “adequate justification” for taking action against the employee. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This requires some level of proof that the speech is actually disruptive of the operations of the public agency.

Matters of private concern are not protected. Specifically, complaints about office politics are not legitimate matters of public concern, and are not protected speech. *Connick v. Meyers*, 461 U.S. 138 (1983). The determination of whether speech touches upon legitimate public concerns or simply airs dirty laundry can be very tough. For instance, the complaint that “the boss gave me an office with no window” would not be protected. The same complaint, phrased slightly differently, would be protected: “the boss only gives offices with windows to women.” The former is a private gripe; the latter deals with public discrimination.

There is one final caveat on the right of free speech. Speech that occurs in the employee’s official capacity, as part of his or her official duties, is not protected speech. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Thus, for instance, an Assistant Commonwealth’s Attorney has no right to go to court and criticize prosecutorial policies.

These issues relating to public speech are very subtle. It is recommended, therefore, that officials seek advice of counsel before taking action based on public speech.

Grievance Procedures

Grievance procedures restrict the employer's ability to make personnel decisions.

Constitutional officers should avoid grievance procedures.

A. *Angle v. Overton*, 235 Va. 103, 365 S.E.2d 758 (1988). The Sheriff demoted an officer. A grievance panel restored the officer to his former position. The Supreme Court upheld the grievance panel's decision—completely ignoring the doctrine of employment at will.

1. The lesson of *Angle*: Grievance procedures tie the employer's hands when it comes to making personnel decisions. Constitutional officers should avoid them at all costs.

Constitutional officers are not required to be in a grievance procedure in order to participate in a local government personnel or pay plan. The Virginia Code specifically gives constitutional officers the authority to opt out of a grievance procedure:

§ 2.2-3008. Employees of local constitutional officers. — Constitutional officers shall not be required to provide a grievance procedure for their employees; however, such employees may be accepted in a local governing body's grievance procedure or personnel system if agreed to by the constitutional officer and the local governing body. (1995, cc. 770, 818, § 2.1-116.012; 1996, cc. 164, 869; 2001, c. 844.)

If you are in a grievance procedure, you should withdraw immediately.

The Fair Labor Standards Act

I. Introduction

A. The Fair Labor Standards Act (FLSA) is the source of many rules which are now the accepted norm in American employment: the forty-hour work week, the minimum wage, extra payment for overtime, and special protection for child labor.

B. At first, the FLSA only reached businesses which affected interstate commerce. In 1974, Congress amended the Act to cover state and local governments. After some uncertainty, the Supreme Court eventually upheld the constitutionality of this extension of the statute. Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528(1985).

Although Congress has made some accommodations to local governments, the FLSA still presents some traps for careless employers. With a little planning, however, local officials can avoid most potential liability under the FLSA.

II. Insurance coverage for FLSA suits.

A. Most Constitutional Officers are covered by a liability plan provided by the Division of Risk Management of the Commonwealth of Virginia. Although this plan covers liability for many potential errors made by Constitutional Officers, it does not provide complete coverage of FLSA violations.

B. Most breaches of the FLSA involve failure to pay an employee what is due. Put another way, the FLSA is a federal statute which requires the proper payment of wages. Wages are set by contract; the employer agrees to hire an employee at a certain rate of pay, and the employee agrees to perform tasks for the employer. When the employer has failed to pay the wages due, he or she has breached a contract--the unwritten contract of employment. The DRM plan does not cover the failure to comply with a contract, or the failure to pay wages when due.

C. Additional liabilities may arise from FLSA litigation, such as liquidated damages above the amount of the wages, and attorneys' fees. The DRM policy may, in appropriate circumstances, cover Constitutional Officers for liability for these sums.

D. **There is no coverage for a judgment for wages.** In the past, the Compensation Board has also been unable to cover such claims. This gap in coverage forces a Constitutional Officer to ask his local government for an extra appropriation.

III. Basic Requirements

A. The FLSA has four basic requirements:

1. Employees must be paid the minimum wage.
2. The work week is set at forty hours. For law enforcement officers, however, the Act allows a sliding scale that averages hours over a work period as long as twenty-eight days.
3. An employee who works more than the allowable number of hours in a pay period must be paid one and one-half times his regular rate.
4. In lieu of cash payment for overtime, a limited amount of compensatory time off may be

given to an employee with the employee's prior agreement. (Mainly, for public employees).

