

# Employment Issues for Non-Profit Organizations

**November 30, 2017**

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## Employment Issues for NPOs

- Independent Contractors, Volunteers, and Interns
- Compliance With Other Federal, State, and Local Employment Laws
- Prevention and Investigation of Harassment Claims



## Misclassification of Employees

- Exempt vs. Non-Exempt
- Independent Contractor vs. Employee
- Volunteers and Interns

## Threshold Issue – Coverage Under FLSA and State Law

- “Enterprise Coverage” = commercial activities result in sales made or business done of at least \$500,000 annually.
- “Individual Coverage” = employees individually engaged in interstate commerce.
- “Named Enterprises” are covered by the FLSA:
  - Hospitals
  - Schools and preschools
  - Government agencies
  - Businesses providing medical or nursing care for residents
- State law normally will cover employees of NPOs (e.g., PA Minimum Wage Act).

## FLSA Exemptions vs. Non-Exempt

- Salary Basis
  - Currently \$455/week (\$23,660 annually)
  - Limited ability to deduct from salary
- Duties Tests
  - “Primary Duty” must be the performance of exempt work
  - E.g., Executive, Administrative, Professional Exemptions

## What Is an Independent Contractor?

### USDOL Fact Sheet 13:

- Employee = a worker who is economically dependent on the business of the employer, regardless of skill level.
- Independent Contractor = a worker with economic independence who is in business for himself/herself.

# Independent Contractor

## An independent contractor typically:

- Charges fees for service.
- Is engaged only for the term required to perform a specified service or task.
- Retains control over the method and manner of work.
- Retains economic independence.
- Is responsible for paying his income, Social Security, and Medicare taxes.

# Independent Contractor Tests

- There is no single test to determine independent contractor status for all purposes.
- **Tests typically focus on “control” and “economic independence”.**
- USDOL: Agreement between parties is “immaterial.” The “reality of the working relationship” is determinative.
- USDOL: The misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy.

## Independent Contractor Tests

- FLSA “Economic Realities” Test :
  - The nature and degree of control by the employer
  - Whether the worker’s managerial skills affect his or her opportunity for profit and loss
  - The extent to which the work performed is an integral part of the employer’s business
  - The relative investments in facilities and equipment by the worker *and* the employer
  - The worker’s skill and initiative
  - The permanency of the worker’s relationship with the employer

## Interns

- USDOL “Fact Sheet 71”:
  - Unpaid internships for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.
  - DOL “is reviewing the need for additional guidance on internships in the non-profit sector.”

## Interns

- The USDOL Test for Determining Whether a Worker is an Intern:
  - The internship is similar to training which would be given in an educational environment;
  - The internship experience is for the benefit of the intern;
  - The intern does not displace regular employees;
  - The employer derives no immediate advantage from the activities of the intern;
  - The intern is not necessarily entitled to a job at the conclusion of the internship; and
  - The employer and the intern understand that the intern is not entitled to wages.

## Volunteers

- Employees may not volunteer to perform the same work they are employed to perform
- Volunteers should not displace regular employees or perform work that would otherwise be performed by regular employees
- Use of unpaid volunteers should be limited to charitable, religious, or humanitarian purposes (and not “commercial activities”).

## Consequences of Misclassification

The penalties for misclassification can be serious. If a company misclassifies an employee as an independent contractor, volunteer, or intern, it may be liable for:

- Back wages and overtime pay.
- Employee benefits, including stock options, retirement benefits, and health plan coverage (or the value of those benefits).
- Disability payments and workers' compensation.
- Tax and insurance obligations.
- Liquidated damages.
- Civil monetary penalties.

## Employment Law Compliance

Classifying a worker as an independent contractor, intern, or volunteer will not shield an employer from claims related to:

- Workers' Compensation;
- Discrimination/Harassment;
- Disability Discrimination or FMLA Obligations; or
- Alleged Violations of Other Federal, state, and local anti-discrimination laws.

