

Welcome to the 2009 Legal Issues Webinar Series



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Pretext Cases Under the ADA: Sound Business Decision or Discriminatory Action?

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Webinar Outline

- I. Overview of Employment Discrimination Law
 - A. Theories of Liability
 - B. Direct Evidence and Circumstantial Evidence
 1. *McDonnell-Douglas*
- II. Showing Pretext
 - A. Ways to Show Pretext
 - B. Honest Belief Rule
- III. Is Showing Pretext Enough?
- IV. Resources for Future Reference

Overview of Employment Discrimination Law

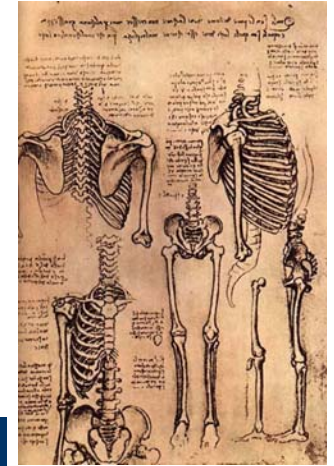


Protected Classes

Every U.S. citizen is a member of some protected class.

- Protected classes Under Title VII of the Civil Rights Act and Other Laws Include:
 - ❖ Race / Color (Title VII)
 - ❖ National Origin / Ancestry (Title VII)
 - ❖ Sex / Gender (Title VII)
 - ❖ Religion (Title VII)
 - ❖ Pregnancy (Title VII – As Amended by the PDA)
 - ❖ Age (ADEA)
 - ❖ Disability (ADA & Rehabilitation Act)

The Anatomy of an Employment Discrimination Lawsuit



- An employee or applicant files a Charge of Discrimination
 - ❖ With EEOC or approved state or local human rights or fair employment practices agency. **Note:** Strict Filing Timelines Apply.
 - ❖ **EEOC:** Mediation (if agreed) > Investigation > Conciliation (cause)
- If no resolution, the Charging Party may file a lawsuit after receiving a Notice of Right to Sue (90 days under ADA).
- **In Court:** Discovery – parties exchange evidence
 - ❖ After discovery, a party may move for “summary judgment.”
 - ❖ No genuine issue of material fact for the jury and only the judge should decide all questions of law.
 - ❖ Usually it is the employer who moves for S/J.
 - ❖ Settlement is more likely for employee’s who win on S/J.

Three Legal Theories of ADA Employment Discrimination

1. **Disparate treatment:** An individual claims they suffered an adverse employment action based on belonging to a protected class.
 - **Pretext:** Asserting a false reason or motive as a cover for the real reason or motive.
2. **Disparate impact:** An individual claims that a workplace rule that is neutral on its face, has a discriminatory impact on members of a protected class.
3. **Failure to provide reasonable accommodation:** Applies to religion and disability cases.

Disparate Treatment – In General

- **Justice Stewart:** “Disparate treatment’...is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.”
 - ❖ **Note:** Or on the basis of another protected class
 - ❖ **Issue:** Did disability motivate the employer's decision?
- “Proof of discriminatory motive is critical”
 - ❖ In some situations, motive “can be inferred from the mere fact of differences in treatment.”

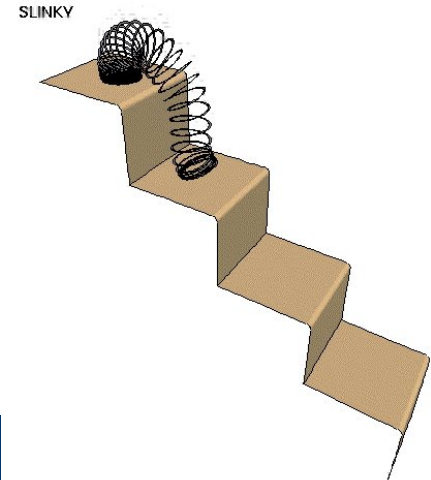
Proving Pretext – Burden Shifting & *McDonnell Douglas*

- **Step 1:** Employee must show he/she suffered an adverse employment action based on disability. In disparate treatment cases, adverse actions may include:
 - ❖ Failure to hire
 - ❖ Discipline / Demotion / Termination
 - ❖ Harassment
 - ❖ Retaliation
 - ❖ Loss of status or pay
 - ❖ Forced leave or reassignment



McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

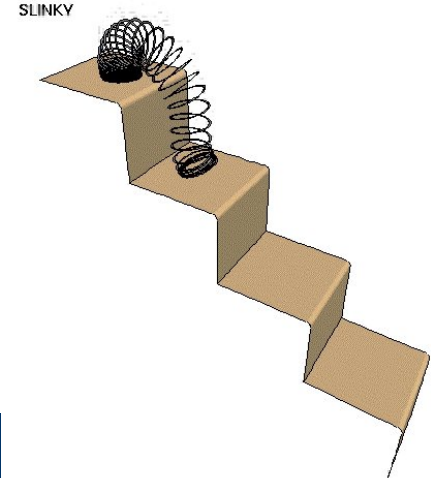
Proving Pretext: Step 2



- **Step 2:** Employer may rebut proof of disparate treatment by showing a legitimate, nondiscriminatory motive for its actions, such as:
 - ❖ Employee was not a person with a disability (or employer was unaware of a disability);
 - ❖ Employee was not qualified;
 - ❖ Company had a reduction in force;
 - ❖ Employee violated a consistently enforced policy that is job-related and consistent with business necessity.

See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Proving Pretext: Step 3



- **Step 3:** Plaintiff can still prove disparate treatment by showing that the employer's explanation is pretextual:
 - ❖ Testimony and cross-examination of witnesses;
 - ❖ Documentary and other produced evidence.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
- **Pretext:** “such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons ... that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.”

Trujillo v. PacifiCorp, 524 F.3d 1149 (10th Cir. 2008).

Proving Pretext: Indirect Evidence

Pretext is shown by Indirect (Circumstantial) Evidence

- **Direct Evidence:** Evidence that stands on its own to prove an alleged fact.
 - ❖ Employer comments, emails, observations, memos, ...
- **Indirect Evidence:** Uses inferences drawn from the evidence. Also called “circumstantial evidence”
 - ❖ **Used in Pretext Cases:** Inconsistent discipline, lack of employees with disabilities, increased oversight after disclosure, unfair negative performance reviews related to disability, ...
 - ❖ ...Circumstantial evidence... is sometimes even more persuasive than direct evidence.

Cases That May Involve Pretext

Pretext May Be Involved in:

- Failure to hire
- Wrongful termination
- Failure to accommodate
- Harassment
- Retaliation
- Hostile work environment

See EEOC Technical Assistance Manual on Title I of the ADA § 8.

The EEOC on Pretext

- **From EEOC TA Manual:** “Even if the respondent produces evidence of a legitimate, nondiscriminatory reason for the challenged action, a violation will still be found if this explanation is a pretext designed to hide the true retaliatory motive.
- Typically, pretext is proved through:
 - ❖ Evidence that the respondent treated the complainant differently from similarly situated employees or
 - ❖ Respondent's explanation for the adverse action is not believable.
 - ❖ If the respondent subjected the charging party's work performance to heightened scrutiny after she engaged in protected activity.

EEOC Examples on Pretext in A Retaliation Situation

- **Example 1:** Employee alleges that the the employer gave him a negative job reference for filing an EEOC charge.
 - ❖ Co. produces evidence that its negative statements were honest assessments of job performance.
 - ❖ No proof of pretext, and therefore no retaliation.
- **Example 2:** Same as Example 1, except there is evidence that the employer routinely declines to offer information about former employees' job performance.
 - ❖ Employer offers no credible explanation for violating this policy with regard to the employee.
 - ❖ Therefore, pretext is found.

Pretext May Be Shown By

Discipline-Related

- Disproving alleged performance problems
- Inconsistent discipline or documentation of problems.
- Employer departure from normal policies
- Shifting explanations by the employer
- Use of a double standard in productivity or discipline
- Targeting an employee for extra work or scrutiny, denying equal benefits, or other harassment.

Cases with these issues are cited in the Legal Brief that accompanies this webinar.