B. The Equal Pay Act (EPA).

1. The FLSA also contains the EPA. 29 U.S.C. §206(d). This statute is now largely outdated and was a precursor to modern laws against sex discrimination. However, it still provides a cognizable cause of action. It provides that men and women doing the same tasks must receive the same pay. Specifically, it commands equality for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
2. A pay differential may be imposed, however due to 1) a seniority system, 2) a merit system, 3) a system which measures earnings by quality or quantity or production, or 4) another basis other than gender.
3. This statute is so easy to evade that it amounts to nothing more than a loophole. Its requirements have largely been supplanted by Title VII of the Civil Rights Act of 1964.

IV. The FLSA's coverage.

- A. The FLSA sets minimal levels for the otherwise contractual relationship between an employer and employee. As noted above, initially the FLSA did not cover local governments and their employees. Now, however, the Act has been amended to make clear that local governments are covered. The statutory definition of an "employer" includes a "public agency." 29 U.S.C. §204(d). Ignoring the distinctions between constitutional officers and other branches of government, the courts have construed the term "public agency" as including constitutional officer. E.g., *Mayhew v. Wells*, 125 F.3d 216 (4th Cir. 1997) (Virginia deputy sheriff entitled to overtime compensation under FLSA).
- B. The definition of an "employee" protected by the FLSA is also broad. Generally, an employee is "any individual employed by an employer." 29 U.S.C. §203(e)(1). In the case of local government officials, there are a few exemptions. An employee is not covered if he or she is not subject to civil or local civil service laws or rules, and he or she:

(i) holds a public elective office;

(ii) is selected by the holder of such an office to be a member of his personal staff;

(iii) is appointed by such an officeholder to serve on a policymaking level;

(iv) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office; or

(v) is an employee in the legislative branch. . . .

29 U.S.C. §203 (e)(2)(C)(ii). These exemptions are interpreted narrowly to include the elected officer and his or her closest advisors. The "personal staff" exemption is construed to mean only those individuals who are under the direct supervision of the elected official and have regular contact of a confidential nature with the elected official. 29 C.F.R. §553.11.

- C. Note that the exemptions apply only to those employees who are not covered under a civil service law **AND** who meet the other requirements. Generally, appointees of constitutional officers serve at the pleasure of the officer. Frequently, however, local officers face pressure to place their offices under local government personnel policies. This can deprive the officer of these exemptions.

V. Regulatory Exemptions

A. Introduction

1. In 2004, after many years, the Department of Labor, in an effort to simplify the complicated long and short tests for exempt employees, promulgated new regulations governing the categories of exempt

employees under the FLSA.

2. Although heralded as a dramatic departure from the old rules, the newer regulations have very little impact on constitutional officers. In practical terms, the newer rules will allow management to designate some more employees as exempt from the overtime requirements of the FLSA.
 3. It is important to keep abreast of judicial interpretations of the regulations to know precisely how the rules apply in any particular situation.
- B. What are exempt employees? Exempt employees do not receive overtime payment or compensatory time for hours worked in excess of the normal workweek.
- C. Salaried Employees—The First Requirement
1. Only employees on salaries can be exempt from the overtime rules. Employees who are paid on an hourly basis are not exempt. (Except for the computer professional exemptions).
 2. **The salaried employees must also meet one of the job function tests discussed below in Part V D to be exempt.**
 3. The employee's weekly salary must be \$455.00, for an annual salary of \$23,660.00. If the employee makes less than this amount, the employee is not exempt under the FLSA, regardless of the nature of his job.

Example: A deputy clerk makes \$22,000 per year. His functions include only management duties. Although his job functions are those of an exempt employee, he is not exempt because he does not make \$455 per week.
 4. An employee who earns a salary of \$100,000 per year is exempt if his or her primary duty includes performing office or non-manual work; and the employee customarily and regularly performs one of the exempt duties or responsibilities of an exempt administrative, executive, or professional employee.
 5. What does it mean to be salaried? A salaried employee receives a predetermined amount constituting all of his compensation for a given workweek regardless of the quality or quantity of work performed during that week.
 6. Wage Deductions and its Limitations.
 - i. Cannot reduce exempt employees' weekly salary below the \$455 threshold or reduce their salary based on an equivalent reduction in work.

