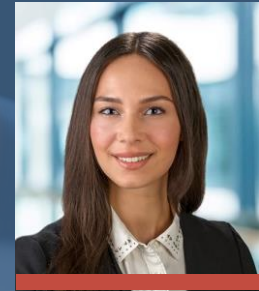


# Workplace Conduct Update



**Ashley Manfull**  
ammanfull@vorys.com



**Samia Shaheen**  
sashaheen@vorys.com

# Employee NLRB Rights – Section 7 and 8

**We don't have unions – I can zone out now...**



**WRONG!**

# Protected Concerted Activity

**Section 8(a)(1)**: It is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7.

## What is Section 7???

# Protected Concerted Activity

**Section 7:** Employees shall have the right to:

- Self-organization;
- Form, join or assist labor unions;
- Bargain collectively through representatives; and
- ***Engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection...”***

# Protected Concerted Activity



# Concerted: Mutual Aid & Protection

- Group complaints/action
- Individual acting with authority of others
- Individual preparing for group action
- Individual trying to induce group action
- Individual activities that are the “logical outgrowth” of collectively expressed concerns
- **Does not include: Purely individual gripes and grievances**

# Who/What is Protected?

- Only “employees” (includes job applicants) – not supervisors
- Union and non-union employees
- Union activity and non-union activity in the workplace
- Group and some solo activities

# Examples

- Talking with co-workers about wages, benefits, working conditions
- Circulating a petition asking for better hours
- Participating in a group refusal to work in unsafe conditions
- Joining with co-workers to talk to your employer, to a government agency, or to the media about problems in the workplace.

[www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/concerted-activity](http://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/concerted-activity)



# Original Pro-Employee NLRB Test

## **History of Concerted Protected Activity:**

*Meyers I and Meyers II* (1986) – test in effect almost 30 years:

Board reviewed “totality of the circumstances” to decide if individual employee conduct amounted to concerted activity

# Trump Era Pro-Employer Test

- *Alstate Maintenance, LLC* (2019):
  - Adopted checklist of 5 “relevant factors” to determine whether employee complaint in the presence of other employees was concerted activity
  - Required solo conduct to be accompanied by evidence of group activities occurring at the same time, or prior to, the solo action
  - Holding: Employee complaint to management in front of coworkers about customer’s cheap tipping later led to coworkers walking away when customer later sought assistance --> Board held employee’s statement was a personal grievance, not a group complaint

# Biden Era Return To Pro-Employee Test

- *Miller Plastic Products* (8/25/23)
  - Reverses Trump-era test; Return to “totality of the circumstances test”
  - Holding:
    - Employee engaged in protected concerted activity when he criticized employer’s decision to remain open at start of COVID pandemic during a company-wide meeting & later asked questions about company’s decision in a 1:1 meeting with supervisor

# Miller Plastics – Key Holdings

- Events after employee's solo action can be “objective evidence” that employee sought to initiate, induce or prepare for group action;
- Employee questions (not just protests) can be a method of inducing group action;
- Both explicit and implicit calls to action are protected;
- Activity “that at inception involves only a single speaker and a listener” (such as 1:1 meeting with supervisor) can be protected

# Fred Meyer Stores, Inc. (5/3/23)

- **ALJ decision:** Employees engaged in protected concerted activity by wearing BLM buttons and masks, even though not directly related to terms/conditions of employment
  - Dress code policy forbid unauthorized buttons or slogans with some exceptions for special promotions like Relay for Life & LGBTQ Pride – enforcement of dress code was inconsistent
  - Judge held wearing BLM slogans & discussing racial prejudice constituted protected activity for purposes of mutual aid/protection

# Fred Meyer Stores, Inc. (5/3/23)

- Other considerations:
  - Because uniforms were required – negotiations about or concerted refusals to follow the policy were protected activities
  - Judge also considered inconsistent past application of dress code; CEO's public support for BLM movement; and effect racial discrimination may have on working conditions

