Avoiding Employment Law Pitfalls
Presented by Elisabeth Kaylor
Assistant City Attorney
City of Arlington

Don’t let this happen to you…
“Mmmm…gummy Venus…”
More Bad Things...
- AstraZeneca pays $250,000 in Sex Discrimination Settlement
- Years Long Battle Against Walmart Heads to the Supreme Court
- Randstad US Charged with Discrimination for Denying Job to Man with Aspergers

What do defense attorneys look for in a “winning case”?
- Safety concerns (jury becomes the conscious of the community)
- Obvious signs of hostile work environment
- Employer breaking the bounds of common decency

- Inept Human Resources (or similar)
- Employer retaliation
- Quid Pro Quo Sexual Harassment
- Good Visuals (translates to Bad Visuals for the Employer)
- Trouble for the Squeaky Clean Employee
Possible Pitfalls
- Hiring Issues
- Lack of Documentation
- Breakdown of the System
- Discrimination Suits
- Employee Privacy

Hiring Issues
- Job postings
- Background Checks
- Credit Checks
- Prior Employers
- Interviewing
- Record reasoning in hiring/lack of hiring

Lack of Documentation
- I cannot repeat this enough: document well, document consistently!
- Actions without support= actions that can be attacked
- Spread the word!
  - Supervisor Liability: hold them accountable
Breakdown of the System

- A surprised employee = a litigious employee
- What are your supervisors doing?
- Is there trouble brewing somewhere?
- How much should legal interfere?
- *Parks and Recreation*

Discrimination Suits

- Be on the look out for all types
- Take complaints seriously
- Educate and enforce

Employee Privacy

- NLRB and Facebook
- *Quan* decision
- Social media policy
Escher v. BWXT

Overview: employee, military member, was termed by BWXT (contractor NNSA) for doing work for Naval Reserves while on the clock

Legal Argument: Escher alleged retaliation in violation of USERRA b/c he had filed two complaints re: company military leave time accounting right before he was terminated. BWXT argued they terminated for a justified reason. Courts agreed with BWXT.

Escher

Background:
- Escher had two complaints lodged against him, one vague and one specific. The more specific complaint yielded evidence of his working another job while at BWXT
- BWXT checked his internet use, email, and phones
  - Narrowly construed complaint that was vague

What the Manager Did:
- Talked to the employee to find out his angle; talked to his direct supervisor
- Compared his actions with those of other employees
- Bounced ideas of other managers and HR
Escher

Things that Could have Gone Better

- Manager had hesitation about firing Escher based on his military job (she was former military)
- Consulted higher-up re: decision (can affect your appeals)
- Escher’s supervisor gave him some leniency
- Common knowledge of misconduct

Escher

- Escher bore the burden to show protected status was a motivating factor in the adverse decision
  - Temporal proximity
  - Several decision-makers knew about his actions
  - Company was inconsistent in investigating the complaints
  - Disparate impact

Escher

- Summary judgment granted for the employer in district court and 6th Circuit
- Why the Employer Succeeded:
  - Consistent discipline
  - Manager owned the discipline
  - Well-documented
  - It also helped that there was little to no merit to Escher’s case
Leslie: Well, you can relax. All I’m going to do is go in and just say, "We're so sorry. It's entirely our fault."

City Attorney: No, no, no. You can't say any of that. It admits liability. You can't say "I’m sorry" or "I apologize." It implies guilt.

Leslie: That's insane. I have to apologize. Andy was a victim...

City Attorney: You can't say "victim".

Leslie: ...in an extremely unfortunate situation.

City Attorney: Can't say "unfortunate" and you can't say "situation".

Leslie: I can't say the word "situation"?

City Attorney: No. It implies there was a situation.