

# Employment Law Aspects of Peer Reporting of Concerning Behaviors

*Presented by: Stephanie Quincy*

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STEPTOE & JOHNSON LLP

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January 5, 2011

# Laws To Consider

- Privacy Rights
- Harassment and Discrimination Laws
  - Title VII
  - Age Discrimination in Employment Act
- Other state law claims (defamation)

## Governmental Employees Have a Right to Privacy

- **Dr. Magno Ortega was head of the psychiatric residency program at Napa State Hospital. Concerns had arisen about coercion of contributions from residents toward the purchase of a computer for himself, alleged sexual harassment of hospital employees, and inappropriate disciplinary action against a resident.**

# Governmental Employees Have a Right to Privacy

- **While the psychiatrist was on leave pending investigation, hospital officials searched his office and seized personal items from his desk and file cabinets that were used in proceedings resulting in his discharge.**
- **Ortega sued, alleging that the search and seizure of his office and materials violated the Fourth Amendment.**

## Governmental Employees Have a Right to Privacy

- **The Supreme Court said that whether the hospital's conduct overstepped 4<sup>th</sup> Amendment bounds turned upon whether the hospital infringed "an expectation of privacy that society is prepared to consider reasonable."**

# Governmental Employees Have a Right to Privacy

- **Some government offices are so open to employees or the public that no expectation of privacy is reasonable. Given the variety of work environments the question whether an employee has a reasonable expectation of privacy depends on the context within which the search takes place.**

# Governmental Employees Have a Right to Privacy

- **The Court found that, under the facts, Ortega did have a reasonable expectation of privacy in his desk, file cabinets, and office.**
- **Even so, said the Court, the hospital did not have to obtain a warrant in order to search those areas. Such a requirement would seriously disrupt the routine conduct of business, at least where the search was for a work-related rather than a law-enforcement purpose. Requiring "probable cause" for the search would likewise impose "intolerable burdens" on the public employer.**

# Governmental Employees Have a Right to Privacy

- **Instead, said the Court, the legality of a warrantless workplace search will turn upon whether the search is:**
  - **(1) "reasonable in its inception" and**
  - **(2) reasonable in its scope.**



# Other Legal Concerns

- **Harassment and Discrimination**
  
- **Defamation**

# Americans With Disabilities Act

- Under the ADA, disability is defined as:
  - 1) a physical or mental impairment that substantially limits one or more major life activities;
  - 2) a record of having such impairment; or
  - 3) being regarded as having such impairment.

# Americans With Disabilities Act

- If behavior taking action against an employee based only on the presumption of mental or emotional instability or failing to accommodate a mental illness can subject an employer to liability under the Act.
- The ADA can be harsh, punishing employers that mention a worker's mental or emotional problems to fellow employees.

# EEOC v. Land Air Express of New England

- The EEOC alleged that the employer fired the employee, an assistant manager, because of her disability when she was hospitalized for depression and post traumatic stress disorder.

# EEOC v. Land Air Express of New England

- The employee, who had worked for the company for over six years, had a lifelong problem of sleeplessness and depression and had been upset by the recent suicide of a friend. Over the objections of her supervisor and her physician, the employer fired the charging party because a high-level manager had a “gut feeling” that she might “go postal.”

# EEOC v. Land Air Express of New England

- **The case settled for payment of \$360,000 including \$186,000 in compensatory and punitive damages, \$50,000 for medical expenses and \$124,000 in attorney's fees.**
- **The employer also agreed to provide ADA training to its senior managers and to adopt and distribute to all employees a statement regarding disability discrimination, accommodation of disabilities, and disability harassment.**

# Americans With Disabilities Act

- Alcoholics are protected under the ADA, but:
  - may not use alcohol at work;
  - must adhere to the same standards of performance and behavior required of other employees.
- The same protection does not apply to the use of illegal drugs.



# How to Balance These Concerns?

- Policies and practices to assure that every situation receives considered treatment.
  - Reporting system and policy
  - Assurances of confidentiality and no retaliation
  - Trained and experienced investigators
  - Thorough and impartial investigations
  - Balanced and fair decision making by more than one person with legal issues analyzed during investigation and decision making