# Practical Take-Aways

- Complaints about work-related issues should be cautiously reviewed when:
  - Employee complaint uses “we,” “us” or other “group” words
  - Conduct solicits support or action from others
  - Conduct implicates treatment of others – not just the individual
  - Conduct prompts expressions of agreement/support/encouragement from others
- Group concern or individual gripe? Hard to know based on new *Miller Plastics* ruling
- Consider what’s driving “insubordinate” behavior

# Protected Concerted Activity





# Protected Concerted Activity

- *Lion Elastomers LLC, 372 NLRB 83 (5/1/23)*



What if the employee isn't so nice about it?

# Protected Concerted Activity

- *Lion Elastomers* overruled 2020 Trump-era *General Motors LLC* decision.
- Trump-era test: If employee behaves inappropriately – would employer have imposed the same discipline regardless of the protected activity?
  - **Employer's motive for the discipline was key**

# Protected Concerted Activity

- *Lion Elastomers* test:
  - Abrasive or inappropriate conduct while engaging in otherwise protected activity is permitted – **unless the conduct is “extreme”**
  - 1974 S.Ct. holding: Labor disputes are often “heated affairs”; federal law “gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.”

# Protected Concerted Activity

- Key Points from *Lion Elastomers*:
  - Employees engaging in protected concerted activities have **more protection** than employees acting on their own – even though engaging in the same misconduct
  - **Employer’s motive / good faith is “immaterial”**
  - “Elevation of ‘civility’” as a “supposed goal” gives employers dangerous discretionary power over employees who exercise statutory rights in opposition to employer’s interests

# Protected Concerted Activity

- **Dissent highlights prior Board Rulings leading to absurd results:**
  - Employee protected where she shook her finger within striking distance & continually screamed “I can say anything I want”; “I can do anything I want.” (*Postal Service*, 364 NLRB 701 (2016))
  - Employee protected where he posted on FB that manager is “such a NASTY MOTHER F\*\*\*\*\* don’t know how to talk to people!!!! F\*\*\* his mother and his entire f\*\*\*ing family!!! Vote YES for the Union!!!!” (*Pier Sixty*, 362 NLRB 505 (2015))
  - Striker protected where he said “F\*\*\* you [N word]” to a black security guard while gesturing with both middle fingers. (*Airo Die Casting*, 347 NLRB 810 (2006))

# Protected Concerted Activity



# Acting on Behalf of Non-Employees

- *American Federation for Children, Inc.* (8/31/23)
  - Found concerted activities by employees on behalf of non-employees are protected when it can also benefit the employees
  - Overruled 2019 Trump-era *Amnesty International* holding that mutual aid/protection didn't include acts by employees on behalf of non-employees

# Acting on Behalf of Non-Employees

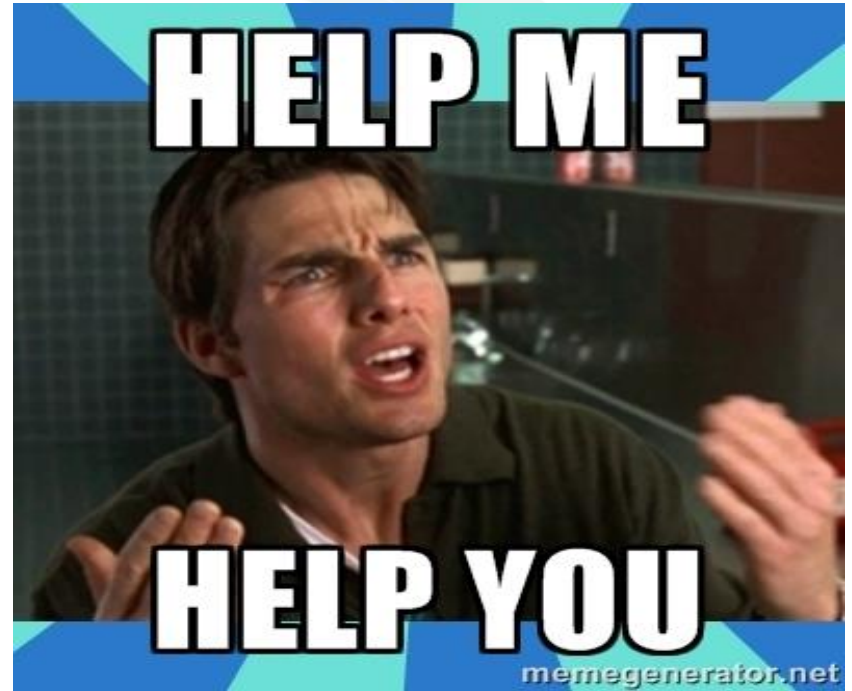
- *Am. Federation* facts:
  - Employee sought coworkers' support in ensuring rehire of former coworker who was waiting for renewal of her work authorization status
  - Coworkers reported that the employee was calling managers “racist” while trying to drum up support
  - Employee resigned after facing termination for creating a “toxic atmosphere”



