THOUGHT-PROVOKING LESSONS FROM HEALTH CARE EMPLOYMENT CASES
Presented by

Beth Rattigan
brattigan@drm.com
Lebanon, NH

David Harlow
dharlow@drm.com
Brattleboro, VT
Today, we will discuss...

• Understanding Basic Requirements of ADA
  ▪ ADA (42 U.S.C. 12101)
  ▪ Vermont FEPA (21 V.S.A. 495)

• Some thought-provoking lessons from recent cases

• PRACTICAL APPLICATIONS
ADA: Four Questions

1. Does Employee have a Disability?
2. Does the disability impact an essential job function?
3. Is there an Accommodation that allows the employee to perform the essential job functions?
4. Is the Accommodation Reasonable?
ADA: Four Questions

1. **Does Employee have a Disability?**
2. **Does the disability impact an essential job function?**
3. **Is there an Accommodation that allows the employee to perform the essential job functions?**
4. **Is the Accommodation Reasonable?**
Disability

• Physical or mental impairment
  ▪ A record of such impairment, OR
  ▪ Being regarded as having such an impairment
• Substantially limits (construed broadly)
• Major life activity
ADA: Four Questions

1. Does Employee have a Disability?
2. Does the disability impact an essential job function?
3. Is there an Accommodation that allows the employee to perform the essential job functions?
4. Is the Accommodation Reasonable?
Essential Job Functions

• Employer’s description of a job
• How the job is actually performed in practice
• Influential factors:
  ▪ Employer’s judgment
  ▪ Written job descriptions
  ▪ Amount of time spent
  ▪ Collective bargaining agreements
  ▪ Work experience of past employees in the position
  ▪ Work experience of current employees in similar positions
ADA: Four Questions

1. Does Employee have a Disability?
2. Does the disability impact an essential job function?
3. Is there an Accommodation that allows the employee to perform the essential job functions?
4. Is the Accommodation Reasonable?
Accommodation

- Interactive dialogue
- Ask: “What can we do to help you do your job?”
- Don’t be afraid to ask!
- Document Discussion
- Employee may admit cannot perform essential function
ADA: Four Questions

1. Does Employee have a Disability?
2. Does the disability impact an essential job function?
3. Is there an Accommodation that allows the employee to perform the essential job functions?
4. Is the Accommodation Reasonable?
Reasonable

- Can employee do essential functions?
- Undue hardship defense
  - Size of employer’s program
  - Type of operation
  - Nature and cost of accommodation needed
- Direct threat defense
  - Direct threat to health or safety of others cannot be eliminated by a reasonable accommodation
Sample Accommodations

Reasonable
• Job restructuring
• Facilities
• Modified Schedule
• Devices
• Vacant Position
• Limited Time off

Unreasonable
• Stress-free
• Indefinite Leave
• New Supervisor
• Rescind Proper Discipline
What makes the healthcare setting different?

• Patient care
  ▪ Demands on healthcare employees are different than in other industries
  ▪ High stress / physically demanding

• Scheduling
  ▪ To meet patients’ needs
  ▪ To comply with regulations
    • E.g., a LNA cannot replace an RN.

These are factors that may be considered in determining what is a reasonable accommodation.
What is trypanophobia?

Facts

- In 2011, Christopher Stevens worked as a pharmacist for Rite Aid. He had been with the company for 34 years.
- That year Rite Aid revised its job description to require pharmacists to hold a valid immunization certificate.
- Stevens learned from his district manager that all pharmacists would be required to do immunization injections.
Christopher Stevens v. Rite Aid Corporation

- Stevens obtained a note from his doctor, stating:
  - “needle phobic and cannot administer immunization by injection.”
- Stevens explained to his district manager that his “trypanophobia” caused him to experience “lightheadedness, paleness, and a feeling that I may faint” and that he would never consider becoming an “immunizing pharmacist.”
- He said he had a disability and requested accommodation.
- Rite Aid HR asked questions:
  - How would it manifest if he tried injections?
  - Any accommodations?
Christopher Stevens v. Rite Aid Corporation

- Doctor responded that he would likely faint and that it would be unsafe for the patient and Mr. Stevens if he tried to do an injection.
- Rite Aid concluded that the ADA did not apply to trypanophobia. Told him to complete injection training.
- Stevens refused.
- Rite Aid terminated him.
- What happened at trial?
Christopher Stevens v. Rite Aid Corporation

