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**The Ghosts Aren't that Friendly.
An Overview of Less Common (but
Still Spooky) Claims Employers
Might Face and Unique Tools to
Keep in the Toolkit.**

Presented by: Jaycee Booth and Katie Campbell

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Not your Everyday Employment Claim

- Title VII: Associational Disability under the ADA
- Title VII: Reverse Race Discrimination
- Race Discrimination under Section 1981
- Constructive Discharge
- Tortious Interference
- Workplace Harassment
- Defamation
- Intentional Infliction of Emotional Distress
- Genetic Information Non-discrimination Act (GINA)
- Respondeat Superior

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Associational Disability Discrimination

- The ADA prohibits discrimination based on relationship or association to an individual with a disability
- Purpose: to protect employees from the assumption/ stereotype that their relationship to a disabled individual would affect their job performance



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Associational Disability Discrimination

- The association to a person with a disability must be KNOWN by the employer
- The ADA does not require a familial relationship with an individual. The inquiry is whether the employer is motivated by the individual's relationship or association with a person who has a disability.

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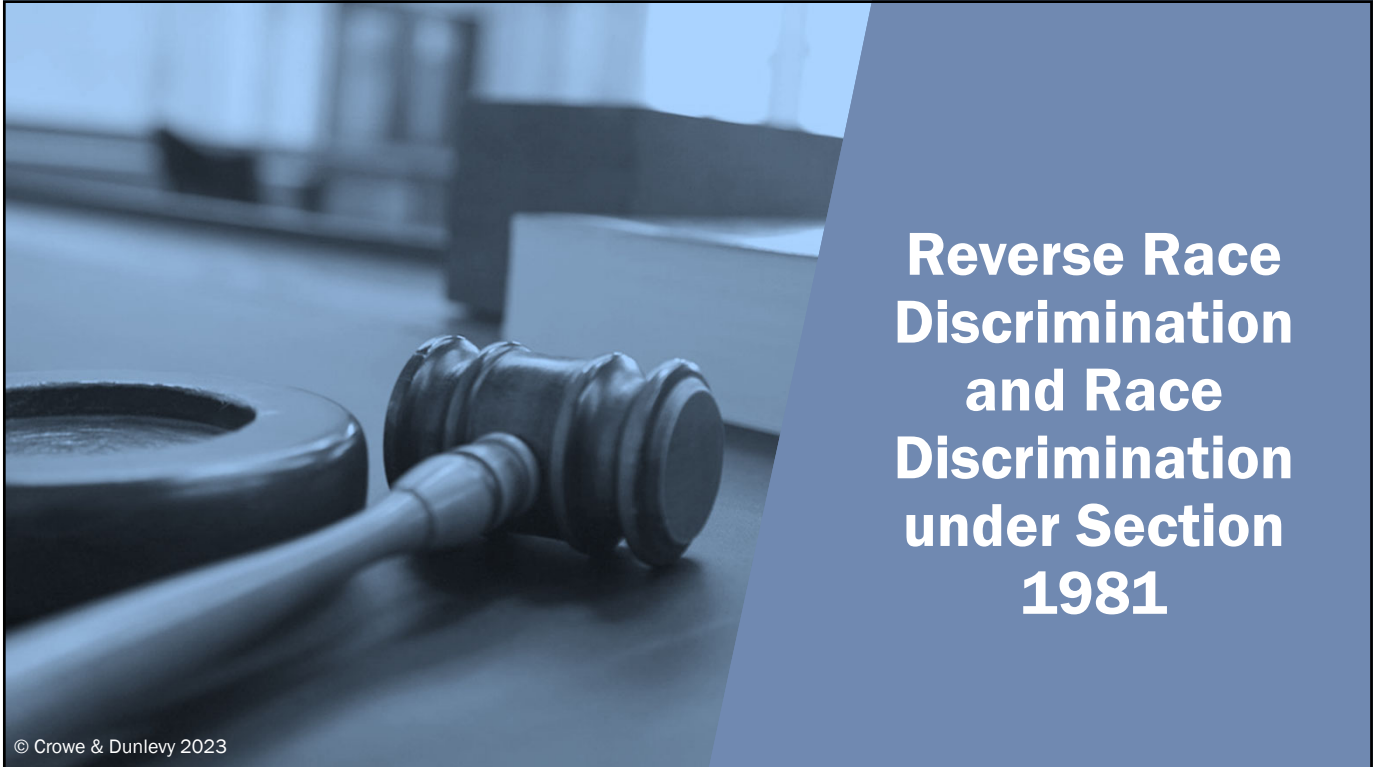
Associational Disability Discrimination

- You do not have to provide a reasonable accommodation to a person without a disability based on that person's association to a person with a disability
- An employer is not required to provide additional health insurance coverage to a person with a disability.

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Reverse Race Discrimination

- Reverse race discrimination refers to discrimination against a historically dominant or majority group, in favor of a historically minority or disfavored group.
- Title VII protections against race discrimination extends to individuals of all races.

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Reverse Race Discrimination (Cont.)

- Instead of demonstrating a protected status, a plaintiff must show: (1) background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority; or (2) a plaintiff may produce facts sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.