Pretext May Be Shown By

Disability-Related

- Admitting disability was a factor in decision making.
- Harassing or discriminatory language
- Evidence of bias, *e.g.*, concern about health-related matters or fear of customer reactions.
- Asserting that non-essential job functions are essential.
- Resistance to providing reasonable accommodations.
- Evidence of discrimination against others with disabilities.
 - ❖ Threats or warnings
 - ❖ Requiring fitness-for-duty exams or medical disclosures
 - ❖ Never hiring or terminating people with known disabilities

Pretext May Be Shown By

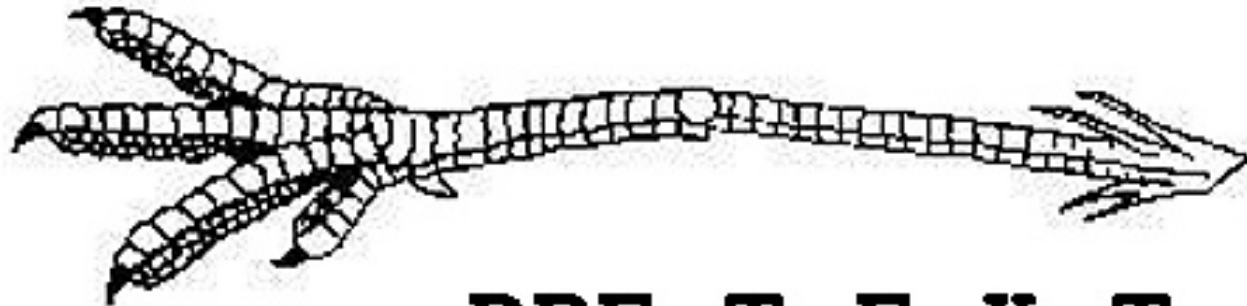
In General

- Improper or inconsistent selection processes.
- Evidence that an alleged layoff or reduction in force (RIF) did not really occur or was carried out in a discriminatory fashion.
- Lies, lies, lies
 - ❖ A hospital telling patients that doctor was unfit, then claiming reason they rejected doctor was his failure to attract patients.

Cases with these issues are cited in the Legal Brief that accompanies this webinar.

Showing Pretext

Welcome to ...



PRE T E X T

the discussion group on rhetorical theory

Showing Pretext: Many Ways But...

- “[T]here are innumerable different ways ... to prove intentional discrimination by means of indirect evidence [and] show that an employer's stated reason is pretextual and not its real reason. The plaintiff may not be forced to pursue any one of these in particular.”

Patterson v. McLean Credit Union, 491 U.S. 164, 218 (1989).

Showing Pretext: Two General Strategies

1. **More Likely Than Not:** Despite potential legitimacy of employer's reasons, it is still more likely than not that disability improperly motivated the employer's decision.
 - ❖ Partially concedes employer position.
 - ❖ Employers may have a "mixed motive" for a decision. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).
2. **No Basis in Fact:** Employee concedes nothing.
 - ❖ Employee shows that employer's claim is false; or
 - ❖ Shows that similarly situated non-disabled employees were treated differently for comparable behavior.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994).

More Likely Than Not: Suspect Timing

Temporal proximity between raising a disability-related issue and an adverse employment action may be evidence of discrimination.

- Employee with respiratory and speech impairments said he was having difficulty talking on the telephone.
- Call-center supervisor responded loudly, “If you're not taking calls there's no work for you to do here so you must be telling me that you're resigning.”
- However, telephone duties were later reassigned.
- Seven months later, employee was terminated.

Parker v. Verizon Pennsylvania, Inc., 309 Fed.Appx. 551, 553 (3rd Cir. 2009).

The Court in *Verizon* – Discriminatory Statements

- **Court:** No discrimination as statement was remote in time to termination.
- “[S]tray remarks...are rarely given great weight, particularly if they were made temporally remote from the date of decision.”
- Discriminatory remarks can show pretext depending on:
 - (1) the relationship between the speaker and the employee;
 - (2) the temporal proximity of the statements to the adverse employment action; and
 - (3) the reason for the statement.

Showing Pretext: Temporal Proximity and Suspect Timing

- A personal care aid at a nursing home was terminated days after disclosing a flare-up of her arthritis and her need for an alternative work schedule.
- At least one justified complaint had been filed against her prior to the disclosure.
 - ❖ Other employees were not terminated for similar complaints.
- **Court:** Suspicious timing was enough to send the case to trial.

Daoud v. Avamere Staffing, LLC, 336 F. Supp. 2d 1129 (D. Or. 2004).