• Jury award of:
  - $485,633 for back pay.
  - $1,227,188 for front pay.
  - $900,000 emotional damages (later reduced to $125,000)

• Appeal to Second Circuit Court of Appeals.
  - Issue: Should the jury have been permitted to decide this, or should the Judge have thrown out the ADA claim as a matter of law?
Christopher Stevens v. Rite Aid Corporation

- Disability? Yes.
- Does it impact an essential function? Yes.
  - Giving the shots was an essential function.
    - Changed job description
    - Had fired *another* pharmacist for refusing to do them
    - Changed policy to require performance of injections
- Is there a reasonable accommodation?
  - Require Rite Aid to give him therapy?
  - Transfer to a Pharmacy Tech position?
  - Hire a nurse to do injections?
  - Assign him to “dual pharmacist” locations?
Facts:

- Leokadia Bryk was a nurse in the psychiatric ward at St. Joseph’s hospital for more than twenty years.
- She used a cane due to back pain, arthritis and hip replacement.
- Failed to follow procedures, and was demoted from Charge Nurse to “Clinical Nurse II” and given a final written warning.
- As a Charge Nurse, the Hospital had no problem with a cane.
- But as Clinical Nurse II (on the psych floor), the Hospital became concerned the cane could be used as a weapon.
EEOC v. St. Joseph’s Hospital (11th Cir. 2016)

• Hospital: No cane. 30 days to apply for other positions. Waived requirements that she hold her current position for at least 6 months for a transfer and have no final written warnings. Hospital had a “best qualified applicant” policy and did not give any preference to her transfer desires.
• She applied for 7 positions and did not get any of them.
• Court: Hospital was reasonable. No obligation to reassign to a vacant position without competition.
EEOC v. St. Joseph’s Hospital (11th Cir. 2016)

“Requiring reassignment in violation of an employer’s best-qualified hiring or transfer policy is not reasonable ‘in the run of cases.’ ... In the case of hospitals, which is this case, the well being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital’s best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients.”
Facts:

- Septuagenarian who was employed as a full-time driver.
- After one month, co-workers began calling him “pathetic old man,” “old man” and other similar names. His supervisor overhead these comments and laughed.
- From March 12, 2015 to March 23, 2015, he developed “stomach problems” that caused him to miss work. He had enough sick and PTO to cover this absence. However, he was required to bring a doctor’s note explaining his absence.
- His supervisor and human resources refused to return him to work, even after he brought in a doctor’s note.
Kurylo v. Parkhouse Nursing & Rehab. Center

• Instead, required that he fill out FMLA paperwork. He was not yet eligible for FMLA, but Human Resources said they wanted the paperwork anyway to decide if he would be terminated.
• Doctor refused to fill out the paperwork.
• Wrote Plaintiff a letter, saying he had abandoned his job and did not put him back on the schedule.
  ▪ Plaintiff filed a Complaint, alleging age discrimination, disability discrimination, and retaliation.
  ▪ Defendant filed a motion to dismiss the disability and retaliation claims.
Kurylo v. Parkhouse Nursing & Rehab. Center

• Issue #1: Are “Stomach problems” a disability? No.
  • “[A] temporary, non-chronic impairment of short duration is not a disability....”
  • “[A]n injury or illness involving several months of limitation, without long-term or permanent effect, is not a disability under the ADA.”

• Issue #2: “Regarded as” disabled? No.
  • 42 U.S.C. § 12102(3)(B): the “being regarded as having such an impairment” provision “shall not apply to impairments that are transitory and minor”
So what happened to the disability claim? Dismissed.

What about retaliation? Not so fast.

- Retaliation does **not** require that the employee actually have a disability.
- It is enough that an employee engages in “protected activity” by asking for an accommodation.
- Even if not disabled, the employee is still protected from retaliatory acts by the employer.
Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2017)

- Kowitz was a respiratory therapist.
- She took an FMLA leave for neck surgery.
- Upon return, Trinity required updated life support certification.
- Kowitz completed the written portion but was not able to perform the physical portion and was terminated for failure to be certified.
- Trial Court: Dismissed ADA claim because Kowitz was not “qualified” under the ADA – she could not perform essential functions.
- Eighth Circuit Court of Appeals: Reversed.
Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2017)

- The Court held that Kowitz’s notice to her employer created an implied request for an accommodation.