# Acting on Behalf of Non-Employees

- *Am. Federation* Holding:
  - Solo efforts were protected because employee tried to induce other employees to join her;
  - Former employee was an “employee” under NLRA because she sought to be rehired – therefore a “job applicant”;
  - Former employee’s immigration status was irrelevant to her employee status;
  - Employee’s advocacy for former employee’s return was for mutual aid/protection because it would benefit both of them

# Acting on Behalf of Non- Employees



# Acting on Behalf of Non-Employees

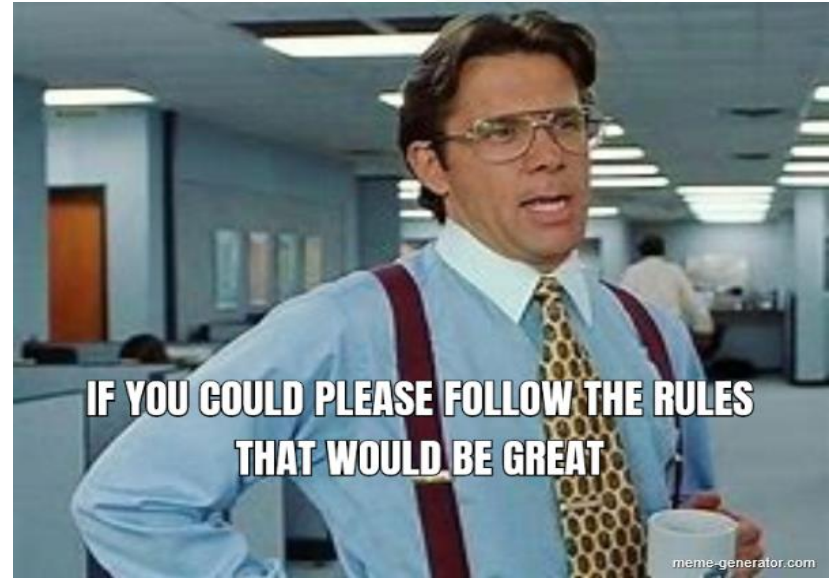
## “The Solidarity Principle”

- NLRB affirmed principle that employees may help themselves by helping non-employees
  - By directly improving their own terms/conditions of employment or
  - By creating the *possibility* of future reciprocal support from others

# Employee Handbook Rules



# NLRB Levels Employee Handbook Rules



# Handbook Rules Under Attack Again

Tide is turning: NLRB liberal majority continues overturning pro-employer tests

**Original NLRB test:** *Lutheran Heritage Village-Livonia*,  
343 NLRB 646:

*Rules that don't explicitly target employee rights may still violate the NLRA if employees would "reasonably construe" them to interfere with their rights.*

# Handbook Rules in the Obama Era

- During Obama Era – standard was used to strike standard handbook rules like:
  - Restricting video / audio recordings
  - Disruptive behavior
  - Speaking to the media