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Reverse Race Discrimination (Cont.)

- Reverse race discrimination claims are likely to rise following the Supreme Court's Decision to strike down Affirmative Action in Schools. While the decision does not apply to private employers, it suggests DE&I efforts could lead to increased reverse race discrimination claims.



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Race Discrimination under 42 U.S.C. § 1981

- Section 1981 creates a cause of action for intentional race discrimination in the making and enforcement of contracts, including employment contracts.
- To support such a claim, a plaintiff must show discriminatory intent.
- Offers greater protection than Title VII.

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Race Discrimination under 42 U.S.C. § 1981

- How does this differ from Title VII?
 - Applicable to independent contractors
 - Can be invoked against employers with less than 15 employees
 - Supervisors can be subject to individual liability
 - Plaintiffs are not required to exhaust administrative remedies
 - Subject to a longer limitations period of four-years
 - No monetary damages cap
 - It does not apply to disparate impact claims

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Constructive Discharge

- Working conditions must be such that a reasonable person in the complainant's position would have found them intolerable. The intolerable working conditions must be the result of conduct that constituted discrimination against the complainant.
- Much higher burden than an involuntary termination.
- Employers should ensure any documents reflecting a voluntary resignation are preserved.

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Tortious Interference with an Employment Relationship

- Plaintiff must allege sufficient facts supporting three primary elements:
 - 1) interference with a business or contractual right;
 - 2) malicious and wrongful interference that is neither justified, privileged, nor excusable; and
 - 3) damages proximately sustained as a result of the interference.

*Many claims fail due to the inability to show damages were proximately caused by interference.

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Tortious Interference with Economic Advantage

- Plaintiff must allege sufficient facts supporting three primary elements:
 - (1) the existence of a valid business or expectancy;
 - (2) knowledge of the relationship or expectancy on the part of the interferor;
 - (3) an intentional interference including or causing a breach or termination of the relationship or expectancy; and
 - (4) resultant damage to the party whose relationship has been disrupted.

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Defamation of Character (Private Figure)

- To prove defamation, a plaintiff must show:
 1. a false and defamatory statement;
 2. an unprivileged publication to a third party;
 3. fault amounting at least to negligence on the part of the publisher; and
 4. either the actionability of the statement irrespective of special damage, or the existence of special damage caused by the publication.

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Defamation of Character (Private Figure)

- Employers are not liable for statements made that are justified, excused or privileged. And communications made within a company to its officers, employees, and agents is not considered “published” for purposes of a defamation claim.



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Intentional Infliction of Emotional Distress (IIED)

- To prove a claim of intentional infliction of emotion distress, a plaintiff must show:
 1. the defendant acted intentionally or recklessly;
 2. the defendant's conduct was extreme and outrageous;
 3. the defendant's conduct caused the plaintiff emotional distress; and
 4. the emotional distress was severe.

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Intentional Infliction of Emotional Distress (IIED)

- For conduct to successfully meet the extreme and outrageous standard, it must be “so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and that such conduct is regarded as atrocious and utterly intolerable in a civilized community.



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Genetic Information Non-discrimination Act

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Genetic Information Nondiscrimination Act (GINA)

- GINA Title II: protects individuals from discrimination based on their genetic information in all aspects of employment.
- GINA prohibits employers from requesting, requiring, or purchasing an employee's genetic information.
- All genetic information obtained by an employer must be treated with confidentiality.

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Genetic Information Nondiscrimination Act (GINA)

What is genetic information?

- information about an individual's genetic tests
- information about the manifestation of a disease or disorder in an employee's family
- Pre-natal genetic information and genetic information of a fetus



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Respondeat Superior

- Generally an employer is not liable for the torts of its employees. However, an employer is liable for an employee's tort under the doctrine of *respondeat superior* if the employee is acting within the scope of her employment.
- Punitive damages may be awarded against an employer if respondeat superior is shown.
- Often accompanied by a gross negligence claim.
Gross negligence

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Oklahoma's Protection from Workplace Harassment and Violence Act

- Allows employers to intercede on an employee's behalf when the employee is being harassed, threatened with violence, etc.
- Credible threat of violence is behavior that places a person in reasonable fear for his or her safety or that of the individual's family members and
- BUT: doesn't just have to be credible threat of violence, just workplace harassment

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Oklahoma's Protection from Workplace Harassment and Violence Act Remedies

- Court can order harasser to avoid coming on or near the employer's property or place of business
- Can keep the defendant from contacting the employer, employees, or other individuals while employee or individual is on company property or at the employer's place of business, or while the person is performing official work duties
- Any other relief necessary for the protection of the employer, workplace, employees, or anyone else performing official business for the employer
- Good news for employers: you're immune from civil liability for seeking or failing to seek injunction under the law, unless the injunction was sought for an improper purpose

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The EEOC's Strategic Enforcement Plan


- What is the EEOC on the lookout for? The EEOC released its Strategic Enforcement Plan for 2024-2028 outlining its priorities, including:
 - Discrimination claims based on race, religion and sexual orientation.
 - Protecting workers affected by pregnancy and childbirth
 - Discrimination arising out of the use of artificial intelligence - Highlighting underrepresentation of women in STEM


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