



**PLUNKETT COONEY**  
ATTORNEYS & COUNSELORS AT LAW

## What Do I Do Now?

### Working Through Complicated Employee Issues

Presented by  
**Theresa Smith Lloyd**

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### Today's Presenter



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### Brief Overview

- Today's presentation: focus on difficult employee issues
  - How to identify?
  - How to resolve?
  - How to prepare for litigation?
- Topics:
  - Gender discrimination; workers' compensation, ADA, FMLA, misclassification mistakes, strange accommodation issues, disciplining a "protected" employee



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### Scenario #1: Gender Discrimination

- In 2013, SCP Corporation hired Michael Smith as financial analysis.
- In 2014, Michael informed his supervisors he was transitioning and would like to be referred to as Michelle.



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### Scenario #1: Gender Discrimination

- Things became a little more complicated in January 2015, when Michelle informed her supervisor that she needed to use the women's restroom.
- Supervisor denied her request and did not bring issue to human resources, thinking it was minor and since "Mike" used men's bathroom for years it was obviously not an issue.

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### Scenario #1: Gender Discrimination

- In February 2015, Michelle received a poor performance review, after years of "excellent" evaluations.
- In March 2015, Michelle's supervisor asked HR what to do as far as Michelle's performance and potential disciplinary actions.
- In April 2015, before Michelle was placed on PIP or otherwise disciplined, SCP receives an EEOC charge of discrimination – hostile work environment based on gender stereotypes.



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### Scenario #1: What do I do now?

- Refrain from issuing any disciplinary action based on performance until detailed investigation into hostile work environment allegation is completed.
- Ensure you have a clear understanding of current status of the law regarding transgender issues and EEOC's focus on same.
- Conduct prompt and thorough investigation.



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### Scenario #1: Status of Law

- *EEOC v Boh Bros. Const. Co.* (5th Cir., 2013)
  - EEOC alleged supervisor of all-male construction crew harassed member of crew based on gender stereotypes.
    - Viewed as “not manly enough”
  - Appellate court held that plaintiff alleging same-sex harassment can show harassment occurred because of sex by showing that it was motivated by harasser’s subjective perception that victim failed to conform to gender stereotypes.

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### Scenario #1: Status of Law

- *EEOC v R.G. & G.R. Harris Funeral Homes, Inc.* (E.D. Mich, 2014)
  - EEOC alleged funeral homes company discriminated based on sex by firing transitioning funeral director/embalmer.
  - Court acknowledged that “even though transgendered/transsexual status is currently not protected class under Title VII, Title VII nevertheless ‘protects transsexuals from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.’”



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### Scenario #1: EEOC Enforcement

- EEOC adopted its current Strategic Enforcement Plan (SEP) in December 2012.
  - SEP includes “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” as top commission enforcement priority.



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### Scenario #1: EEOC Enforcement

- Consistent with this priority, EEOC’s general counsel formed LGBT working group that provides advice and input to agency’s litigators on developing related litigation vehicles. This work group also coordinates internal initiatives and policies, trains internal staff and conducts outreach with external stakeholders.
  - Various private sector litigation, including in Michigan



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### Scenario #1: Investigation

- Interview all necessary witnesses
  - Always have witness present and take very detailed notes.
  - Remember: the 6Ws! Who, what, where, when, why – and *other witnesses*?
  - Ask accuser **what do you want?**
- Prepare detailed report.
  - Summary of witness interviews
  - Summary of conclusions
  - Next steps



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### Scenario #1: Investigation

- Provide accuser and harasser with conclusions of finding.
- Prohibit all forms of retaliation.
- Invite future complaints.
- Proceed with disciplinary action in future based solely on confirmed, objective criteria (i.e., sales numbers, performance under stated goals, customer complaints).



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### Scenario #2: Workers' Compensation → FMLA → ADA

- Mary is a Sales Representative for DeSharp Cutlery.
- Spends majority of her day sitting at her desk in company's headquarters.
- She's on 90-day PIP because her sales have consistently been below goal.
- On Jan. 10, 2015, Mary slipped on wet tile floor in company lobby and immediately complained of back pain.



