



## 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)

#### 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.

<u>Sexual Harassment</u> – 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;
- 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:

- 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.

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

#### <u>Standard 2 – Mixed Motives Test</u>

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

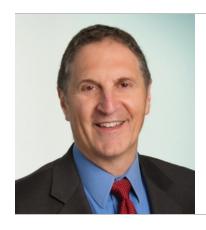
Employee must prove that "but for" the retaliatory motive, the employer would not have taken the adverse action.

## 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)

- 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

Portland, ME 04101-2480

84 Marginal Way, Suite 600

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**

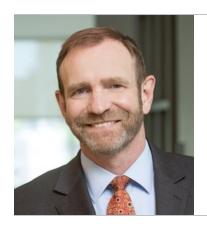
- · Maine State Bar Association
- The College of Labor and Employment Lawyers
   Fellow
- American Bar Association Employer-Employee Relations Committee Vice-Chair
- Maine State Bar Association Labor & Employment Section Chair
- Maine Council of School Board Attorneys Member
- New Hampshire Bar Association

#### **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

Suguamish 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

acole@dwmlaw.com

1001 Elm Street, Suite 303 Manchester, NH 03101-1845

#### **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