- “Kowitz did not ask for a reasonable accommodation in so many words, [but] her notification to her supervisor that she would not be able to obtain the required certification until she had completed physical therapy implied that an accommodation would be required until then.”

- No magic words needed.

- Plaintiff was a medical technologist with 34 years of employment history at the Hospital.
- In 2012, she received her very first verbal warning.
- She continued to receive warnings and discipline related to continued mistakes at work.
- Her supervisor admitted these errors were “out of character”
- Plaintiff was then diagnosed with sleep apnea and informed her supervisor.
- Plaintiff continued, however, to make mistakes (even with treatment for sleep apnea)
- Eventually, Plaintiff was terminated.

- Hospital argued that the reason for the termination was out of concern for patient safety – the medical errors made by the Plaintiff were a risk.
- Court dismissed the disability discrimination claim on summary judgment.
- Held: there was no evidence that the Defendant’s reason for termination was a pretext for discrimination.
- The Plaintiff’s mistakes (even if they were related to her sleep apnea in some way) were a legitimate risk to patient safety and there was no evidence the Defendant fired her for some discriminatory reason.
Questions?
Handling the Odious Patient
Presented by

John Maitland
&
Ben Traverse
• African-American OB Nurse, Ruth Jefferson
• White Supremacist parents, Turk and Brit Bauer
• File Note:

NO AFRICAN AMERICAN PERSONNEL TO CARE FOR THIS PATIENT
Patient Rights

• Right to Refuse Treatment
  ▪ Patient Bill of Rights  [state law, organizational policies]
  ▪ Common law battery
  ▪ US Constitution – liberty interest  [Cruzan decision]

• Right to Receive Treatment [EMTALA]
  ▪ Medical screening
  ▪ Emergency medical treatment; active labor

• Right to receive treatment regardless of race, gender, religion, ethnic origin, . . .
Employee Rights

• Right to work in an environment free from unlawful discrimination.

• Title VII of Civil Rights Act of 1964
  ▪ Race, Color, Religion, Sex or National Origin
  ▪ ?? Sexual Orientation

• Section 1981, 42 USC 1981 (intentional race discrimination)

• Vermont Fair Employment Practices Act

• New York Human Rights Law
Hostile Work Environment

- Conduct that unreasonably interferes with individual’s work performance, OR
- Conduct that creates an intimidating, hostile or offensive work environment.

- Conduct must be *Severe* or *Pervasive*

- Conduct must be subjectively and objectively offensive

- **Facts**
  - African-American CNA in a nursing home in Indiana
  - Racial preference policy, stated on daily assignment sheets
  - Numerous racial comments from co-workers during 3 months of employment

- **Conclusion**
  - Reversed lower court’s judgment for nursing home
  - Not the same as gender – BFOQ
  - Nursing home’s policy of honoring racial preference condones racial harassment (daily reminders); supervisor addressing comments not enough

• Facts
  ▪ African-American RN in small NY hospital
  ▪ Told to care for patient known to make intolerable racist comments
  ▪ RN complained; told to “deal with it”

• Conclusion
  ▪ Case dismissed
  ▪ No allegation that RN intentionally assigned to patient
  ▪ Patient had dementia
  ▪ No adverse action

• Facts
  ▪ African-American RN Supervisor at rehab facility in Michigan
  ▪ Learned about patient request
  ▪ She complained

• Conclusion
  ▪ Case dismissed
  ▪ No adverse action, no contact with patient, worked only one more shift afterwards.

- Facts
  - African-American RN in geriatric unit
  - NBW policy, later revoked
  - Several racist comments from Asian supervisor

- Conclusion
  - Case dismissed
  - Preference forms (before it ended) just in admin office, not open for all to see
  - Actions not sufficiently severe or pervasive because they occurred over 3 years
McCrary v. Oakwood Healthcare (2016)

• Facts
  ▪ African-American Respiratory Therapist in Michigan
  ▪ Patient expresses preference, noted w/o deciding
  ▪ RT twice asked to leave by patient during night shift
  ▪ RT complained
  ▪ Next day, Mgr and Patient Rep met with patient, will not grant request, offer transfer
  ▪ Patient stays, gets treated by other AA care takers
  ▪ RT sues, claiming discrimination

• Conclusion
  ▪ Case continues; jury must decide
FACTORS  (Dr. Kimari Paul-Emile)

1. The Patient’s Medical Condition
2. The Patient’s Decision-Making Capacity
3. Reasons for the Request
4. Options for Responding to the Request
5. Effect on the Employee
Best Practice Considerations