## Best Practices

To ensure that the independent contractor classification requirements are satisfied:

- Use an independent contractor agreement to establish the terms of the working relationship.
- Avoid having independent contractors, interns, or volunteers do the same work as employees.
- Avoid using former employees as independent contractors or interns.
- Avoid using independent contractors to perform work that is integral to the business.
- Require independent contractors to complete a Form W-9, Request for Taxpayer Identification Number and Certification.
- Issue separate guidelines for independent contractors, interns, and volunteers instead of providing them with the employee handbook.

## Other Federal, State, and Local Employment Laws



# Preventing Sexual Harassment and Liability

November 30, 2017

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## The (incomplete) list of powerful men accused of sexual harassment after Harvey Weinstein

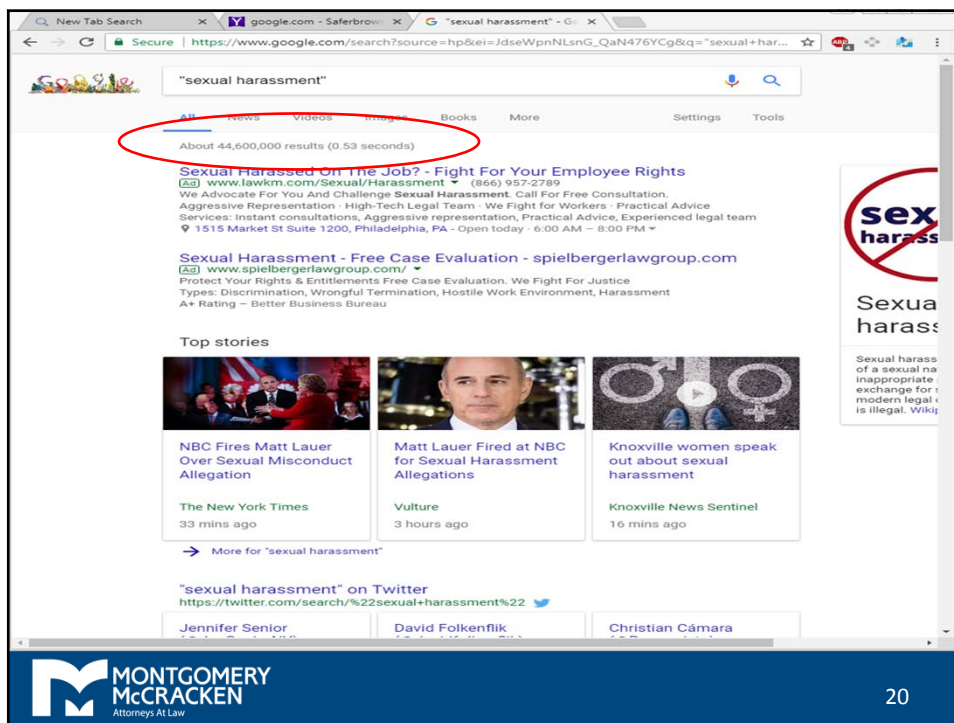
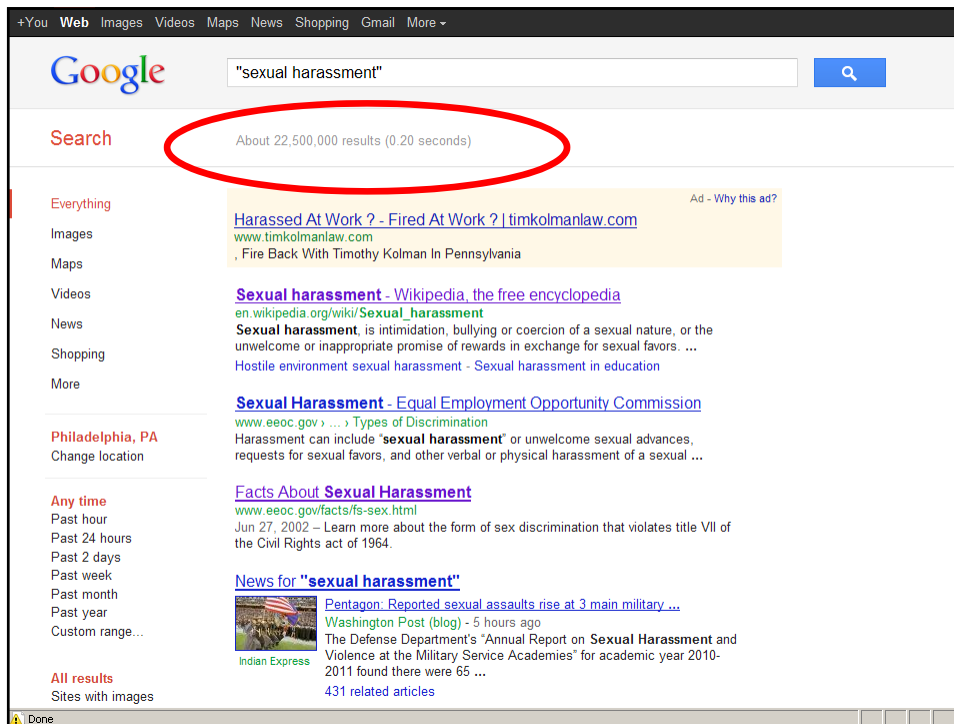
Updated 2:05 PM ET, Wed November 1, 2017