- ii. Dock Exempt Employees' Wages. By docking the pay of those employees for reasons other than those specified by DOL regulations, the employer may inadvertently transform those employees into non-exempt employees entitled to overtime. Deductions cannot be made for absences of less than a full day or because of problems with quality of work. Docking should normally not be used as a form of punishment.
- iii. Disciplinary Action. An employer cannot dock an exempt employee's salary for misconduct or issues with such things as breakages or cash shortages. A person is deemed to be an hourly employee if the employer deducts pay for disciplinary deductions.

Note: Deductions from salary for disciplinary suspensions may occur in full day implements for days an employee is suspended without pay.

Note: A suspension for an entire week without pay is allowable under the FLSA since the employee would not have performed any work that week.

Note: If salary is only a portion of an exempt employee's compensation, however, deductions could be made from bonuses or commissions. An employer should not, however, attempt to divide an exempt employee's pay by dividing it into salary and non-salary to dodge the DOL restrictions. Such an intentional subterfuge could result in severe penalties for intentional FLSA violations. 29 CFR §§ 541.118(a), 541.212, 541.312.

- iv. Docking for Absence. Exempt employees cannot be docked where they have not worked certain hours or days in a given week where they have performed some work. However, they need not be paid for workweeks where they fail to perform any work.
- v. Tardiness. Since payment on salary basis means paying a predetermined amount for a predetermined period of time, an exempt employee's salary cannot be reduced if he or she arrives late to work, leaves early from work or takes an extended meal or break. An employer can, however, impose some other sort of disciplinary measure.
- vi. Inclement Weather. If the employee has performed any work in the week that an employer is closed due to inclement weather, he or she must be paid for the entire week since exempt employees are not to be paid based on the quality or quantity of work

performed in a given week.

- vii. Jury or Military Duty. An employee cannot be docked because of jury, witness or military duty. An employer may offset any witness fee, military pay or jury pay an employee receives against the employee's salary.

- viii. Insufficient work available. If an employer does not have enough work for the employee during "down time," the employee is entitled to full salary so long as the employee is ready, willing and able to work.

- ix. Three Major Exceptions to General Prohibition against Payroll Deductions from Exempt Employees.
 - a. the employee is absent for one or more days due to personal reasons other than illness or accident.

 - b. the employee is absent for one or more days for sickness or accident and the employer makes payroll deduction in accordance with a bona fide sickness and accident plan. This situation refers to the time before an employee qualifies for annual sick leave or after that employee has used up all available sick time.

Note: A plan that allows approximately six days of sick leave a year, allows employees to take sick leave after 90 days of employment (or sooner) is likely to meet DOL scrutiny.

 - c. the salaried exempt employee is involved in the "infraction of a safety rule of major significance." An example would be smoking cigarettes in an explosives factory or gas refinery. This exception can rarely be used by the employer barring extraordinary circumstances. Please note, however, that although the FLSA allows penalties, Virginia law forbids deductions from salary without the employee's consent. Va. Code §40.1-29(C).

- x. Effect of Improper Deductions from Salary. The exemption is lost only for the employees in the classification affected by the practice of improper deduction. Other exempt employees retain their exemption.

Example 1: For two months, a Sheriff improperly deducts half-day absences from the salaries of purely administrative supervisors. For those two months, the supervisors are deemed non-exempt employees.

Example 2: For two months, a section manager in the Commissioner's office improperly deducts half-day absences of purely administrative supervisors. Only the supervisors affected by the manager's improper actions lose their exempt status; other supervisors retain their exemption.

- xi. Safe Harbor. If an employer has a clearly communicated policy that prohibits improper deductions and that includes a complaint mechanism, the employer will not lose the exemption for good faith errors unless they continue after employees have complained. Improper deductions that are isolated or inadvertent will not result in loss of exemption, if the employer promptly corrects the situation by reimbursing the employees.

D. Categories of Exempt Employees

1. In addition to the salary requirement discussed above, an exempt employee must fall in one of the four categories discussed in this section.
2. **Function not title.** The job title does not create an exemption. Rather, the duties performed by the employee determine whether the employee is exempt.
3. Primary duty. The employee's primary duty must be the performance of exempt work. Primary means the major or most important duty the employee performs. Employees who spend 50% of their time performing exempt work will generally meet the primary duty requirement.
 - a. Non-exempt work that is "directly and closely related" to the performance of exempt work is considered exempt work. Thus, relatively menial tasks that arise from exempt duties are also exempt work. For instance, if a supervisor must prepare time records of the employees she supervises, the preparation of the records is exempt.
 - b. Helping with non-exempt tasks in emergencies does not cause an employee to lose exempt status. An emergency is an event that cannot be anticipated.