# Handbook Rules in the Trump Era

- Republican NLRB majority in 2017 eliminated *Lutheran Heritage* Standard – adopted new pro-employer test:

- *Boeing* decision:

*New test **balanced** the handbook rule's potential impact on employees' NLRA rights and the employer's "legitimate justifications" for the rule*



# Handbook Rules in the Biden Era

- ***Stericycle Inc.*, 372 NLRB 113 (8/2/23)**
  - Democrat majority rescinded Trump-era business-friendly rule
  - Evaluate handbook rules through the eyes of “an employee who is economically dependent on the employer”

# Stericycle Standard for Handbook Rules

- **NLRB will now review validity of a rule based on how the employee would understand it.**
  - Employees who are dependent on employers for their paychecks are more cautious & likely to interpret a rule “*more broadly than a neutral third party might.*”

# New Stericycle Standard

- **Employers no longer get benefit of the doubt:**
  - What an employer *meant* the rule to accomplish is “immaterial”
  - Rule will be presumptively unlawful if worker could reasonably interpret it to have a coercive meaning – even if there’s another reasonable reading of the rule that isn’t coercive

# New Stericycle Standard

- Any ambiguity in a work rule will be construed against the drafter (You)
- “Whether some hypothetical employee only sometimes, or even never, contemplated Section 7 activity is immaterial”
- The Board can challenge a work rule even if the employer does not apply it to an employee

# New Stericycle Standard

**If rule is presumptively unlawful – Employer must prove:**

- (1) Legitimate & substantial interest in maintaining the rule; and
- (2) That interest could not be achieved with a more narrow rule.

# New Stericycle Standard

- Handbook rules at issue in *Stericycle*:
  - Requiring employees to keep harassment allegations confidential;
  - Preventing employees from taking actions that could hurt the company's reputation

# Handbook Rules Now Under Scrutiny

- Non-disparagement of products, services, managers, employees, etc.
- Insubordination
- Workplace civility
- Fraternalization
- “Inappropriate” or “disrespectful” behavior
- Disclosure of confidential information (without adequate definitions)

# More Handbook Rules Under Scrutiny

- Contacting/speaking with the media
- Use of recording devices; taking pictures in the workplace
- Posting information that “could damage the reputation of the Company”
- Use of Company logos, trademarks, etc.
- Dress codes
- All things social media



# Practical Take-Aways

- Are your handbook policies overly vague/subjective?
  - Ensure rules on conduct, social media and speech are narrowly tailored, if possible
  - Consider adding Section 7 disclaimer
- Review policies through employees' eyes
- Don't assume traditionally "insubordinate" behavior isn't protected
- Engage with employees on workplace issues.
- Be practical – Don't allow chaos

# Harassment in the Workplace



# Harassment in the Workplace

- **EEOC “Proposed Enforcement Guidance on Harassment in the Workplace”**
  - Published in Federal Register on 10/16/23
  - 144 pages with footnotes
  - Open for public comment through 11/1
  - Approved 3-2 by commissioners
  - Provides ‘clarity’ on new legal developments
  - Original guidance published in 1990s

# EEOC Harassment Guidance

## **Establishing causation:**

“Harassment need not explicitly refer to a protected characteristic to be based on that characteristic where there is other evidence establishing causation.”

- Review totality of circumstances

# EEOC Harassment Guidance

- Facially discriminatory conduct
  - Conduct that explicitly insults/threatens based on protected class
  - **Does not have to be directed at a particular worker nor do all workers in that protected class have to be exposed to the conduct**
    - Ex) degrading workplace comments about women in general - even if not related to specific female employee - show anti-female animus.