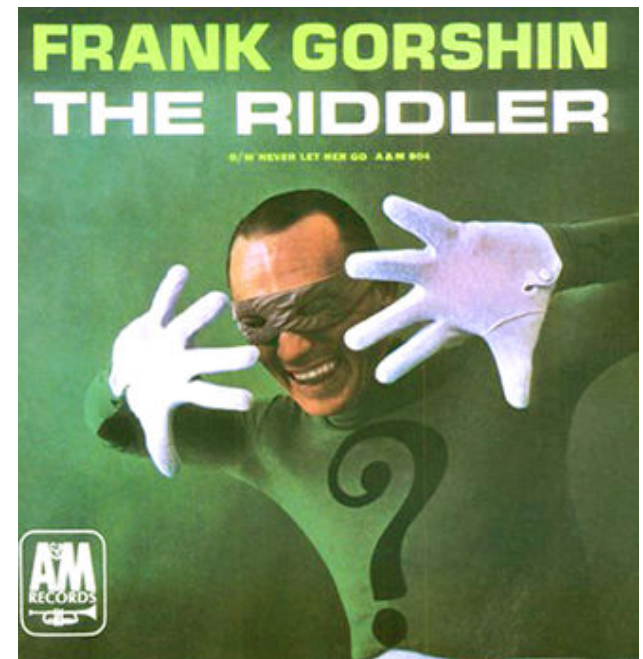
Showing Pretext: Temporal Proximity

- School superintendent was terminated after the board filed fifty-five disciplinary charges against her
- Charges were only leveled after client disclosed her breast cancer and began receiving chemotherapy.
- Employee was denied annual evaluations for the two years immediately after her treatment began.
- Court acknowledged the board's dissatisfaction may have been genuine.
- As charges were only filed after disclosure, there was enough evidence of pretext to send the case to trial.

Guglielmo v. Kopald, 2007 WL 1834740 (S.D.N.Y. 2007).

Pretext Cases Under the ADA:

Questions??



Showing Pretext: What's the Real Reason?

- **Employer:** Applicant not hired due to lies on medical form.
- **Interviewer:** Applicant not hired because of his disability.
- **Court:** Employer's reason was pretext.

Lentos v. Hawkins Const. Co., 2007 WL 3376760 (D.Neb. 2007).

- Transportation co. claimed that it did not hire a person with diabetes due to the lack of a prior work history.
- Hiring manager testified that she was free to waive the work history requirement whenever she desired.
- **Court:** Enough evidence of pretext to go to trial.

Lawson v. CSX Transportation, Inc., 245 F.3d 916 (7th Cir. 2001).

What's the Real Reason?

Dark v. Curry



- Heavy equipment operator with epilepsy had an aura before work but worked anyway.
- Had a seizure while driving but no one was hurt.
- Employer claimed that employee engaged in misconduct by driving after the aura.
 - ❖ Also argued employee was unqualified and a direct threat.
- Employer sent employee for a medical evaluation.
- **Court:** There was an issue of fact as an employer shouldn't "need a doctor's opinion to assess whether Plaintiff had engaged in misconduct."

Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006).

What's the Real Reason? Workforce Reductions

- A supervisor admission that disability played a role in a downsizing for economic reasons, this may be evidence of pretext.

Nodelman v. Gruner & Jahr USA Pub., 2000 WL 502858 (S.D.N.Y. 2000).

- If the economic downturn did not start until after Plaintiff's termination, this may be evidence of pretext.

Serwatka v. Rockwell Automation, Inc., 2007 WL 2441565 (E.D.Wis. 2007).

Showing Pretext: Falsity of Employer's Reason

- While the types of proof that can be offered to demonstrate the falsity of employer's proffered reasons are broad, they generally fit into two main categories:
 - (1) Proving that an employer is straight-out lying; or
 - (2) Comparing an employers' actions vis-à-vis an employee with disabilities to a similarly situated employees without disabilities.

Showing Pretext: Falsity of Employer's Reason

- Employee with one hand terminated for poor performance.
- Excellent performance reviews before termination.
- **Court:** Employee did “more than merely raise a skeptical brow” as to the employer’s real reason for the termination.
- Therefore, there were triable issues of fact.

Zierke v. Donnelley & Sons Co., 1997 WL 614390 (N.D.Ill. 1997).

- A pharmaceutical company claimed that it fired an employee for violating a corporate travel policy.
 - ❖ Plaintiff claimed he was excused from compliance with the policy.
- **Court:** Rejected plaintiff’s claim – lack of evidence.

Maslanka v. Johnson & Johnson, Inc., 305 Fed.Appx. 848 (3rd Cir. 2008).

Showing Pretext: Falsity of Employer's Reason

- Evidence of authoring poor performance reviews after making a termination decision, warrants a trial.
Lawrence v. National Westminster Bank NJ, 98 F.3d 61 (3rd Cir. 1996).

