



Singin' the HR Blues

2017 NNAHRA Annual Conference Cherokee, NC

Wednesday, September 27, 2017 | 8:30-10:00 AM

Presented by

Drummond Woodsum's Indian Nations
Labor & Employment Group

Daniel J. Rose, Esq. (*Lead Vocal*)
S. Campbell Badger, Esq. (*Bass*)
Anna B. Cole, Esq. (*Harmony*)

NOTES

I. WHAT IS EMPLOYMENT DISCRIMINATION?

A. DEFINITIONS

1. **Employment Discrimination:** Adverse action taken by an employer on the basis of (or because of) an individual's trait or activity that is given protection by law.
2. **Adverse Employment Actions:** Treating one employee differently than other employees in an adverse manner (e.g., failing to hire, disciplining, demoting, suspending, or terminating.)
3. **Protected Traits:** Classifications or traits that, as a matter of public policy, should not be considered by employers when taking adverse employment actions (e.g., sex [including sexual harassment and pregnancy], race, color, ancestry, religion, national origin, age, disability, military service, union activities).
4. **Protected Activities:** Activities protected under law (e.g. assisting someone in complaining about unlawful discrimination, or using protected leave [like family medical leave]).
5. **Adverse Employment Actions in Retaliation Claims:** Any action that might deter a reasonable person from engaging in protected activities.

B. FORMS OF DISCRIMINATION

1. **Disparate Treatment:** Treating one employee differently than others based on a legally protected trait or activity.
2. **Disparate Impact:** Requiring a test or using a hiring standard that has the effect of discriminating against a protected class without a bona fide basis.
3. **Harassment:** Conduct, related to a protected trait or activity, that has the purpose or effect of substantially interfering with an employee's ability to perform their job or that creates an intimidating, hostile, or offensive work environment.

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Sexual Harassment – Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual; or
- c) Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

- 4. Retaliation:** Adversely affecting an employee's terms and conditions of employment because the employee asserted a claim or assisted another employee in asserting a claim of discrimination.

Making Out of Prima Facie Case

To allege a discrimination claim, the complainant must show:

- i) That he or she is a member of a protected class or engaged in a protected activity;
- ii) That he or she was subject to an adverse employment action; and,
- iii) That the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

Burden Shifting In Discrimination Cases

If the complainant can make out a prima facie discrimination the burden shifts to the employer to show one of the following, depending upon the type of discrimination alleged:

Standard 1 – Pretext Test

Employer must show it had a legitimate, non-discriminatory reason for the adverse employment action.

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If the employer meets its burden to show a legitimate non-discriminatory reason, the employee must prove that the legitimate, non-discriminatory reason is a pretext.

Standard 2 – Mixed Motives Test

Employee must prove only that the discrimination was a “motivating” factor in the adverse employment action, even though other factors played a role.

Employer must show that, although the protected trait or activity was one reason for the adverse action, it was not the motivating factor, i.e., the Employer must show it would have made the same decisions even in the absence of the impermissible discriminatory factor.

Standard 3 – “But for” Test

Employee must prove that “but for” the retaliatory motive, the employer would not have taken the adverse action.

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10 SUGGESTIONS FOR INVESTIGATING EMPLOYEE MISCONDUCT

Performing a proper investigation of a complaint against an employee is essential in order to discover the truth, make informed discipline decisions, and protect the rights of both complainant and employee. To be effective, investigations must be well-planned and performed with deliberation. After acting to protect the safety of individuals and property, an employer should determine who will investigate and the scope of the investigation.

1. **RECEIPT OF THE COMPLAINT: TIMELY TRIAGE IS CRUCIAL**
2. **UNDERSTAND THE LEGAL CONTEXT: KNOW THE RULES**
3. **PROTECT THE STATUS QUO**
4. **PLAN THE INVESTIGATION**
5. **CONDUCT THE INVESTIGATION**
 - a) Review documents beforehand.
 - b) Location of the interview
 - c) Interview each employee individually if you can.
 - d) The same investigator should conduct all interviews.
 - e) Commencing the interview
 - f) Recording the interview
 - g) Order of interviews
 - h) Scope of questions
 - i) Ask the hard questions.
 - j) Understand the setting.
 - k) Ending the interview
6. **MAKE THE DECISION (ABOUT WHAT HAPPENED – NOT ABOUT WHAT THE EMPLOYER SHOULD DO)**

NOTES

7. DRAFT A WRITTEN REPORT ABOUT THE FACTS (NOT ALWAYS)
8. DETERMINE DISCIPLINE/ACTION, IF ANY
9. DRAFT COMMUNICATION WITH EMPLOYEE INVOLVED
10. COMMUNICATE WITH EMPLOYEE & FILE