# EEOC Harassment Guidance

- Facially discriminatory conduct

## **Example**

- 2 employees work in open-cubicle office environment & often make derogatory comments about gay men & lesbians
- Horatio (who is gay) overhears the comments & is offended, even though not directed at him
- Based on these facts – Horatio is the victim of facially discriminatory harassment even though not specifically targeted by the comments

# EEOC Harassment Guidance

- Conduct not directed at Complainant
  - Doesn't need to be – but the more it directly it affects complainant, the more likely to be hostile work environment
  - Offensive conduct directed at others in complainant's protected class can contribute to HWE for complainant
    - Even if outside of complainant's presence so long as he becomes aware of it & it's sufficiently related to his work environment

# EEOC Harassment Guidance





# EEOC Harassment Guidance

- Unlawful Stereotyping - Examples
  - Sex-based assumptions about family responsibilities;
  - Suitability for leadership roles;
  - Expression of sexual orientation / gender ID;
  - Retirement expectations

# EEOC Harassment Guidance

- Unlawful Stereotyping
  - **“Such stereotyping need not be motivated by animus or hostility toward that group”** (seems at odds with harassment definition)
  - In some cases: terms not seemingly discriminatory when viewed in isolation may operate as “code words” showing an intent to discriminate within larger context
    - “You people”; “boy” – cited as examples

# EEOC Harassment Guidance

- Comparative Evidence
  - Evidence showing “qualitative and/or quantitative differences in conduct directed at individuals in different groups can show an inference of harassment
    - Examples
      - held to higher performance standards;
      - lack of same flexibility given to other employees
      - hostility/aggression

# EEOC Harassment Guidance

- Off Duty Social Media
  - “Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace.”

# EEOC Harassment Guidance

- What makes it a hostile work environment?
  - If no explicit change in terms/conditions of employment: Conduct must be sufficiently “severe or pervasive to create an objectively and subjectively hostile work environment.”

# EEOC Harassment Guidance

- **Remember: Severe OR Pervasive – not both**

## **Severe**

Violence

Physical touching

Level of authority

## **Pervasive**

Number of incidents

Timeframe

Happened to others

# EEOC Harassment Guidance

- **Not a general “civility code”**
  - no protection for “run-of-the-mill boorish, juvenile, or annoying behavior”
  - Conduct must be “more than merely offensive” – but not required to cause psychological harm
  - Review totality of circumstances

# EEOC Harassment Guidance

- Irrelevant that victim continued to perform well
  - Sufficient that the harassment made it more difficult for reasonable person in the situation to do the job



# EEOC Harassment Guidance

- Subjectively Hostile Work Environment
  - *In general*, Complainant's own statement is enough
  - If individual complained → logically follows they thought the conduct was hostile
  - Complainant's subjective perception can change over time – what once was welcomed might now be unwelcomed
  - **Fact that an employee tolerated – or even participated in – the conduct is not dispositive**
    - Victim may have felt no other choice but to “go along to get along”

# EEOC Harassment Guidance

- Objectively Hostile Work Environment
  - Reasonable person in employee's position would find the conduct hostile
  - Look at surrounding circumstances, expectations, relationships
  - **Requires “appropriate sensitivity to social context” – from perspective of a reasonable person of complainant's protected class**
    - Ex) Allegation of Hispanic harassment evaluated from perspective of reasonable Hispanic person; LGBTQ harassment evaluated from perspective of reasonable LGBTQ person, etc.

# EEOC Harassment Guidance

- **Employer's Affirmative Defense**

- (1) Employer acted reasonably to prevent & promptly correct harassment; and
- (2) Employee unreasonably failed to use employer's complaint procedure or take other steps to avoid/minimize harm

# EEOC Harassment Guidance

- Remember: Affirmative Defense not available if supervisor takes *tangible employment action* as part of hostile work environment
  - Automatic liability
  - No defense

# EEOC Harassment Guidance

- Showing your anti-harassment policy is effective:
  - Defines what conduct is prohibited
  - Widely disseminated
  - Comprehensible to workers
  - Requires supervisors to report harassment
  - Give multiple avenues for reporting harassment
  - Identifies accessible points of contact to report harassment
  - Explains complaint process