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### Scenario #2: Workers' Comp. Injury

- After fall, Mary returned to work but complained to anyone who would listen about her lower back pain.
- Before end of day, Mary left to treat at urgent care clinic and told her supervisor she would keep him updated.
- Next day, supervisor learned that Mary called HR to file workers' compensation claim and to seek workers' compensation benefits.



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### Scenario #2: Workers' Comp. Injury & FMLA Leave

- HR specialist properly and promptly notifies Mary that she will need to use FMLA time while she is on leave for workers' compensation injury.
  - If HR specialist failed to do this, employee could use FMLA at a later time for different reason.
- Mary's doctor certifies that she will need to be off of work for 12 weeks to undergo series of epidural injections and receive physical therapy.
- Mary is scheduled to return to work on April 7, 2015.




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### Scenario #2: FMLA → ADA

- On April 5, 2015, Mary's treating physician indicated she was restricted from sitting for longer than 15 minutes at a time, lifting more than 10 pounds or bending.
- Workers' compensation carrier had IME conducted of Mary, showing she suffered from lumbargo but no significant objective injuries.
- On April 7, 2015, Mary called HR specialist and advised she would not be coming to work as she could not sit at her desk all day and would update company when she was able to return full-time.
- That same date, Mary's supervisor stops by to figure out what is going on with Mary – she was on a PIP, and he needs to fill position if she cannot meet requirements.




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### Scenario #2: What do I do now?

- Do not accept workers' compensation decision as determinative of employee's ability to work. ADA and workers' compensation requirements define disability and ability to work differently.
- ADA: disability =
  - Physical or mental impairment that substantially limits a major life activity
  - Record of such impairment
  - Being regarded as having such an impairment




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### Scenario #2: What do I do now?

- Immediately contact employee. Send detailed letter via email (if possible) and mail (with certification of receipt requested) indicating:
  - FMLA was exhausted, expected to return to work on April 7, 2015 (**cannot enforce 12-week then terminated policy**)
  - Has represented cannot return to work
  - Unfortunately, explanation is insufficient to substantiate need for reasonable accommodation.



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### Scenario #2: What do I do now?

- Make sure letter advises why reason was insufficient:
  - No duration
  - No nature of disability
  - No severity of impairment
  - No indication what is impaired – walking, standing, bending, lifting, etc.



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### Scenario #2: What do I do now?

- Provide list of questions for treating physician to answer within following seven to 10 days:
  - Definition of disability
  - Job description
  - Questions re:
    - Ability to perform job functions
    - Physical/mental impairment
    - Duration/severity
    - Potential accommodation



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### Scenario #2: What do I do now?

- Follow-up if no additional information is provided
  - As you know, on April 8, 2015, we notified you that we needed additional information ... . If we do not hear from you by April 24, 2015, we will assume you have voluntarily ended your employment effective that date.

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### Scenario #2: What do I do now?

- If employee returns to work, you can resume PIP, but must provide all reasonable accommodations necessary to allow employee to meet PIP standards.
  - FMLA time irrelevant to performance evaluation.



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### Scenario #3: Misclassification Mistake

- Steve, Sally and Sam all work for Cozack Accounting as IT Support Personnel.
- Trio typically works 9 to 5 but often stay late or come in on busy weekends during tax season to remedy various computer issues.
- Trio is also on call 24-hours-a-day, just in case there is an emergency.