Example 1: In the treasurer's office, a supervisor must work at the counter during the crush of business when county or city tags

are due. This is not exempt work, because the treasurer can anticipate the rush of business.

Example 2: The Sheriff's office must handle an unusual volume of arrests due to civil disobedience at a political event. A supervisor chips in to help classify inmates. The supervisor is still an exempt employee, because the arrests are unanticipated.

4. Executive Employees.

a. Employees employed in a bona fide executive capacity are exempt from the overtime law.

b. An executive meets three criteria (in addition to the salary requirement). Executive will meet all three of the following:

i. Manage an enterprise or a customarily recognized department or subdivision thereof.

(a) Management typically includes such functions as interviewing, selecting and training employees, setting and adjusting pay and hours, directing the work of employees, appraisals, handling employee complaints and grievances, disciplining employees, planning work, apportioning work among employees, determining what to keep in stock or inventory, providing for safety, budgeting, and implementing or monitoring compliance with legal requirements.

(b) A customarily recognized department or subdivision is one that has a permanent status and continuing function. Heading up ad hoc committees or assignments does not amount to executive work.

ii. Customarily and regularly direct the work of two or more other employees. A department with five employees could have two executives in it, but not three.

iii. Have the authority to hire or fire employees, or whose suggestions as to hiring, firing, promotion, demotion, or change of job status receive "particular weight."

Particular weight means that it is part of the employee's job to make such recommendations. It will also depend on the frequency with which such suggestions are made and the frequency with which they are relied upon.

5. Administrative Employees

- a. An employee in a bona fide administrative capacity is exempt.
- b. Administrative employees meet two criteria (in addition to the salary requirement):
 - i. Work in the office or non-manual work related to the management or general operations of the employer.
 - (a) This is work typically related to management or general business operations of the whole office as opposed to work that is more involved with the production side of a business.
 - (b) Typical functions include budgeting, auditing, quality control, purchasing, procurement, safety, personnel, and legal and regulatory compliance.
 - ii. Perform duties involving the exercise of discretion and independent judgment as to matters of significance.
 - (a) Judgment and discretion involve thoughtful activity in areas in which there are several possible courses of conduct.
 - (b) Examples include formulation of policy, deviation from established policy, providing expert advice, long and short term planning, and handling disputes.

6. Professional Employees

- a. Employees in a bona fide professional capacity are exempt.
- b. A professional employee must meet **one of two criteria** (in addition to the salary requirement):
 - i. The work requires knowledge of an advanced type in a field of science or learning typically acquired by specialized intellectual instruction, or
 - ii. The work involves imaginative work or talent in an artistic or creative endeavor.

7. Computer employees.

- a. Computer employees are exempt, provided they meet the salary requirement or are paid at least \$27.63/hr.
- b. "Computer employees" consist of computer systems analysts, programmers, software engineers, or other similarly skilled workers whose primary duty must consist of:
 - i. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - ii. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - iii. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - iv. A combination of the aforementioned duties, the performance of which requires the same level of skills.
- c. Employees who simply use computers or who repair hardware are not exempt.

8. Law Enforcement Officers

- a. Police officers, deputy sheriffs, correctional officers, and the like, regardless of rank, who perform work such as preventing or detecting crime, rescuing victims, surveillance, investigations, detaining criminals, interviewing witnesses, preparing reports, and similar tasks, **do not ever qualify as exempt employees, regardless of their other tasks.** 29 C.F.R. § 541.3.
- b. The effect of this rule is simple and will not change how law enforcement agencies operate. It means that simply designating one employee on a shift or team as the supervisor, and giving that person supervisory authority, does not turn that person into an exempt employee.

Example: A sergeant who supervises a road shift but also drives a police car on patrol is not an exempt employee.
- c. An administrator who does not perform front line law enforcement duties can still be exempt.