**ROME** — It's only been a few weeks since the sexual assault allegations against movie mogul Harvey Weinstein exploded into public view, but more than 100 powerful men have since been accused of sexual harassment or sexual assault, according to a list compiled by CNN.

It isn't surprising that the list is incomplete, as the list is still growing. CNN's list of accused men includes names like Jeffrey Epstein, the convicted sex offender; Jeffrey Tambor, the actor; and Jeffrey Tambor, the actor. The list also includes names like Jeffrey Tambor, the actor; and Jeffrey Tambor, the actor.

This list of men who've been accused of sexual harassment or sexual assault is still growing, and it's not clear how many more men will be added to the list. The list is still growing, and it's not clear how many more men will be added to the list.





- How common is Sexual Harassment in the workplace for women between ages of 18 – 34?

**1 in 3**

- Out of those women who said they have experienced workplace sexual harassment, how many reported it?

**→ 29%**

**→ 71%**

- Of those women who reported sexual harassment in the workplace, how many felt the report was handled fairly?

**15%**

## WHAT FORMS

- Verbal  
→ **81%**
- Unwanted Touching  
→ **44%**
- Lewd Emails or Texts  
→ **25%**

## BY WHOM

- Male co-workers  
→ **75%**
- Male clients or customers  
→ **49%**
- Male managers  
→ **38%**
- Female co-workers  
→ **10%**

## **Why Do Employees Hesitate to Report Discrimination, Workplace Harassment and Sexual Harassment?**

- Fear of losing their job
- Fear of retaliation
- Fear of getting someone into trouble
- Fear of disrupting the workplace
- Fear of being accused of having no sense of humor
- Fear of being embarrassed
- Fear of feeling like “less of a man/woman”
- Fear of not being believed. Discrimination and harassment are generally subtle and inconspicuous

## How Does a Company Prevent Sexual Harassment?

1. Policies
2. Train
3. Management sets the tone
4. React appropriately

## Workplace Harassment Is:

- Unwelcome, unwanted or offensive conduct based on or because of an employee's protected class status.

## Overview of Anti-Discrimination Laws

Federal and State law prohibit discrimination on the basis of:

- Sex (including pregnancy and gender nonconformity)
- Race
- Color
- Religion
- National Origin
- Age
- Disability

## Overview of Anti-Discrimination Laws (cont'd)

- Others – PHRA
  - Race, color and national origin;
  - Sex (includes pregnancy-related conditions);
  - Sexual orientation
  - Gender identity
  - Genetic information
  - ancestry
  - Religion;
  - Age (40 and older);
  - Disability;
  - A person who uses leave covered by the Federal Family and Medical Leave Act;
  - Service in the uniformed services
  - A person who uses Military Leave;
  - A person who associates with a protected class;
  - A person who opposes unlawful employment practices, files a complaint or testifies about violations or possible violations; and
  - Any other protected class as defined by federal law.