• Do not condone the behavior
• Isolate the situation
• Support your staff
• Review factors
May 16, 2017
Hampton Inn, Colchester, VT

DRM Health Care Labor and Employment Law Summit
VT, NH, NY
May 16, 2017

Labor Law Update:
The Changing Face of the NLRB
Presented by

Peter B. Robb
&
Timothy E. Copeland, Jr.
The Changing Face Of the NLRB
2016 County-Level Presidential Election Results

Election 2016: County-Level Results

- Trump counties: 84%
- Clinton counties: 16%
## Composition of House and Senate

### House of Representatives

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democratic Party</td>
<td>193*</td>
</tr>
<tr>
<td>Republican Party</td>
<td>237</td>
</tr>
</tbody>
</table>

*Democrats pick up 6 seats in 2016

### Senate

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democratic Party</td>
<td>46*</td>
</tr>
<tr>
<td>Republican Party</td>
<td>52</td>
</tr>
<tr>
<td>Independents</td>
<td>2**</td>
</tr>
</tbody>
</table>

*Democrats pick up 2 seats in 2016
**Both Independents caucus with Democrats

### Senate Seats Up for Re-election in 2018

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>Democratic Party</td>
<td>23</td>
</tr>
<tr>
<td>Republican Party</td>
<td>18</td>
</tr>
</tbody>
</table>

*Democrats have 23 Senate seats up in 2018 — with 5 in states Trump won by double-digits. Two independents are also up.

**Republicans have 8 seats up for election – only 1 in a state Clinton won.
Senate: 114th Congress

Senate: 115th Congress

Source: 270 to Win
Composition of Federal Courts

- Total Federal Judges = 890
- Current vacancies = 124
- Pending nominees = 2
  - 59 pending nominees were leftover from the previous Congress
- Republican-appointed judges held majorities in 10 of 13 U.S. Federal Courts of Appeal at the start of President Obama’s first term
  - In 2009, 2 circuits were evenly split between Republican- and Democratic-appointed nominees
  - In 7 of 10 courts they outnumbered Democratic-appointed judges 2-1
- Democratic-appointed judges now hold majorities in 9 of 13 U.S. Federal Courts of Appeal
NLRB General Counsel

- Richard Griffin
  - Was one of the NLRB recess appointees successfully challenged under the Supreme Court's holding in the *Noel Canning* case
  - Former General Counsel for the International Union of Operating Engineers
  - Served on the Board of Directors for the AFL-CIO Lawyers Coordinating Committee
  - Mr. Griffin's term expires on November 3, 2017
  - In other words, that is the *formal* expiration date
NLRB General Counsel Initiatives

- Misclassification of individuals as independent contractors a potential unfair labor practice – employer depriving individuals of Section 7 Rights under the NLRA

- Initiative to expand Weingarten rights including expansion to non-union represented employees

- Cases involving allegations that “English-only” policies violate the NLRA

- Cases involving the expansion of the right of employees to utilize employer electronic communication systems in addition to email systems – expansion of the Board’s Purple Communications decision

- Cases involving union access to employer property during union organizing campaigns – “equal access issues”
NLRB Issues

- Continued NLRB scrutiny of employer handbooks and other policies including social media policies and even contracts. Employers need to be aware of:
  - Overly broad confidentiality provisions
  - Post-employment non-compete provisions (anti-solicitation of customers or employees)
  - Restrictions on employees speaking to the media
  - Policies that restrict or prohibit employee criticism of employer terms and conditions of employment
  - Prohibitions on employees recording conversations and photographing in the workplace
  - Policies that dictate “positive” relationships among employees
  - Policies that strictly prohibit use of vulgarity by employees in the workplace
  - Policies that prohibit discussion of employee wages/benefits and other terms and conditions of employment

- The Jurys Boston / Purple Communications I election rerun remedy
NLRB Issues

- The current NLRB majority narrowly defines what an employer may prohibit as pro-union “solicitation” See Conagra, enf. denied by 8th Cir.