VI. Determining and Paying Overtime

- A. The FLSA's most significant obligation for public employers is the duty to compensate employees for overtime work. The rule is simple: employees are entitled to be paid one and one-half their normal rate for time worked over forty hours per week, *except law enforcement officers*. Public employees may receive compensatory time off, in certain circumstances.
- B. Law enforcement officers. Typically, law enforcement officers, including jailors, work schedules incompatible with the forty-hour week requirement. Their tours of duty often involve long shifts on successive days, with long times off between tours. For this reason, there are special rules that allow for the averaging of those employees' hours over a time longer than a normal 40 hour week. Typically, law enforcement officers may work up to 171 hours over twenty-eight days before any overtime obligation occurs. 29 C.F.R. §230.
- C. Normal Hourly Rate. The normal hourly rate of any employee is at least the minimum wage. 29 C.F.R. §778.113. For hourly employees, the normal hourly rate is their rate of pay. For salaried employees, it is the salary divided by the number of hours the employee is intended to work.
 1. Although determining the hourly rate can be a simple computation, it may be deceptively complicated, and it is always extremely important.
 2. Typically, a seven-day week is the base work period over which hours are calculated. If an employee is paid \$400 per week, and his normal work schedule is 40 hours per week, his hourly rate is \$10 per hour. Suppose, however, that the employee is expected to work 35 hours per week; then his hourly rate is \$11.43 per hour. The difference seems small, until the employer is required to pay overtime for the hours worked. Then, the base rate is \$11.43 per hour, and the premium rate (1.5 times the hourly rate) is \$17.15 per hour. If the employee has incurred overtime for a long period of time, the pay difference can become substantial.

***Management tip:* Employers should state in writing the number of hours employees are expected to work. The normal working period should include the maximum number of hours permissible for that time. Each employee should sign a document indicating that he or she understands the employer's expectations for hours worked.**

3. The value of most fringe benefits is not calculated into the base wage. Insurance premiums, for instance, are not part of the FLSA wage. Neither are cash bonuses such as holiday pay. If an employer pays an employee an extra day's pay for working Christmas, the bonus does not become part of his calculation of his base wage. These exclusions are narrow, and are fact specific.

- D. Hours worked. The FLSA holds employers responsible for work that is required, requested, "suffered," or allowed. Work is "suffered" by the employer if the employer knows or has reason to know that it occurs, even if the employer has not requested the employee to do the work. 29 C.F.R. §785.11.

The FLSA defines "work" in the broadest possible sense. Work consists of any physical or mental exertion, no matter how difficult, controlled or required by the employer.

Management tip: **If you know, or have reason to believe, that an employee is working "off the clock," you face possible substantial overtime liability.**

Classic examples are workers who take work home voluntarily. If the employer knows the worker is doing so, he is responsible to compensate the employee for the time spent at home. Canine officers have turned this provision of the law into a gold mine, by caring for their dogs at home, where their work is unmonitored, and the amount of time they spend on the task is not susceptible to challenge.

Management Tip: **Adopt a written policy forbidding overtime without prior written authorization, and requiring employees to turn in written time records as soon as the overtime is completed. While this will not exonerate an employer completely, it lays the groundwork for defense of an overtime claim.**

Breaks. Short work breaks are not excluded in determining the hours worked. For instance, if employees can take two fifteen minute breaks during the day, the hours worked are not reduced by the breaks taken. These breaks are deemed a benefit to the employer, because they increase employee efficiency. 29 CFR §785.18.

Meal Breaks. Meal breaks of thirty minutes or more are excluded from the work day. Note, however, that if the employee has any potential responsibilities that keep the lunch break from being completely his own, the lunch break is counted as time worked. 29 C.F.R. §785.19.

Break for Breastfeeding. The new Patient Protection and Affordable Care Act of 2010, i.e. the Healthcare Reform Act, amends the FLSA to allow unpaid breaks to women who are breastfeeding. Under 29 U.S.C. §207(r)(1), employers must allow nursing mothers to take a break every time they need to express breast milk and requires employers to provide a private location, other than a bathroom, where such employees may express milk. Employees must be allowed such breaks for up to one year after their child's birth. Employers with less than 50 employees are exempt if the breastfeeding requirements would "impose an undue hardship by causing the employer significant difficulty or expense."

Attendance at seminars is generally counted, unless it is far divorced from the job. 29 CFR §785.27.