## What is Sexual Harassment?

- A form of sex discrimination that violates Title VII and equivalent state and local laws
- **Hostile work environment:** The advance or conduct unreasonably interferes with an employee's work performance by creating an intimidating, hostile, or offensive work environment
- **Quid pro quo:**
  - Submission to the advance or conduct is made explicitly or implicitly a condition of employment.
  - Submission to or rejection of the advance or conduct is used as a basis for employment decisions.

## Hostile Work Environment Harassment

- Involves harassment in the workplace that is:
  - Unwelcome.
  - Based on protected class status (sex or gender).
  - Attributable to the employer.
  - Severe or pervasive enough to change the conditions of employment and create an abusive environment.
- Need not be targeted at the offended individual to give rise to a hostile work environment claim.
- Examples:
  - Turning work discussions into sexual topics.
  - Repeatedly asking out an employee who is not interested.



## Quid Pro Quo Harassment

- *Quid pro quo* is Latin and it means “this for that”
- *Quid pro quo* harassment applies where a supervisor seeks sexual favors either:
  - In return for a job benefit (for example, a promotion or raise)
  - To avoid a job detriment (for example, a demotion or pay cut)
- *Quid pro quo* harassment also occurs when an employee’s reaction to an advance negatively affects his employment
- Examples:
  - A manager tells her employee that she will give him a raise if he goes on a date with her.
  - An employee is passed over for a promotion after rejecting her supervisor’s advances.
  - An employee in a romantic relationship with a manager receives preferential treatment.

## Examples of Sexual Harassment

Sexual harassment comes in many forms and is not limited to physical actions. Harassment also includes verbal or non-verbal conduct that rises to the level of being “severe or pervasive.”

Examples of sexual harassment include:

- Physical actions, such as:
  - Touching or brushing against an individual’s clothing, body, or hair.
  - Initiating unwanted sexual activity, such as kissing, touching, or hugging. ([Video](#))
  - Rubbing or touching anyone sexually in the presence of another.
  - Exposing oneself.

## Examples of Sexual Harassment (cont'd)

- Verbal actions, such as:
  - Repeating requests for a date with someone who has not returned an interest.
  - Telling unwelcome jokes or stories, often with sexual innuendo. ([Video](#))
  - Initiating unwelcome flirtations.
  - Making or using derogatory comments, epithets, slurs, and jokes. ([Video](#))
  - Making graphic verbal commentaries about an individual's body or using sexually degrading words to describe an individual.
  - Using expressions that can be belittling such as “honey,” “dear,” “sweetheart,” or “lady supervisor.”

## Examples of Sexual Harassment (cont')

- Non-verbal actions, such as:
  - Staring or looking someone up and down.
  - Blocking or impeding an individual's movement.
  - Following someone inappropriately.
  - Giving unwelcome gifts.
  - Making sexual gestures.
  - Displaying sexually suggestive objects, pictures, cartoons, books, or magazines.
  - Winking, blowing kisses, or licking lips.
  - Standing or sitting too close to someone.

## Harasser's Intent is Irrelevant

- Sexual harassment may be unlawful even if not motivated by sexual desire.
- Gender is also irrelevant:
  - Men can harass women
  - Women can harass men
  - Men can harass men
  - Women can harass women

## Harassment Not Limited to the Workplace

- Sexual and other harassment can occur outside the workplace, for example during:
  - Annual meetings
  - Business trips
  - Holiday parties
  - Sporting events

## Scenario

**An employee reports harassment to his/her supervisor and says, “I don’t want you to do anything about this. I just want you to listen and be aware of what is going on.”**

- **How should the supervisor respond?**

## Scenario (Answer)

### **Answer:**

- A supervisor cannot promise to “just listen and be aware.”
- Once a supervisor receives a report of harassment or discrimination, a supervisor has an obligation to take action.
- In fact, a supervisor has the responsibility to ensure the integrity of the workplace. A supervisor must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about.

## What is Retaliation?

- When an employee suffers an adverse employment action for engaging in a protected activity (for example, reporting harassment or cooperating in a related investigation).
- Retaliation is prohibited by law. Supervisors should refrain from retaliating against any employee who reports harassment.
- “Adverse employment actions” include:
  - Termination from employment.
  - Demotion.
  - Reassignment to a less desirable position or duties.
  - Reduction of work hours.
  - Failure to promote.
  - Failure to award pay increases or raises.