- The current NLRB majority continues to narrowly define NLRB supervisory status, sometimes defying all common sense.
  - In the LakeWood Health Center case, the Board, in a recent 2-1 decision over the dissent of NLRB Member Miscimarra, held that nurses at a hospital in Minnesota who were the highest ranking individuals during their respective shifts at the employer were not supervisors in that such factor was only a “secondary” criteria in analyzing supervisory status cases
  - The nurses in dispute in this case had the authority to assign and reassign nurses and others that reported to them based on their skill, experience, and ability to meet patient care needs
  - Issue boils down to how much evidence is needed to prove 2(11) duty?
NLRB Issues

- NLRB implementation and court review of the new joint employer standard
  - *Browning-Ferris* appeal pending in the D.C. Circuit
  - *McDonald’s* case et al.
  - McDonald’s also is involved in joint employer litigation involving other statutes
  - A federal judge in California allowed class action wage theft litigation to proceed against McDonald’s and certain of its franchisees on a joint employer-type theory (“ostensible agency”)
  - The *CNN* case pending in the federal court of appeals also raises significant joint employer issues
What Precedent From the Obama NLRB Will Survive and For How Long?

- Phil Miscimarra dissented in nearly every major precedent change from 2013 to present.
- New Board Members likely to agree that Obama Board went too far.
- Will Trump Board be quickly confirmed?
- Will the new Board be collegial and productive?
- To what extent will the General Counsel and Regions follow the lead of the Board?
Missouri Becomes the 28th Right-to-Work State

Source: National Right to Work Foundation
2016 Private Sector Union Membership

- A. All Private
- B. Transportation and Utilities
- C. Construction
- D. Information (Publishing, Broadcasting, Telecom)
- E. Manufacturing
- F. Education and Health Services
- G. Wholesale and Retail Trade
- H. Leisure and Hospitality
- I. Professional and Bus. Services
- J. Financial Activities

Employee Rights Under The NLRB
EMPLOYEE RIGHTS
UNDER THE NATIONAL LABOR RELATIONS ACT

The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:
• Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
• Form, join or assist a union.
• Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
• Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
• Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
• Strike and picket, depending on the purpose or means of the strike or the picketing.
• Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:
• Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
• Question you about your union support or activities in a manner that discourages you from engaging in that activity.
• Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
• Threaten to close your workplace if workers choose a union to represent them.
• Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
• Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's website: www.nlrb.gov.

Click on the NLRB's page titled "About Us," which contains a link, "Locating Our Offices." You can also contact the NLRB by calling toll-free: 1-866-667-NLRA (6572) or (TTY) 1-866-315-NLRA (6572) for hearing impaired.

The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of an air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).
Protected Concerted Activity

• The activity will be **protected** if it is related to wages, hours or other terms and conditions of employment and is not illegal

• The activity will be **concerted** if:
  - It is engaged in, with or on behalf of other employees
  - It looks to the involvement of other employees

• These rights exist for all employees -- those who are currently organized and those who are not
Under the NLRA

• It is unlawful for an employer to:
  ▪ interfere with,
  ▪ restrain, or
  ▪ coerce
  employees in the exercise of their rights
Interference with Employee Rights:

Employment Policies and Rules of Conduct
Confidentiality Policies - Unlawful

- Verizon Wireless, 365 NLRB No. 38 (2017)

Verizon Wireless acquires and retains personal information about its employees in the normal course of operations, such as for employee identification purposes and provision of employee benefits. You must take appropriate steps to protect all personal employee information, including social security numbers, identification numbers, passwords, financial information and residential telephone numbers and addresses.

You should never access, obtain or disclose another employee’s personal information to persons inside or outside of Verizon Wireless unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under these policies.
Confidentiality Policies - Lawful


You must take appropriate steps to protect confidential personal employee information, including social security numbers, identification numbers, passwords, bank account information and medical information. You should never access or obtain, and may not disclose outside of Verizon, another employee’s personal information obtained from Verizon business records or systems unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under those policies.
Confidentiality Policies – Unlawful

- **Rocky Mountain Eye Center, P.C., 363 NLRB No. 34 (2015)**

  Information about physicians, other employees, and the internal affairs of Rocky Mountain Eye Center, P.C. are considered confidential. Breach of either patient or facility confidentiality is considered gross misconduct and may lead to immediate dismissal.
Use of Employer Email Systems

- **Purple Communications, Inc., 365 NLRB No. 50 (2017)**

  Employee use of a company email system for statutorily protected communications on non-working time must presumptively be permitted if employees have been given access to the system.