“On call” status can cause real problems. When an employee is on call and must remain at the department or must restrict his movements, so that he cannot use his time as his own, the employee is working. For instance, an officer who must stay at home awaiting a call to testify is deemed working. In contrast, if a deputy takes his department cruiser home and is required to keep the radio on to respond to emergencies, he is not working until he is called into action.

Travel time does not count as work time, unless the employee runs into an emergency which requires him or her to start working earlier. There are special rules for out of town travel.

Traded shifts do not count toward overtime calculations. If two employees agree to trade shifts, and, as a result, one works overtime, the voluntary trade of time does not count as hours worked for calculating overtime. Note, however, that employers may not encourage or coerce trading in order to circumvent the overtime laws.

***Management Tip:* Whenever employees trade shifts, they should sign a form indicating that they have mutually agreed to do so.**

Hours spent in court waiting to testify count as hours worked.

Employees may not volunteer to do their regular jobs. 29 U.S.C. §203(e)(4). They may volunteer to do jobs in another department of the locality, if it involves entirely different work. For instance, a bookkeeper may volunteer to serve as an auxiliary firefighter.

True volunteers--members of the public who do not have public employment--are not subject to the FLSA. 29 C.F.R. §553.104.

- E. The work day is irrelevant. If an employee works fifteen hours one day, no overtime is incurred unless he works more than the allowable number of hours per work cycle.
- F. Duty of Management. It is the job of management to determine the hours worked by employees. Employers may not accept the benefits of an employee who devotes extra time to the job, without incurring the duty to compensate for that time spent. Otherwise, it is too easy to create a culture in which uncompensated overtime is the norm.

1. The Department of Labor has defined management’s duty as follows:

[I]t is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so. 29 CFR §785.13

2. Constitutional Officers cannot be expected to know what every employee does every minute, or to know how every task is accomplished. Yet, they are responsible if their employees work overtime to do the work required. In these days of tightened belts, the tendency is to ask employees to get the job done, whatever it takes. This is an invitation to substantial liability.

Management Tip. The entire management team must be alerted to potential problems with overtime liability. If an employee is taking home work every night, steps must be taken to limit the work done. If an employee is accomplishing more than is humanly possible in the allotted time, a supervisor must investigate the situation.

3. In sum, the employer is responsible to determine when employees work overtime and to compensate for those hours. To avoid liability, the employer must exercise vigilance, and not accept the benefits of long hours, without incurring the responsibility of compensation.

G. Compensating for Overtime. When employees work overtime, they are entitled to be paid one and one-half times their normal hourly rate for the overtime hours. The pay must ordinarily be made on the regular payday which encompasses the time spent on overtime. If, however, the amount of time cannot be computed in the regular pay cycle, the employer may include overtime compensation in the next paycheck. 29 CFR §778.106.

1. The 7(k) Exemption. Congress has granted to law enforcement employers a limited exemption from the requirements of the FLSA. Most employers face a strict standard: if an employee works more than forty hours in a week, the employer owes overtime.

Law enforcement agencies may spread the hours over twenty-eight days, and may require employees to work 171 hours during the twenty-eight day work cycle.

Management Tip: Twenty eight days means four weeks, not a month. The 7(k) exemption creates a work cycle that lasts four weeks, not one month. The work cycle and the pay cycle are not the same.

2. The employer must “elect” the 7(k) exemption. The FLSA and the Federal Regulations do not spell out how to claim the exemption. For safety’s sake, it should be claimed in writing, signed by the employee.

Management Tip: Put it in writing. Put it in writing. Put it in writing. Give your employees written notice, and have each employee sign a document indicating that he received notice of the 28-day cycle.

- H. Compensatory time. Public employers may use compensatory time off to satisfy some overtime obligations. In order to use compensatory time off, the employee must agree to accept compensatory time before it is credited to him. The employee, however, may not insist on compensatory time if the employer desires to pay him in cash.

Management Tip: Get it in writing. Get it in writing. Get it in writing. Have the employee sign a document agreeing to accept compensatory time off in lieu of cash compensation.

1. Compensatory time accrues at the rate of one and one-half hours for every hour of overtime. 29 U.S.C. §207(o). Most employees may accrue no more than 240 hours of compensatory time. Public safety officers may accrue 480 hours. Overtime in excess of the maximum must be paid in cash.
2. The employee may take compensatory time off after reasonable notice to the employer at any time that does not unduly disrupt the employer's functions. Id. Do not credit an employee with compensatory time that may not realistically be taken by the employee. 29 C.F.R. §553.25. Simple inconvenience is not sufficient, and the fact that the employer must bring in a replacement for the day does not justify denying the request.