## Remedies for Sexual Harassment

- Back pay
- Front pay
- Emotional distress damages
- Punitive damages
- Attorneys’ fees and costs
- Reinstatement

## Hypothetical 1

Jeff is a supervisor and Claudia, one of his employees, tells him that a co-worker keeps asking her out and making other remarks that make her uncomfortable at work. To Jeff, the situation doesn't sound like sexual harassment. Claudia wears tight clothes and short skirts and is known around the office to be quite a flirt. Jeff thinks Claudia is being overly sensitive and exaggerating the situation.

- - - - -

What are Jeff's responsibilities, if any?

## Answer to Hypothetical 1

Jeff must report Claudia's complaint to Human Resources.

- Supervisors must report all employee complaints to Human Resources.
- Jeff's subjective opinion of the situation is not relevant.
- Supervisors have a duty to maintain a respectful workplace and not permit inappropriate behavior to go unchecked. If uncertain about appropriate activities or behavior, supervisors should consult Human Resources.
- Supervisors should also support the company in its responsibility to investigate complaints of discrimination. At the end of the investigation, supervisors should work with Human Resources to implement any disciplinary action.

## Hypothetical 2

Rebecca often tells her administrative assistant, James, who has been working for her for about six months, how attractive she finds him. James never says anything in response. Rebecca assumes he is flattered and continues saying things like, "You should wear tighter shirts so I can see your muscles" and "I bet you're really good in bed."

When James learns that another administrative assistant hired after him earns more money, James asks Rebecca for a raise. Rebecca says that she will consider it if James goes out to dinner with her. James makes it clear that he wants to keep their relationship purely professional and would prefer not to go out with her. Rebecca says she understands and that they can talk about it over dinner.

While having lunch with a friend in Human Resources, James mentions that his boss will only consider a raise if he goes out with her, which he is dreading because she constantly makes comments that make him feel uncomfortable.

## Hypothetical 2 (cont'd)

Human Resources investigates the comments and interviews Rebecca. Angry and embarrassed, Rebecca transfers James to a nighttime word processing position where she won't have to see him at work.

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Is Rebecca sexually harassing James?

What, if anything, should James do or say in response to his boss' constant comments?

Does Rebecca's transfer of James constitute retaliation?

## Answer to Hypothetical 2

- Yes, Rebecca's conduct probably does amount to legally actionable harassment of James. Remember, the standard is that the conduct must be unwelcome, and must be so severe **or** pervasive as to create a hostile work environment. For six months, Rebecca has been regularly making inappropriate comments, which is a pervasive amount of time. Whether the comments have created a hostile work environment is based on both an objective and subjective standard. Here, an objective person would find that the sexually suggestive comments were offensive. James also subjectively found the comments unwelcome and offensive.

## Answer to Hypothetical 2 (cont'd)

- James should not have to silently endure his boss' sexually suggestive comments, which are inappropriate and offensive. James could have considered telling his boss that her comments made him uncomfortable and asked her to stop. If he did not feel comfortable confronting his boss directly, he should have informed Human Resources so they could take appropriate action.
- Yes, Rebecca's reassignment of James appears retaliatory.
  - James reported harassing behavior to Human Resources, which is a protected activity.
  - Assuming that the nighttime word processing role is a less desirable position, James' reassignment as a result of reporting harassment constitutes an "adverse employment action" and is prohibited.



## Hypothetical 3

Laura is very attracted to her boss, Will. Since they are both single, she asks him out for after-work drinks. After proceeding to dinner and having a few too many drinks, they both go back to Laura's apartment and Will ends up spending the night.

-----

Are there any potential problems here? What are the factors to consider?

Could this be considered sexual harassment?