Daniel J. Rose

Attorney

207.253.0537 Direct
207.772.3627 Fax

84 Marginal Way, Suite 600
Portland, ME 04101-2480

drose@dwmlaw.com

PRACTICE AREAS

Employment & Labor

Collective Bargaining

Indian Law

Indian Nations Labor &
Employment

Tribal Business Enterprise
Group

School & Education

School Employment

Health Care

Municipal Law

Maritime Law

EDUCATION

Boston College Law School,
J.D., 1989

Hamilton College, B.A., 1984

BAR & COURT ADMISSIONS

Maine

New Hampshire

U.S. District Court, District of
Maine

U.S. District Court, District of
New Hampshire

Dan Rose is Drummond Woodsum's Practice Group Leader for Labor and Employment. His practice focuses on the representation of private and public entities and Indian Tribes in employment and labor matters on a national level, including compliance with discrimination laws, wrongful discharge, wage/hour issues, workers' compensation discrimination, litigation and negotiations. He is active in representing employers before various federal and state agencies, including the National Labor Relations Board, the Maine Human Rights Commission, the Unemployment Compensation Commission, and the Maine Labor Relations Board, as well as in arbitration and employment litigation in both federal and state courts. Dan has consistently been recognized by national and regional publications which rate labor and employment lawyers including Best Lawyers in America, Chambers USA, and New England Super Lawyers. He is an elected Fellow of The College of Labor and Employment Lawyers, the highest recognition by colleagues of sustained outstanding performance in the field of labor and employment law.

In addition to representing private sector employers and Indian tribes nationally, Dan represents school districts and other public entities throughout the State of Maine and New Hampshire on a full range of legal matters.

Dan is editor of "Litigating the Employment Tort Case," published by the American Bar Association.

Dan presents on employment topics nationally and provides seminars for individual clients. He is a co-author of Maine School Law (Fourth Edition 2012) and Significant Cases in Maine School Law (Second Edition), and has served as an instructor for school law courses offered by the University of New England and the University of Southern Maine.

U.S. Court of Appeals for the
First Circuit

Little River Band of Ottawa
Indians Tribal Court

Snoqualmie Tribal Court

While in law school, Dan served as an editor of the Boston College Law Review and authored an article on compulsory education and parental rights. After graduation, he served as law clerk to then Chief Judge Gene Carter, U.S. District Court, District of Maine.

AWARDS

- Labor Law - Management Lawyer of the Year, Portland, ME (Awarded by Best Lawyers) (2016 and 2012)
- New England Super Lawyers, Employment & Labor, Schools & Education (2007-2016)
- Best Lawyers USA
 - Education Law (2013-2016)
 - Employment Law - Management (2011-2016)
 - Labor Law - Management (2011-2016)
- Chambers USA, Maine, Labor & Employment
- Martindale Hubbell, AV Preeminent

MEMBERSHIPS

- Maine State Bar Association
- The College of Labor and Employment Lawyers
Fellow
- American Bar Association Employer-Employee Relations Committee
Vice-Chair
- Maine State Bar Association Labor & Employment Section
Chair
- Maine Council of School Board Attorneys
Member
- New Hampshire Bar Association

COMMUNITY/PUBLIC SERVICE

- State of Maine, Civil Service Review Panel
Appointed (March 2015)

PUBLICATIONS

- Editor, "Litigating the Employment Tort Case," American Bar Association
- Co-Author, Maine School Law, 4th Edition (2012)
- Co-Author, Significant Cases in Maine School Law (2nd Edition)