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### Scenario #3: Misclassification Mistake

- Job description for position indicates:
  - Responsible for diagnosis of computer-related problems as requested by employees and customers of employer
  - Conducts problem analysis and research
  - Troubleshoots and resolves complex problems either in person or by using remote control software
  - Ensures timely closeout of trouble tickets



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### Scenario #3: Misclassification Mistake

- Duties and amount of time, generally, that trio spends is as follows:
  - 55 percent analyze, troubleshoot and resolve complex problems
  - 20 percent install, configure and test upgraded and new business computers and applications
  - 10 percent participate in design, testing and deployment of client configurations throughout organization

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### Scenario #3: Misclassification Mistake

- Five percent participate in analysis and selection of new technology
- Five percent document technical processes and troubleshooting guidelines
- Five percent monitor automated alerts generated by systems management tools and make decision on most effective resolution



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### Scenario #3: Misclassification Mistake

#### Administrative Exemption

- Compensated on salary or fee basis at rate of not less than \$455 per week ...
- Whose primary duty is performance of office or non-manual work directly related to management or general business operations of employer or employer's customers
- Whose primary duty includes exercise of discretion and independent judgment with respect to matters of significance



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### Scenario #3: Misclassification Mistake

#### Computer Employee Exemption

- Compensated on salary ... not less than \$455 per week
- Whose primary duty consists of:
  - Application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications

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### Scenario #3: Misclassification Mistake

- Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications
- Design, documentation, testing, creation or modification of computer programs related to machine operating systems
- Combination of aforementioned duties, performance of which requires same level of skills



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### Scenario #3: Misclassification Mistake

#### Not within Administrative Exemption:

- Primary duty described consists of installing, configuring, testing and troubleshooting computer applications, networks and hardware. Maintaining computer system and testing by various systematic routines to see that particular piece of computer equipment or computer application is working properly according to specifications designed by others are examples of work that **lacks the requisite exercise of discretion and independent judgment within the meaning of the administrative exemption** ... Their duties do not involve, with respect to matters of significance, comparison and evaluation of possible courses of conduct, and acting or making decisions after various possibilities have been considered ...




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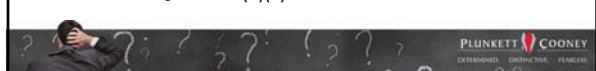
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### Scenario #3: Misclassification Mistake

#### Not within Computer Employee Exemption:

- Primary duty of this employee **does not involve "application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications."** Nor is primary duty of IT Support Specialist "[t]he design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications"; "[t]he design, documentation, testing, creation or modification of computer programs related to machine operating systems," or "[a] combination of these duties, the performance of which requires the same level of skills." 29 C.F.R. § 541.400(b)(4)




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### Scenario #3: What do I do now?

- Create detailed plan
  - Are there other company changes in future?
  - Can we transition to salaried, non-exempt as part of "new year" or "new business plan?"
- Do not make any abrupt changes to classification of employees
  - Will raise red flags




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### Scenario #3: What do I do now?

- Consider waiting to conduct thorough audit of all classification once DOL issues revisions to FLSA regulations
- Consider slowly restricting overtime and increasing salary
- Ensure any/all records regarding time worked by employees are properly maintained
- DOL's Propose Rule – three key changes:
  - New minimum annual salary-level test: \$50,440
  - New minimum total annual compensation for highly compensated exemption (now \$122,148 annually)
  - Newly established mechanism for annually updating minimum salary and compensation levels



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### Scenario #4: Unreasonable Accommodation

- David was hired by Del-Rel Groceries in 2012 to be store manager.
- Since May 2014, David's performance has been horrible. Customer complaints, tardiness issues and not meeting applicable inventory and revenue goals.
- In January 2015, David was placed on a 90-day performance improvement plan.
- David met plan's measurable goals: inventory was better and revenue was up, but his attitude problems remained and numerous employees verbally complained.



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### Scenario #4: Unreasonable Accommodation

- District manager decided on April 10, 2015 to terminate David.
- Plan was in place to tell David of his termination first thing the morning of April 12, 2015.
- On April 11, 2015, David called HR director and advised her that as a result of his severe post traumatic stress disorder, he needed a reasonable accommodation to complete essential functions of his job.



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### Scenario #4: Unreasonable Accommodation



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### Scenario # 4: Unreasonable Accommodation

- David indicated he needed to be able to bring his miniature horse with him to help him get through his days.
- Horse could stay outside or in office (due to sanitary concerns), but he needed to be able to visit with horse during breaks to help keep him calm and measured.



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### Scenario #4: What do I do now?