- If plaintiff was terminated for three write-ups but others were not, this may be evidence of pretext.
Horsewood v. Kids R Us, 27 F.Supp.2d 1279 (D.Kan. 1998).

- Evidence that an employee's performance reviews drastically worsened when her supervisor changed presented a question of pretext for a jury.
Lien v. Kwik Trip, Inc., 2007 WL 4820967 (W.D.Wis. 2007).

Showing Pretext: Employer's Discriminatory Statements

- Employee had a knee infection after surgery.
- **Supervisors:** They did not like the employee “gimping around” and he should “lose the crutches.”
- These comments undercut claims of poor performance.
Wilson v. Executive Jet Management, Inc., 2006 WL 495973 (S.D. Ohio 2006).

- Plaintiff who was missing two fingers on his left hand since birth, was denied a position in a local police department.
- Dept. claimed there were better qualified candidates.
- **Court:** There is a question of fact as those involved in his hiring process referred to him as a “cripple.”
Kreger v. Baldwin Borough, 2006 WL 456249 (W.D. Pa. 2006).

Falsity of Employer's Reason – Similarly Situated Employees

- When a company terminated an employee with cancer for running an unprofitable office and sending unprofessional emails, there is a question of pretext even though the employer's reasons were may be legitimate.
- Other employees who ran unprofitable offices and sent unprofessional emails were not terminated.
- **Court:** Plaintiff survives motion for summary judgment.
Kleeman v. Disaster Services, Inc., 2006 WL 572323 (M.D.Tenn. 2006).

- No pretext if plaintiff's emails were more sexually explicit than the emails of employees who were not disciplined.
Trnka v. Biotel Inc., 2008 WL 108995 (D.Minn. 2008).

Falsity of Employer's Reason – Similarly Situated Employees

- A pharmacy contended that it rejected an applicant with cerebral palsy because she admittedly could not count pills quickly and had communication barriers.
- Applicant showed that other pharmacists counted pills slowly and several had extremely thick foreign accents that posed communication barriers.
- **Court:** Denied the pharmacy's motion for summary judgment.

Thalos v. Dillon Companies, Inc., 86 F.Supp.2d 1079 (D.Colo. 2000).

Is Showing Pretext Enough?



Is Falsity of Employer's Explanation Enough? – The Honest Belief Rule

What if an employer honestly believes that his reasons are legitimate when those reasons are actually false?

- **One Hand:** The decision was inappropriate as the reasons for the adverse employment decision were false.
- **Other Hand:** If an employer honestly believed the reasons, it was not masking an unlawful motive.
 - ❖ “If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a ‘pretext.’”
 - No requirement of a “reasonable” belief.

The Honest Belief Rule – A Split of Circuits

- **Seventh Circuit View:** “Strict application” of “honest belief” rule.
- If an employer honestly believed the reasons behind its decision, even if those beliefs are foolish, trivial or baseless, the employee will lose.
- Where an employee who had trouble walking following knee surgery was terminated for baseless reasons, summary judgment for the employer was upheld as employer honestly believed that the employee had behaved fraudulently.

Kariotis v. Navistar International Transportation Corp., 131 F.3d 672 (7th Cir. 1997).

The Honest Belief Rule – A Split of Circuits

- **Sixth Circuit View:** Employer must demonstrate that its honest belief was reasonable.
- Chrysler terminated an engineer after discovering that he had narcolepsy that was not disclosed at application.
- There were questions as to whether the engineer was diagnosed prior to his application and whether he disclosed the condition to the employer.
- **Court:** Employer's honest belief must be "reasonable."

Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998).

The Honest Belief Rule – A Split of Circuits

- “[A]ctions ... [must] be grounded on fact and not ‘on unfounded fear, prejudice, ignorance, or mythologies...’”
- Even if facts are later proven false, employers are protected by the honest belief rule if reasonable reliance.
- Here, employer’s reliance on medical documentation indicating the engineer was diagnosed before starting with the company was reasonable.

Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998).

Supreme Court has not definitively sided with either opinion. However, under either approach, reasonable reliance on facts that justify termination will not be deemed pretextual.

Is Showing Pretext Enough? “Pretext Plus”

May a trier of fact find discrimination based solely on evidence of pretext with no evidence of unlawful motivation?