S. Campbell Badger

Attorney

207.253.0514 Direct

207.772.3627 Fax

84 Marginal Way, Suite 600

Portland, ME 04101-2480

scbadger@dwmlaw.com

PRACTICE AREAS

Employment & Labor

Collective Bargaining

Indian Law

Indian Nations Labor &
Employment

Tribal Business Enterprise
Group

School & Education

School Employment

EDUCATION

University of Maine School of
Law, J.D., *cum laude*, 1993

University of Massachusetts,
B.A., *cum laude*, 1987

BAR & COURT ADMISSIONS

Maine

Little River Band of Ottawa
Indians , 2009

Pueblo of Laguna Tribal Court
, 2016

Snoqualmie Tribal Court ,
2016

Suquamish Tribal Court , 2015

Campbell is a shareholder and Chair of the firm's Labor Relations Sub-Group, the largest collective bargaining practice group in Northern New England. Campbell has represented public and private employers in all aspects of labor, employment, and labor relations matters for over 20 years, as well as tribal government employees and their enterprises for the past 8 years. He has extensive experience representing employers at the bargaining table negotiating for both initial and successor contracts; representing employers before administrative agencies involving unit determinations, merger and modification proceedings, and unfair labor practice proceedings; and representing employers in numerous contract grievance arbitrations involving employee discipline and contract interpretations. He has negotiated over 175 collective bargaining agreements with various unions including the United Steelworkers, Teamsters, IAM & AW, IBEW, SEIU, OPEIU, Operating Engineers Union, AFSCME, the Maine State Employees Association, and the Maine Education Association and has experience negotiating contracts for a variety of industries including manufacturing plants, paper companies, machine shops, casinos, hotels, security, school districts, towns, and quasi-municipal entities. He represents employers when purchasing companies with a union workforce and advises on their obligations under the NLRA. In addition, he consults clients on compliance with discrimination laws, wrongful discharge, and wage/hour issues and actively represents clients before the Maine Human Rights Commission and the Maine Labor Relations Board.

As a member of the firm's Indian Law practice group, Campbell advises and represents Indian tribes and their enterprises on personnel, employment, and labor relations matters, including union-organizing drives, collective bargaining, and the adoption of tribal laws governing labor relations and employment matters.

Campbell also created and implemented a national certification training program for human resource professionals in tribal governments and tribal enterprises with the National Native American Human Resources Association. This extensive three-and-one-half-day workshop provides human resource directors and associates

with the practical knowledge and skills they need to handle their unique employment challenges as well as the necessary tools to protect and promote self-determination and prevent further federal intrusion in sovereign matters.

MEMBERSHIPS

- American Bar Association
- National Council of School Board Attorneys
- Maine State Bar Association
- Maine Council of School Board Attorneys

COMMUNITY/PUBLIC SERVICE

- United Way
Coordinator
- Friends of Forest Lodge
Member
- Maine Arts in Education
Member



Anna B. Cole

Attorney

603.716.2895 Ext. 231

603.716.2899 Fax

1001 Elm Street, Suite 303

Manchester, NH 03101-1845

acole@dwmlaw.com

PRACTICE AREAS

Employment & Labor

Conflict Management

Employee Benefits

Collective Bargaining

Higher Education

Indian Law

EDUCATION

Tulane University, J.D., *cum laude*, 2011

University of New Hampshire,
B.A., *summa cum laude*,
2008

BAR & COURT ADMISSIONS

New Hampshire

Massachusetts

U.S. District Court, District of
New Hampshire, 2011

Anna Cole is a member of Drummond Woodsum's Labor and Employment Group. Anna provides counseling and litigation services to public and private employers, as well as Indian nations and their enterprises, in all aspects of employment law. She represents employers in collective bargaining, contract administration, grievance and arbitration proceedings, and before the New Hampshire Public Employee Labor Relations Board. Anna advises and trains clients on workplace issues arising under the Family Medical Leave Act, Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, and Title IX of the Education Amendments of 1972. She also reviews and drafts employee handbooks, and employer policies and procedures to ensure compliance with state and federal laws, as well as best practices. Anna also represents companies, municipalities, non-profit organizations, and schools in discrimination, harassment, and retaliation claims before the New Hampshire Commission for Human Rights and the Equal Employment Opportunities Commission. She presents on employment topics nationally and provides training seminars for individual clients.

Prior to joining Drummond Woodsum, Anna practiced for four years at another prominent law firm in Manchester, New Hampshire. Before entering private practice, Anna served as a judicial intern for the Honorable Chief Justice John T. Broderick, Jr., as a legal assistant for Blake J. Godbout & Associates, Boston MA; and as a legal intern at the New Hampshire Attorneys General's Office in Concord, NH.

AWARDS

- New England Super Lawyers, Employment & Labor, Schools & Education, Employment Litigation, Rising Star (2015-2016)

MEMBERSHIPS

- Daniel Webster-Batchelder American Inn of Court
Executive Board Member, 2012
- New Hampshire Bar Association
Young Lawyers' Section Vice Chair, 2014-2015, Member 2011-2015
- Leadership Greater Manchester
Class of 2015

COMMUNITY/PUBLIC SERVICE

- Manchester Regional Board, Child and Family Services
Chair (2015)
- Manchester Regional Board, Child and Family Services
Member (2012 - present)
- University System of New Hampshire
Student Trustee (2007-2008)

Contact Us

84 Marginal Way, Suite 600
Portland, Maine 04101-2480
207.772.1941 Main
207.772.3627 Fax

100 International Drive, Suite 340
Portsmouth, NH 03801-6891
603.433.3317 Main
603.433.5384 Fax

1001 Elm Street, Suite 303
Manchester, NH 03101-1845
603.716.2895 Main
603.716.2899 Fax