- Do not dismiss request as unreasonable or absurd.
  - Miniature horses are service animals in certain circumstances
- Send “we need more information” letter to David to promptly provide his treating physician. That letter will verify: (1) he has disability; and (2) miniature horse is only reasonably accommodation to allow him to perform essential functions of his job.



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### Scenario #4: What do I do now?

- Understand current status of law regarding reasonable accommodations
  - Sixth Circuit case:
    - Young girl with autism and seizures owns a miniature horse that assists her at her home.
    - Multiple complaints from neighbors caused city official to remove horse from home.

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### Scenario #4: What do I do now?

- Family sued for violation of ADA.
- Sixth Circuit ruled in family's favor, finding factual dispute sufficient to send to jury with regard to whether accommodation was "reasonable."



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### Scenario #4: What do I do now?

- Always remember: no bright-line rule
  - When employee with disability requests to use service animal at work, employer has right to request documentation or demonstration of need for service animal, that service animal is trained, and that service animal will not disrupt workplace.
  - Documentation may not be available from healthcare provider so employer may need to consider other sources for documentation.



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### Scenario #4: What do I do now?

- Be prepared for issues to arise with other employees when strange or unusual accommodation request is granted.
  - For example, other employees may be allergic to animal.
    - Is that allergy disability what needs to be accommodated?

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### Scenario #4: What do I do now?

- Universal ban may be unreasonable. Consider other options: telecommuting, air cleaners, private offices, restricting animals from certain areas, changing paths in/out, changing areas of work for employee with allergy.



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### Scenario #4: What do I do now?

- Do not declare "undue hardship" without appropriate documentary support.
  - Undue hardship: "significant difficulty or expense incurred by a covered entity"
  - Certain factors **must** be considered before declaring proposed accommodation as unreasonable.



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### Scenario #4: What do I do now?

- Undue Hardship Factors:
  - Nature and net cost of the accommodation (taking into consideration availability of tax credits and deductions, or outside funding)
  - Overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources

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### Scenario #4: What do I do now?

- Undue Hardship Factors:
  - Overall financial resources of covered entity
  - Overall size of business of covered entity with respect to number of its employees
  - Number, type, and location of its facilities



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### Scenario #4: What do I do now?

- Type of operation or operations of covered entity, including composition, structure and functions of workforce, and geographic separateness and administrative or fiscal relationship of facility or facilities in question to covered entity
- Impact of accommodation upon facility operation, including impact on ability of other employees to perform their duties and impact on facility's ability to conduct business



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### Scenario #4: What do I do now?

- Key takeaways:
  - What is a reasonable accommodation for one employee is not reasonable for another
  - What is an undue hardship for one business is not for another
  - Every analysis is extremely fact-specific and cannot be taken lightly.



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### Questions?



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### Post-Webinar Survey



We want to hear from you!!



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## Sophisticated Employer Series

- 2016 Webinar Lineup Coming Soon!




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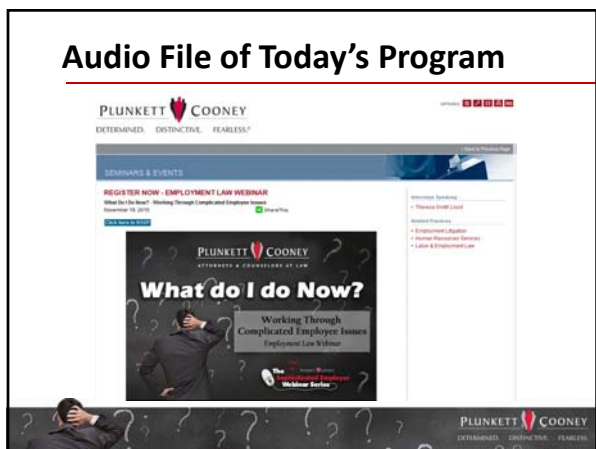
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## Audio File of Today's Program




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## Labor & Employment Blog



<http://www.plunkettcooney.com/blogs-thesophisticatedemployerblog>




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**Thank You!!**



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