

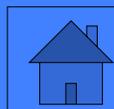


EEOC	ADEA	Social Media Employer Liability	Retaliation	Protected Speech & The NLRA	Pot Luck
100	100	100	100	100	100
200	200	200	200	200	200
300	300	300	300	300	300
400	400	400	400	400	400

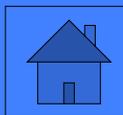
The EEOC received a record number (99,947) of these in 2011.



What are Charges of Discrimination?



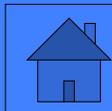
This is the EEOC's favorite tool for obtaining additional information from employers after the EEOC receives the employer's Position Statement.



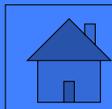
What is a Request for Information?



The EEOC always fairly investigates claims and accurately assesses Charge allegations.



What is “are you kidding me?”

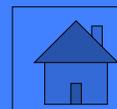


## HYPOTHETICAL

Joel filed an EEOC Charge claiming disability harassment and discrimination (termination) based on a speech impediment. Joel's supervisor David initially tells you that David noticed Joel sometimes stuttered, but only during sales calls when Joel seemed unprepared. David explained he tried a few tricks to break Joel of the habit, but never thought Joel was disabled. The employer's Position Statement points out that Joel was terminated by the company President for poor performance and that the President did not even know about his stutter. The EEOC conducts interviews and David tells them he researched how to deal with speech impediments and that the speech issue was a major factor in David's assessment of Joel's poor performance. The President tells the EEOC he based his termination decision solely on David's evaluation of Joel's performance. How do you evaluate the claim following the EEOC interviews, and what are your options?



You need to wait this number of days after an over-40 claimant signs a release before giving them the settlement payment.



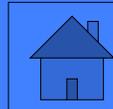
What is Seven?



An EEOC Final Regulation was approved earlier this year for this defense which demonstrates that an employment practice that adversely impacts older workers is not discriminatory.



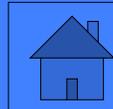
What is the “Reasonable Factors Other Than Age”  
defense?



When evaluating an ADEA claim, one of the  
primary issues you want to consider is the potential  
application of this defense created by the U.S.  
Supreme Court in *Gross v. FBL Financial Services,  
Inc.*



What is “but for” causation?



### HYPOTHETICAL

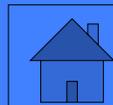
Barry is a 52 year old nurse in a dialysis center. His new manager, Robin is concerned that Barry is not working through his patients quickly enough, which causes Barry to see fewer patients in a day compared to the other nurses in Barry's department. Robin says to Barry, “I'm concerned this job demands too much from you and that you cannot keep up.” Several days later, Barry is insubordinate to one of the dialysis center physicians. Robin informs HR Director Maurice of the insubordination. Based on Robin's report, Maurice terminates Barry's employment. Does Barry have an ADEA claim?



How Employers may be held liable for defamation  
arising from their employees' private blogs...

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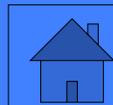
What is Employer Ratification?  
Ward v. Cisco



Employers cannot be liable if they have a social media policy prohibiting defamatory or other improper usage.

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What is false?  
See Blakely v. Continental Airlines; NLRB 2012  
Report from Social Media Policies [www.NLRB.gov](http://www.NLRB.gov)



## HYPOTHETICAL

Company ABC maintains a strict social media policy prohibiting any misuse of social media that could lead to liability for defamation or damage to reputation. Steve posts embarrassing photos of himself in try-outs for The Biggest Loser on ABC's Facebook account. Joe, Steve's boss, posts on the same Facebook account-accessible by all 1500 employees-that Steve really is The Biggest Loser, because his posted photos cost him his job and he is fired. Before being escorted from the building, Steve posts back that his female co-workers submitted much more embarrassing photos when they tried out for "Project Runway."

Does Steve have a claim?



## POSSIBLY

- No evidence Steve's posts caused damage to company – just embarrassing to himself
  - Joe's email firing Steve and calling him the Biggest Loser is defamatory
  - Disparate Treatment concerns as well
- See Marshall v. Mayer & Alderman of City of Savannah, et al., 2010 U.S. App. Lexis 3233 (11th Cir. 2010)



What happens when co-workers post sexually explicit comments on Facebook and when the supervisor then blogs negative comments about the employee who complains about those Facebook posts, calling her a “loser” and a religious zealot who should become a nun if she can’t handle some good natured joking.

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What is hostile work environment harassment and what is retaliation?

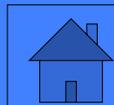
See Blakey v. Continental Airlines, 751 A.2d 538 (NJ 2000)

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In Burlington Northern v. White, the U.S. Supreme Court defined this as: “Any action that would dissuade a reasonable worker from making or supporting a charge of discrimination.”

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What is retaliation?



An employer can be liable for this type of retaliation claim when a decision-maker makes an adverse employment action for seemingly appropriate reasons but that decision is motivated by another supervisor's retaliatory animus.

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What is "cat's paw" retaliation or discrimination?

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The Supreme Court recently created a new form of retaliation claim in Thompson v. North American Stainless.

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What is third-party retaliation?



## HYPOTHETICAL

Bill and Mary both work for Dubious Motor Works. They work in the same department and their boss previously agreed that they could work the same shift for convenience sake. Mary reports to Dubious management that she observed a supervisor calling a Muslim co-worker a “rag-head” on one occasion. Dubious investigates the incident and disciplines the supervisor. Five months after Mary’s report, Bill’s supervisor tells him that due to reduced business they are cutting personnel on all shifts. Although he is not losing his job, the restructuring means that Bill must choose between 1) being transferred to another plant across town, or 2) working a later shift.

Is there a retaliation claim against Dubious?



S.Ct. decision on “SEXTING” regarding company-owned phones as “possibly” protected private speech.

What is City of Ontario v. Quon (2010)?

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Facebook trash talking about the boss and  
workplace conditions.

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What is “possibly” protected speech?  
NLRB v. AMR (2011)  
2012 NLRB Report on Social Media Policies  
[www.NLRB.gov](http://www.NLRB.gov)

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NLRB will protect employees’ lewd, and  
derogatory Facebook posts as long as the  
communication also reflects this.

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What is “concerted activity” pertaining to  
workplace conditions?  
2012 NLRB Report on Social Media Policies  
[www.NLRB.gov](http://www.NLRB.gov)

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Employers cannot be liable if they have a social  
media policy prohibiting defamatory or other  
improper usage.

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What is false?  
See NLRB 2012 Report on Social Media –  
[www.NLRB.gov](http://www.NLRB.gov)



In AT&T Mobility v. Concepcion – the S.Ct.  
held that employers can require employees  
to do this in order to prohibit class action  
lawsuits.

What is sign a mandatory Arbitration  
Agreement  
But See NLRB' s Conflicting Opinion in  
NLRB v. D. R. Horton

