



SCOTUS	Workplace Conduct	Discrimination & EEOC Enforcement	Retaliation	Privacy & Protected Speech	Wages
100	100	100	100	100	100
200	200	200	200	200	200
300	300	300	300	300	300
400	400	400	400	400	400

Bonus Round! 2


SCOTUS for \$100

New SCOTUS decision confirmed this higher standard of proof is required to establish age discrimination and retaliation

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What is "but for" causation?

See *University of Texas v. Nassar* (2013)




SCOTUS for \$200

The Supreme Court, in recognizing this exception to employment discrimination laws, held that it was Unconstitutional for the state to force a religious school to continue employing a narcoleptic teacher because the decision “affects the faith and mission of the church itself.”

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What is the “ministerial exception”?

In *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), the court held that “the ministerial exception is not limited to the head of a religious congregation,” and found that it applied in this case because the school held the teacher out as a minister, her title reflected a significant degree of religious training and formal commissioning, the teacher referred to herself as a minister, and the teacher’s job duties “reflected a role in conveying the Church’s message and carrying out its mission.”




SCOTUS for \$300

The Supreme Court held that, for purposes of a vicarious liability analysis, a supervisor is defined as a person who is empowered by the employer to do this.

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What is take tangible employment actions against the employee?

Vance v. Ball State, 133 S.Ct. 2434 (2013)



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SCOTUS for \$400

The Supreme Court's unanimous reversal of this pro-employer case quashed any hope of employers had for receiving these on the basis of past severance payouts to laid-off workers.

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What are big tax refunds?

In *U.S. v. Quality Stores*, SCOTUS reversed the Sixth Circuit ruling that severance payments to involuntarily severed employees were not taxable under FICA.




Workplace Conduct for §100

Because of increased popularity of informal texting, emailing, blogging or posting to social media websites, courts have recognized these new forms of harassment.

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What is text harassment and cyberbullying?




Workplace Conduct for §200

This government agency has turned employment law on its head by attempting to put new teeth into an old law.

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What is the National Labor Relations Board?




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Workplace Conduct for §300

Liability defense where no tangible employment action taken.

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What is the *Faragher Ellerth* defense of: 1) taking prompt remedial action and 2) employee failure to take advantage of corrective measures




Workplace Conduct for §400


Rich is the manager in ABC Co.'s manufacturing department. Rich doesn't like Steve because Steve is a war veteran who often speaks of his time in the service, and Rich believes that the U.S. is too quick to abandon diplomatic solutions. Rich does not like how other employees listen with admiration to Steve's stories. However, Steve works in marketing, so Rich has no power over him. Rich goes to George, Steve's supervisor, and tells him that Steve has anger management problems and has become a workplace bully. George takes Rich's word for it and fires Steve without an investigation.

Under this theory, ABC Co. is liable for wrongful termination based on veteran status.

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What is the Cat's Paw theory?




Discrimination & EEOC Strategic Enforcement Plan for §100

Employers using criminal background and credit checks in the hiring process may be subject to one of these claims.

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What is an EEOC enforcement action for disparate treatment?

EEOC's #1 priority in its new Strategic Enforcement Plan is elimination of barriers in recruiting and hiring, including enforcement actions against companies who use background screens



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Discrimination & EEOC's Strategic Enforcement Plan for §200

The EEOC says this about its guidance on Criminal Background Checks

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What is “not legally binding?”
State of Texas v. EEOC, No. 5:13-CV-255-C (N.D.Tx. Apr. 4, 2014).

The EEOC recommends that an employer conduct an "individualized assessment" which evaluates job relatedness, business necessity, and temporal proximity of the screen before using a criminal record as a bar to employment.




Discrimination & EEOC's Strategic Enforcement Plan for 8300

One of EEOC's new enforcement priorities in the Strategic Enforcement Plan

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What are emerging areas of the law, including expanding the definition of disability under the ADA; pregnancy claims; LGBTQ orientation claims as gender based discrimination; and GINA?




Discrimination & EEOC's Strategic Enforcement Plan for §100

EEOC cannot bring an enforcement action without first doing this.

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What is conciliation?

See *EEOC v Bloomberg* (SDNY, Sep. 9, 2013)



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Retaliation for §100

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?




Retaliation for §200

The more of this that passes after the protected act, the stronger the defense against a retaliation claim.

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What is time?




Retaliation for §300

New form of retaliation claim created in 2010 by the Supreme Court (*Thompson v. North American Stainless*).

31

What is third-party retaliation?
(or in that case, firing the complainant's fiancé)




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Retaliation for §400

When an employee anticipates discipline or other adverse employment action and quickly files a complaint

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What is "retaliation"?




Privacy & Protected Speech for \$100

In *City of Ontario v. Quon*, the U.S. Supreme Court indicated that this type of communication on company owned phones/pagers could "possibly" be protected private speech.

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What is sexting?




Privacy & Protected Speech for §200

Document employers can use to avoid liability for recording phone conversations under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, known as the “Federal Wiretapping Act.”

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What is an Employee (Communications) Policy

Providing adequate notice that certain phone lines will be recorded allows the employer to apply the “Consent Exception.”




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Privacy & Protected Speech for §300

Section 7 of NLRA protects this employee conduct (even on company technology).

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What is social media speech re: workplace conditions?




Privacy & Protected Speech for §100

- 1) Intrusiveness of search (manner & specificity)
- 2) Area of the search (scope)
- 3) Purposes motivating the search
- 4) Degree of employer suspicion

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What are the factors considered for determining whether an employer search was reasonable (private employers)?

Note that a search is unlawful if the search violates an employee's reasonable expectation of privacy OR if the search itself is unreasonable




Wages for \$100

This happens to an FLSA Collective Action claim where no claimants have yet opted in and the employee's individual claim has been satisfied or is otherwise dismissed

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What is "becomes moot"?

"Under the FLSA, . . . conditional certification does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court. So even if [the employee] were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (internal citations omitted).



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Wages for \$200

In order to avoid having his complaint dismissed by way of motion, a Plaintiff must provide these two details in his Complaint to properly allege a violation of the Fair Labor Standards Act.

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What is (1) the compensation he is entitled to and (2) the number of hours worked without proper compensation?

Ekokotu v. Fed. Express Corp., 408 F. App'x 331, 340 (11th Cir. 2011) ("To establish a prima facie case of an FLSA violation, a complainant must show as a matter of just and reasonable inference the amount and extent of his work in order to demonstrate that he was inadequately compensated under the FLSA.")



Wages for \$300

Because employees who wish to participate in a collective action must opt into the suit (Rule 23 cases are opt-out actions) and because not all former and more importantly current employees choose to participate in a collective action, employers face two significant problems in the event they are unable to prevail on a summary judgment motion.

What are favorable settlements and modifying current pay practices?



Wages for \$400

Unlike class actions under Fed.R.Civ.P. 23, which require plaintiffs to establish numerosity, commonality, typicality and that the class representative is an adequate representative plus satisfying one of the three factors set forth under Fed. R. Civ. P. 23(b), collective action representatives need only establish that other class members are what?

What is “similarly situated”?

See 29 U.S.C. § 216(b). Furthermore, “similarly situated” has generally been undefined. *But cf., Dybach v. State of Florida, Dept. of Corrections*, 942 F.2d 1562 (11th Cir. 1991) (holding that before a district court conditionally certifies a collective action so as to allow solicitation of potential plaintiffs through court-mandated notice, “the district court should satisfy itself that there are other employees ... who desire to opt in and who are similarly situated with regard to their job requirements and with regard to their pay provision”).