- The Supreme Court clarified the law in a 2000 decision rejecting the pretext-plus framework.
- A trier of fact could find for a plaintiff who showed pretext absent evidence of an employer’s true motivations.
 - ❖ “[I]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”
- If the totality of the evidence creates a prima facie case and demonstrates pretext, plaintiff can prevail.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Pretext Issues: Tips for Employees With Disabilities

- Document employer conduct that seems motivated by disability.
- Address inappropriate conduct and complain to supervisor in cases of harassment or discriminatory treatment.
- Provide proof of any injuries arising from an employer's wrongful conduct that was incurred during employment.
- Be aware of statute of limitations and filing requirements.

Pretext Issues: Tips for Employees With Disabilities

- Allege all possible applicable claims in all filings.
 - ❖ A plaintiff may waive “any failure-to-accommodate employment claim ... by calling his claim a disparate treatment claim.”

Timmons v. General Motors Corp., 469 F.3d 1122 (7th Cir. 2006);
See also, *Boldridge v. Tyson Foods, Inc.*, 280 Fed.Appx. 723 (10th Cir. 2008)(unpublished).

- ❖ *McDonnell Douglas* burden shifting analysis “does not make sense where the employer's reliance upon the employee's physical or mental impairment is obvious.”

Jeffrey v. Ashcroft, 285 F. Supp. 2d 583 (M.D. Pa. 2003).

Pretext Issues: Tips for Employers

- Train managers on the ADA and disability awareness, especially new hires.
 - ❖ Include disability issues in harassment and other training.
 - ❖ Have disability accommodation and harassment policies (with appropriate grievance procedures.)
- Properly defining essential job functions is important.
- Be consistent in treatment of employees
- Document all performance and safety issues.
- Make sure that reliance on information is reasonable.
- Centralized decision making can avoid inconsistent actions that may give rise to pretext claims.

Case for Discussion – Facts

- A bus mechanic is hard of hearing and meets SSA's definition of deafness although he has some hearing.
- Bus mechanic for 15 years; 5 years with this company.
- A new supervisor for the mechanic began last year.
 - ❖ Supervisor sometimes called the mechanic a “deaf doofus” or “Beethoven” and made other negative comments about hearing.
 - ❖ Would sometimes pretend to talk to mechanic without saying anything coherent to to confuse the mechanic.
 - ❖ Wrote up the mechanic three times in the past year for poor work.
- Mechanic never received write-ups before.

Case for Discussion – Facts

- Mechanic was also supervised by two other people
 - ❖ Received no write-ups from them.
- After the third write-up, mechanic was terminated via a letter he was handed by the owner of the company.
- He claims that other mechanics with more write-ups and with more serious infractions were not terminated.
 - ❖ Some were suspended or had their pay cut
 - ❖ Others received no discipline for their offenses.
 - ❖ Claims that his write-ups were for minor infractions that others commit without being written up.
 - ❖ Claims there are not consistently enforced policies.

Case for Discussion – Facts

- At EEOC, Bus Co. said: Supervisor decided mechanic was no longer qualified to work safely on buses.
 - ❖ Mechanic was unable to hear engine sounds or instructions.
 - ❖ Had a sloppy and “know-it-all” work ethic resulting in poor work.
 - ❖ Jeopardized the lives of people on the buses or roads.
- Other supervisors said that his work was adequate.
 - ❖ Mechanic occasionally made mistakes, as did other mechanics.
 - ❖ For this reason, there are many layers of checking the work before a bus leaves the repair station.
 - ❖ He was not the best mechanic but was probably in the top half of the mechanics at the company.