# EEOC Harassment Guidance

- Showing your complaint process is effective:
  - Provides for prompt / effective investigations and corrective action
  - Provides adequate confidentiality protections
  - Provides adequate anti-retaliation protections

# EEOC Harassment Guidance

- Showing your training is effective
  - Explains harassment policy & complaint process
  - Describes / provides examples of harassment
  - Provides info on employee rights if they experience, observe, learn of, or report harassment;
  - Provides info to supervisors/managers on how to prevent, ID, stop, report & correct harassment
  - Tailored to the workplace & workforce
  - Regularly provided to all employees; and
  - Clear, easy to understand format

# EEOC Harassment Guidance

- Employee Failure to Use Complaint Process
  - Reasonableness of failure to report, or delayed timing, depends on particular circumstances
  - Failure to use complaint procedure may be reasonable if based on a reasonable belief that complaint process was ineffective
  - **Generalized fear of retaliation, standing alone, isn't a reasonable basis** – but could be reasonable if facts show basis for potential retaliation



# EEOC Harassment Guidance

- Adequacy of your investigation
  - Sufficiently thorough to arrive at “reasonably fair estimate of truth”
  - Trial-type investigation not needed
  - Conducted by impartial party well-trained in interviewing witnesses/evaluating credibility
  - Get info from all parties involved
  - Alleged harasser shouldn’t have direct/indirect control over investigation
  - Conflicting versions of events: Conduct credibility assessments

# EEOC Harassment Guidance

- Appropriate corrective action
  - Designed to stop harassment & prevent it from continuing
  - Proportionality
  - Heightened responsibility to protect employees against abuse of power
  - Ensure harassment stops (key factor!) – continue to monitor the situation
  - No additional burden on complainant
  - Extent to which harassment was substantiated

# EEOC Harassment Guidance

- Inconclusive Investigation

“An employer is not required to impose discipline if, after a thorough investigation, it concludes that the alleged harassment did not occur, or if it has inconclusive findings.”

- BUT – consider preventative measures like counseling, training, monitoring, general workforce reminders

# EEOC Harassment Guidance



# EEOC Harassment Guidance

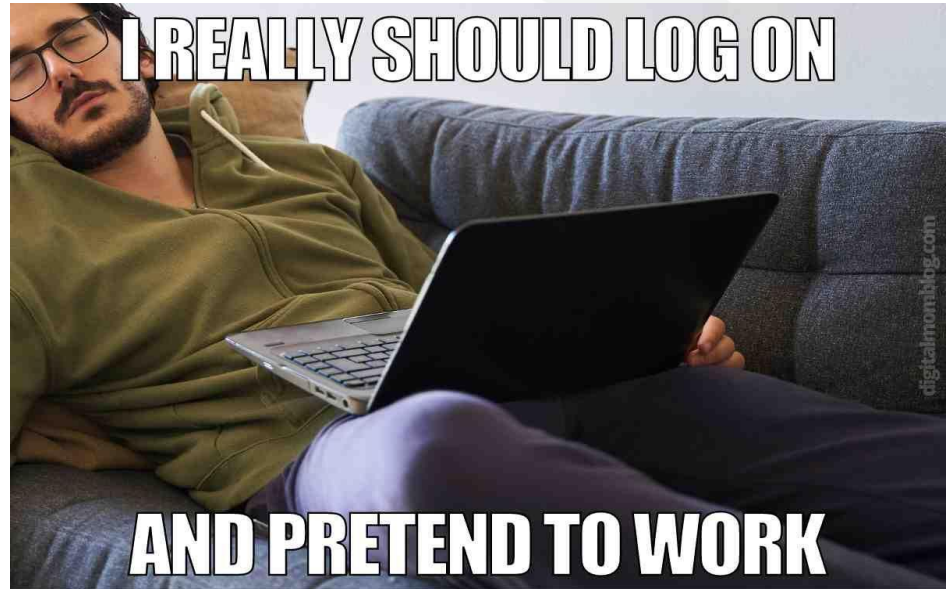
- Huh?