## Answer to Hypothetical 3

- Based on the few facts in the hypothetical, this situation appears to be mutually desired by two consenting adults. Whether or not a romantic relationship is allowed depends on if the company has a workplace romance policy that forbids relationships between supervisors and employees.
- Even if the company's policy does not forbid supervisors from dating their subordinates, the situation does raise some legal exposure for the company, and for Will. Because Will is Laura's boss, Laura could later allege that she felt pressured to sleep with Will in order to keep her job, or for a number of other job-related reasons.
- Employers and supervisors should be aware of how their sexual relations with a subordinate could have detrimental effects on the company.

# Verdict

Case 5:14-cv-05171-JLS Document 87 Filed 01/13/16 Page 1 of 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN GERUNDO : CIVIL ACTION  
v. : NO. 14-5171  
AT&T, INC., et al :

### ORDER

AND NOW, this 11<sup>th</sup> day of January, 2016, IT IS HEREBY ORDERED that a verdict is entered in favor of plaintiff John Gerundo and against defendant AT&T Services, Inc. in the amount of **\$370,000.**

BY THE COURT:

JEFFREY L. SCHMELI  
JEFFREY L. SCHMELI, J.

**\$370,000**

# Fee Petition

Case 5:14-cv-05171-JLS Document 92 Filed 01/25/16 Page 1 of 103

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN GERUNDO :  
Plaintiff, : CIVIL ACTION NO. :  
v. : 5:14-cv-05171-JLS  
AT&T INC.; AT&T SERVICES, INC. :  
Defendants. :

### PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND THE PENNSYLVANIA HUMAN RELATIONS ACT

Plaintiff, John Gerundo, by and through his undersigned counsel, hereby moves for reasonable attorney's fees and costs under the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq ("ADEA"), and the Pennsylvania Human Relations Act, 43 P.S. §951, et seq. ("PHRA"). As the prevailing party at trial in this matter, Plaintiff now seeks an award of **\$651,398 in reasonable attorney's fees** for services performed, and **\$31,597.98 for reasonable costs** incurred, through January 11, 2016, the date on which the jury rendered a verdict in his favor.

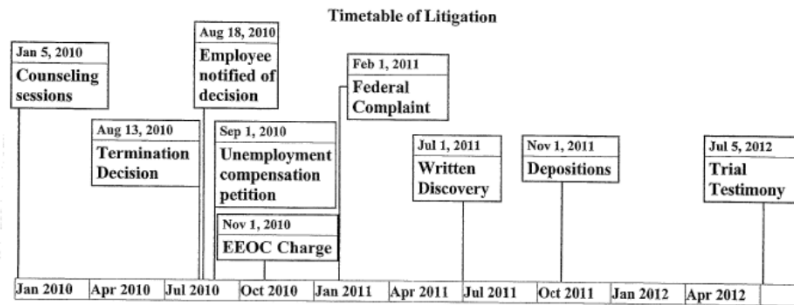
**\$651,398 in Reasonable Attorney's Fees**

**\$31,597.98 for Reasonable Costs**

# Newspaper Story



# Timetable of Litigation



## Note-taking Techniques

- Who, What, When, Where, Why
- Quotes
- Impressions
- Later Input
- Avoid certain writings

# Case Number 1

## *Alice v. Municipality*

Alice alleges that:

- she complained to her supervisors and the controller about fraud and waste and theft of time in her department.
- non-exempt employees took vacation but didn't use vacation days, and instead, were paid regular pay for that time off.
- she was discharged because she was a whistleblower and because of her age.

The Municipality claims that:

- it discharged her when she was out of the office for three hours and then did not tell the truth about where she was during that time.

# Email

Please remember, I came into this job without any presuppositions about people. While Alice can be an excellent worker at times with some good ideas, **she is often a very miserable and vindictive person**. I figured that one out all by myself. No one had to tell me anything, lest you think I was brainwashed by a "clique". She developed poor relationships with many, many others in my department (all by herself) prior to my arrival, and has made little effort to repair them. **To put it bluntly, her people-skills stink**. I believe you saw her temper come to a head in January, and I don't think she's liked me very much since, despite my more than generous flexibility with her schedule.