  (Unless employer rebuts the presumption by demonstrating that special circumstances are necessary to maintain production or discipline justify restricting the right.)
Use of Employer Email Systems – Unlawful

- **Verizon Wireless**

You may never use company systems (such as e-mail, instant messaging, the Intranet or Internet) to engage in activities that are unlawful, violate company policies or result in Verizon Wireless’ liability or embarrassment. Some examples of inappropriate uses of the Internet and e-mail include:

  - pornographic, obscene, offensive, harassing or discriminatory content;
  - chain letters, pyramid schemes or unauthorized mass distributions;
  - communications primarily directed to a group of employees inside the company on behalf of an outside organization.
Off-Duty Employee Access

- **Marina Del Rey Hospital, 363 NLRB No. 22 (2015)**

**Lawful or Unlawful?**

Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her shift.

An off-duty employee is not allowed to enter or reenter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business. “Hospital related-business” is defined as the pursuit of an employee’s normal duties or duties as specifically directed by management.

An off-duty employee may have access to nonworking, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.
Marina Del Rey Hospital, cont’d

- NLRB: lawful on its face, but unlawfully applied in a discriminatory manner

- Hospital applied policy to curtail off-duty employees from meeting Union representatives in the cafeteria, but

- Allowed off-duty access to pick up paystubs, submit scheduling requests, apply for transfers, attend retirement parties and wedding / baby showers
Conduct Policies

Lawful or Unlawful?

1. Prohibiting conduct by an employee that “impedes harmonious interactions and relationships.”
2. Prohibiting “negative or disparaging comments about the professional capabilities of an employee or physician made to employees, physicians, patients or visitors.
3. Prohibiting “verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.”
4. Prohibiting “behavior that is counter to promoting teamwork.”
All Unlawful

1. Language is “so imprecise” that it could encompass any disagreement or conflict among employees, including those related to discussions protected under the NLRA.

2. Rules would reasonably be construed to prohibit expressions of concern over working conditions.

• William Beaumont Hospital, 363 NLRB No. 162 (2016)
Who is a supervisor?

- Lakewood Health Center, 365 NLRB No. 10 (2016)
  - Six “patient care coordinators” in a small acute care hospital held not supervisors
Whole Foods Market, 363 NLRB No. 87 (2015)

• “Team Member Recordings” policy:

- It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.
“Team Meetings” Policy

In order to encourage open communication, free exchange of ideas, spontaneous and honest dialogue and an atmosphere of trust, Whole Foods Market has adopted the following policy concerning the audio and/or video recording of company meetings:

It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

Please note that while many Whole Foods Market locations may have security or surveillance cameras operating in areas where company meetings or conversations are taking place, their purposes are to protect our customers and Team Members and to discourage theft and robbery.
NLRB: Unlawful

“Photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present.”
Examples:

• Recording images of protected picketing
• Documenting unsafe workplace equipment or hazardous working conditions
• Documenting and publicizing discussions about terms and conditions of employment
• Documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions
What is an “overriding employer interest”? 

- NLRB: “encouraging open communication” at annual town hall meetings and termination-appeal peer panels was not enough to justify Whole Foods’ policy.

- What about HIPAA and patient privacy?
Flagstaff Medical Center, 357 NLRB No. 65 (2011)

• Portable electronic equipment policy:
  ▪ prohibited the use of electronic equipment during worktime, and
  ▪ provided that “[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited.”
NLRB: Lawful Policy

• “The privacy interests of hospital patients are weighty, and FMC has a significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography.”

• “Employees would reasonably interpret FMC’s rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity.”
Weingarten Rights

• Employees have a right to be accompanied and assisted by their union representative at meetings that the employee reasonably believes may result in disciplinary action.
• The employee has the right to advice and active assistance from the union representative.

Does a request to submit to drug testing trigger the right?
NLRB: Yes

Manhattan Beer Distributors, 362 NLRB No. 192 (2015)

- The employer “violated Section 8(a)(1) of the Act by denying [the employee] his right to union representation at an investigatory interview that he reasonably believed would result in discipline by directing him to immediately submit to a drug test, notwithstanding his request to have a union representative present.”

- And “. . . by discharging [the employee] for refusing to take the drug test in the absence of a union representative.”
Expert Panel – Best Practices in Grievance Administration

John Maitland, DRM, Moderator
Vicki Stetzel, UVM Medical Center
Lesley Classen, Rutland Regional Medical Ctr.
Roland Ransom, Health Care and Rehabilitation Services of Southeastern VT
April Tuck, DRM
May 16, 2017
Hampton Inn, Colchester, VT

DRM Health Care Labor and Employment Law Summit
VT, NH, NY