The employee must receive the time off within a reasonable time of the request to use the compensatory time. The following are examples of factors which control whether an employer has granted leave within a reasonable time:

- a. The normal work schedule of employees.
 - b. Anticipated work loads.
 - c. Emergencies which may arise.
 - d. Availability of staff to fill in for the employee taking leave.
 - e. Other legitimate considerations relating to the management of the office.
3. Buying back unused compensatory time can be costly. Current employees must be paid at their pay rate at the time they receive payment, not at their pay rate when they worked the overtime. When employees retire, they are entitled to payment at the higher of the average rate over the last three years of employment or their final pay rate. 29 C.F.R. §207(o).

4. Non-FLSA Compensatory Time Off. Do not treat compensatory time off for other reasons as FLSA compensatory time. Frequently, employees receive “compensatory” time for working on holidays or birthdays, or for other reasons. Employers may deal with non-FLSA overtime however they want; the FLSA’s rules do not apply.

The FLSA’s rules only apply to compensatory time that an employee receives in lieu of overtime worked in excess of the statutory limitations.

I. Va. Code §§ 9.1-700 through 9.1-706.

1. Special rules apply to law enforcement departments with over 100 employees. In these agencies, state law requires that time spent on paid leave counts as time worked.
2. Assume a law enforcement employee works a 40 hour week. She takes 8 hours leave, and works an additional 35 hours in a week. This person would be entitled to would have 3 hours overtime compensation. This is a requirement of state law, and not the FLSA. The same principle would apply to an employee on a 28 day cycle.
3. Under this same statute, if an agency sets an employee’s normally expected hours at 160 under a 28 day cycle, the time between 160 hours and 171 hours should be compensated as overtime. Again, this is a requirement of state law, not the FLSA.

VII. Lawsuits Under the FLSA

- A. Statute of Limitations. The statute of limitations is ostensibly two years. For willful violations of the statute, the statute of limitations is three years. Almost all violations of the FLSA are willful. A willful violation occurs when an employer either knows that his conduct violates the statute or acts with reckless disregard for the statutory requirements.
- B. Remedies.
 1. Back wages owed. The Court may order all overtime payments to be paid.
 2. Liquidated damages. Ordinarily, the employee will receive an amount equal to his back pay as liquidated damages.
 - a. Good Faith Defense. If an employer acts in good faith **and** with reasonable grounds to believe that his act did not violate the FLSA, the Court **may** deny liquidated damages.
 - b. The following conditions do not constitute good faith:

- 1) You were asleep at this seminar and missed this part of the materials.
- 2) Employer was ignorant of the requirements.
- 3) Lack of funds to pay overtime.
- 4) Need to have employees to provide essential law enforcement services.
- 5) Board of Supervisors will not cooperate in adopting work cycle.

3. Attorney's fees for the prevailing plaintiff.

C. Anti-discrimination/retaliation. An employer may not take adverse action against an employee who files a claim or who testifies in an FLSA case.

January _____, 2020

I acknowledge receipt of policy _____ and agree to abide by its terms.

Policy No. _____

Work Schedule/FLSA Requirements

This office follows a one-week 40 hour work cycle pursuant to the Fair Labor Standards Act. All employees are expected to work 40 hours over a work week.

Employees may not work more than 40 hours per week without authorization of _____. Any employee who works more than forty hours per week must submit a record of the work on the first day of the following week.

When employees work more than 40 hours per week, they are compensated with compensatory time, which is credited at the rate of 1 2 hours per hour of overtime worked.

Policy No. ____

Work Schedule/FLSA Requirements

This office has adopted the 28 day, 171 hour work cycle pursuant to the Fair Labor Standards Act. All law enforcement officers are expected to work 171 hours over a twenty eight day period. It is possible that officers may be scheduled for shifts which total less than 171 hours over twenty eight days, but emergencies and other requirements generally require our officers to work additional hours bringing the expected time of work to 171 hours.

When law enforcement officers work more than 171 hours, at the Sheriff's discretion they may be compensated with compensatory time, which is credited at the rate of 1 ½ hours per hour of overtime worked.