## Email

On a personal level, Alice's friend is also truly miserable and as immature as a 10 year-old. I'm actually embarrassed that she is an employee of mine. What I can't believe is she has the nerve to think I have a problem with her age, when there are several others her age (and older) still working in the department who all seem to think I'm treating them just fine. I don't care one bit how old she is, my problems are her loud, obnoxious mouth, her poor personal hygiene, and the fact that she can be plain ole' mean at times.

## Newspaper Story

### 'WHISTLE-BLOWER' TESTIFIES TO VIOLATING PAYROLL POLICIES

\* \* \*

Jurors saw an interoffice email in which Alice's boss lambasted Alice as a "miserable and vindictive person" whose "people skills stink."

In the email, Alice's boss described a second Parks & Recreation department employee as "immature as a 10-year-old" with "poor personal hygiene, and . . . Plain ole' mean at times."

## Case Number 2

### *Peter v. Company*

Plaintiff Peter claims that:

- he was discharged because of his national origin;
- everyone else in the group was Caucasian;
- he was set up to fail; and
- he was treated unfairly in completing his first project.

The Company states that:

- he wasn't experienced in the hands-on type of work necessary to complete his project; and
- with his education and experience, as represented in his CV, he should have completed the first project within a few weeks without the need of any assistance.

## Email

So, I have set expectations with him that he needs to begin to look for other opportunities...He is definitely not a

9/20/2007



# Email

fit for the group but want to cover myself here and ensure we are on the same page when we meet with him. I will fill out that form for Thursday but my expectation is that he begins to look for other opportunities either within or external.

Thanks for your help!

# Email

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**From:**  
**Sent:** Monday, July 09, 2007 4:12 PM  
**To:**  
**Subject:** .

Hey

I don't know if we have enough to support termination or if you have more information that . . .

*Thanks!*

Manager, Human Resources



# Notes of interview

C  
 - MC came up w/ plan  
 Got test. They did it took  
 too long.  
 He had to find out some way  
 the SVP - said it was a good  
 plan.  
 Opinion - He had been treated  
 unfairly. New person given  
 project w/o opportunity to  
 get acclimated, w/o tools he  
 needed. They had done 40 gig  
 testing on BB b/f and had test  
 plan they wouldn't give it to  
 him. Could have been a useful  
 reference point. He was set up  
 to fail. It was unfair.

Peter came up with a plan. Good test. They said I took too long.

His leadership said outcome was fine. SVP - said it was a good plan.

Opinion is he had been treated unfairly. New person given projects w/o opportunity to get acclimated, w/o tools he needed. They had done 40 gig testing on BB b/f and had test plan they wouldn't give it to him. Could have been a useful reference point. He was set up to fail. It was unfair.

# Notes of Interview

C  
 Sr. Transport Engineer  
 Directly on project: Testing for new  
 platform. \_\_\_\_\_ led Equip had been  
 ordered. His role was to do product testing  
 (40 gig circuits over \_\_\_\_\_ network  
 element). To certify it.  
 \_\_\_\_\_ Initial testing through his market.  
 Market engineers represent different  
 engineers. got his diagrams.  
 Felt it was unfair. Had only been w/ co.  
 short time & given project. Well versed in  
 optical testing. Had never done it on that  
 type of equipment. They gave him project.  
 Given now timeline. No template, nothing  
 laid out. Had to come up w/ own test plan.  
 Had no direction, help. MC had to reach out  
 to others b/c no test plan. Given no time  
 line. He delivered by MGT.

Sr. Transport Engineer Directly on project: Testing for new platform. \_\_\_\_\_ led Equip had been ordered. His role was to do product testing (40 gig circuits over \_\_\_\_\_ network element). To certify it.

\_\_\_\_\_ Initial testing through his market. Market engineers represent different engineers. got his diagrams.

Felt it was unfair. Had only been w/ co. short time & given project. Well versed in optical testing. Had never done it on that type of equipment. They gave him project. Given now timeline. No template, nothing laid out. Had to come up w/ own test plan. Had no direction, help. MC had to reach out to others b/c no test plan. Given no time line. He delivered by MGT.

## Lessons Learned

- Be careful with your writing, especially email
- Prepare, prepare, prepare
- No case is a small case