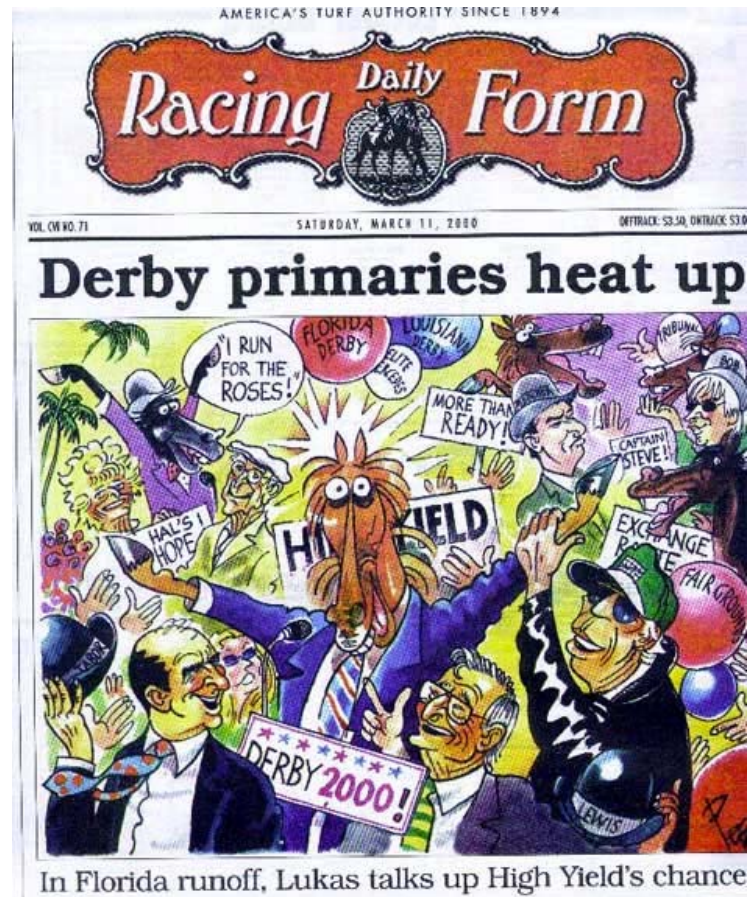
Case for Discussion – Facts

- Co. denied supervisor made improper statements
- Claimed discipline was handled uniformly
 - ❖ Admits there were no written guidelines for discipline
- EEOC found reasonable cause that discrimination occurred and issued a Notice of Right to Sue.
- Mechanic filed suit in federal district court.
- In court, co.'s discovery answers stated that the owner of the company made the termination decision.
 - ❖ Based his decision on information from all the supervisors and complaints from other mechanics.

Case for Discussion – Discussion Questions

- Identify the issues and facts that may be relevant to proving, or disproving pretext.
- Is it important whether the supervisor or owner made the termination decision?
- What issues are raised by the discovery answers?
- How does the company's handling of discipline factor into the situation?
- Are other ADA issues relevant?

Resource Information





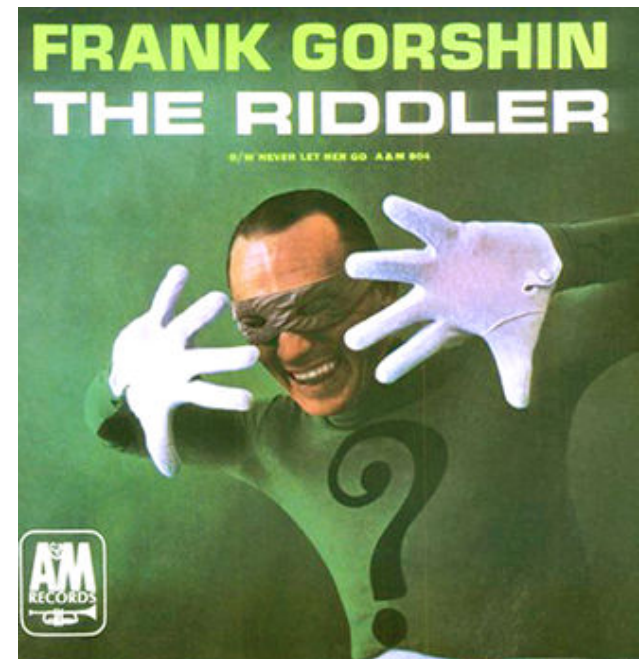
Resources



- **DBTAC: Great Lakes ADA Center** - www.adagreatlakes.org; 800/949 – 4232(V/TTY)
- **Equip For Equality** - www.equipforequality.org
800/537-2632 (V); 800/610-2779 (TTY)
- **Illinois ADA Project** - www.ADA-IL.org;
877/ADA-3601 (V); 800/610-2779 (TTY)
- **Advocacy Inc.** - www.advocacyinc.org;
(512) 454-4816 (Voice/TDD)
- **Job Accommodation Network** - www.jan.wvu.edu
- **Equal Employment Opportunity Commission (EEOC)**
www.eeoc.gov

Pretext Cases Under the ADA:

Questions??



Pretext Cases Under the ADA: Sound Business Decision or Discriminatory Action?

The End

Thank you for Participating In Today's Session



Please join us for the next session in this series.

The dates and subjects for upcoming Webinars will be
announced soon.

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http://www.formdesk.com/idealgroupinc/dbtac_evaluation_pretext_cases