“Although an employer cannot be found liable for conduct that does not violate federal EEO law, the duty to take corrective action may be triggered by notice of harassing conduct that has not yet risen to the level of a hostile work environment, but may reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.”

# The WFH Accommodation



So Many Memes  
to Choose  
From...



# The WFH Accommodation

- **Minerva Z v. McDonough (EEOC 2022)**: where EE's doctor said EE needed 3 days of telework per week, providing 2 days not a reasonable accommodation where employer didn't seek information on whether that would be effective.
- **Oliver M. v. Fudge (EEOC 2022)**: EE not entitled to FT remote work where there was no medical evidence establishing it was "required" for EE to perform essential job functions.
- **Jona v. Pompeo (EEOC 2020)**: EE only entitled to "situational" telework, not FT telework, where she didn't prove FT telework was needed for her medical conditions.
- **Brunckhorst v. City of Oak Park Hts (8<sup>th</sup> Cir. 2019)**: EE not entitled to WFH where restrictions didn't state he "must" work from home – even if "easier," not required to accommodate EE's preference.



# How Do We Know of Need for Accommodation?

- **Sublett v. Masonic Homes of KY (6<sup>th</sup> Cir. 2022)**: Where EE failed to notify employer that her granted accommodation wasn't working, she didn't adequately request reasonable accommodation.
- **Collier v. City of Memphis (6<sup>th</sup> Cir. 2021)**: EE on STD leave was required to request reasonable accommodation if needed to RTW. Burden not on ER to contact him.
- **Zachery v. Kendall (EEOC 2022)**: ER not obligated to provide accommodation to EE who never asked for it. Rejecting EE claim that ER "should have known" because job application included military discharge for personality disorder.

# ADA Interactive Process

## When It's NOT Needed:

### 1. **Employee admits it's not needed**

**Edwards v. WellStar Medical (11<sup>th</sup> Cir. 2022)**: Where EE with depression/anxiety admitted she could perform all essential job functions, no accommodation needed.

**Payne v. Cornell Univ. (2d Cir. 2022)**: EE failure to accommodate claim undermined by admission to ER that accommodations she was given were “working fine.”

# ADA Interactive Process

## 2. Employee Cleared To Work with No Restrictions

**Conlan v. Costco (9<sup>th</sup> Cir. 2022):** No duty to engage in interactive process where employee's doctor returned him to work without restrictions.

**Hudson v. Tyson Farms (11<sup>th</sup> Cir. 2019):** Holding ER didn't fail to provide reasonable accommodation where EE's doctor returned her to work with no restrictions.

# ADA Interactive Process

## When It IS Needed:

### **Enough info given to suspect a disability**

**Tomlinson v. Krauss-Maffei Corp. (6<sup>th</sup> Cir. 2023)**: holding EE initiated interactive process by stating he couldn't work with his supervisor because of PTSD.

**McCray v. Wilkie (7<sup>th</sup> Cir. 2020)**: holding interactive process triggered when EE informed supervisor that the company van was causing him pain while driving.

# ADA Interactive Process

## Compare:

**Hrdlicka v. GM (6<sup>th</sup> Cir. 2023)**: EE transfer request because she disliked her current department and the people in it was insufficient.

**Behm v. Mack Trucks (3d Cir. 2023)**: Insufficient notice where EE requested shift change due to scheduling conflicts with picking up her kid, not a medical condition

**Mueck v. La Grange (5<sup>th</sup> Cir. 2023)**: EE's request for shift change to attend court-ordered substance abuse classes after DUI conviction reasonably interpreted as dealing with legal consequences, not a disability.

# Final Words of Wisdom...



# Thank You



**Ashley Manfull**  
ammanfull@vorys.com



**Samia Shaheen**  
sashaheen@vorys.com