

A nighttime photograph of a city skyline reflected in water. The skyline includes several illuminated skyscrapers and a prominent bridge with ornate stone arches and lights. The lights from the buildings and bridge are reflected in the calm water in the foreground.

Annual Labor & Employment Seminar

Taft Stettinius & Hollister LLP
December 4, 2015

The Interplay of the ADA and FMLA

How Much Leave is Too Much?

Presented by
Gregory Parker Rogers
December 4, 2015

FMLA Leave Entitlement

- 12 weeks/year for eligible employees
- May be taken
 - All at once
 - In chunks
 - Intermittently

FMLA Leave Entitlement

- Practice Pointer
 - Employer decision to grant “FMLA leave” for non-FMLA eligible reason DOES NOT count against an employee’s 12 weeks/year annual entitlement

Recent FMLA Cases of Note

- Granting More Than 12 Weeks FMLA Leave Not a Violation
- *Banks v. Bosch Rexroth Corp.*, 2015 WL 2109807 (6th Cir. 2015)
 - Employer mistakenly approved 12 weeks plus 141 extra FMLA hours
 - Upon discovery, 141 hours were properly coded but were not held against employee
 - Employee tried to take additional leave. Employer scheduled her for IME. She failed to show for IME twice and was discharged
 - FMLA claim failed. Employee not prejudiced by being allowed extra FMLA leave

Failure to Advise That She Could Be Fired for Failing to Turn in FMLA Certification Was FMLA Violation

- *Wallace v. Fed Ex. Corp.*, 764 F.3d 571 (6th Cir. 2014)
 - Fed Ex offered Wallace FMLA leave and verbally asked her to complete FMLA form
 - Wallace failed to return form and was terminated for two consecutive days' absence after form was due
 - Fed Ex failed to notify Wallace of the consequences of failing to return the form

- *Wallace v. Fed Ex. Corp.*, 764 F.3d 571 (6th Cir. 2014)
 - Fed Ex violated 29 CFR 825.305(d) for failure to notify about the consequences of failing to return the form – Wallace testified she would not have missed work had she known
 - 825.305(d) – “At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee’s failure to provide adequate certification.”

Employee Handbook Does Not Meet Individual Notice Requirement

- *Lupyan v. Corinthian College*, 761 F.3d 314 (3d Cir. 2014)
 - Once an employer is on notice that employee desires FMLA qualifying leave, per 29 CFR 825.305, employer must:
 - (1) Within five days notify the employee of eligibility for FMLA leave
 - (2) Notify the employee in writing whether leave is FMLA leave
 - (3) Provide written notice of employee's obligations and adverse consequences for failure to comply; and
 - (4) Notify the employee of the specific amount of leave that will be counted against the FMLA entitlement

- In *Lupyan*, the employer relied on its handbook rather than provide individualized notice. The Court of Appeals found that the handbook did not meet the individualized notice requirement.

Late or Inadequate Employer Notices Are not Actionable Unless They Cause Harm

- *Bellone v. Southwick-Tolland Reg'l School Distr.*, 748 F.3d 418 (1st Cir. 2014)
 - Employer issued the 29 CFR 825.305 notices but it issued them late
 - Court dismissed FMLA interference claim. Plaintiff could show no harm
 - Court did not buy claim that employee would have taken less leave had he known it was counting against his FMLA entitlement

Leave As A Reasonable Accommodation Under the ADA

Basic Principle – Employees Are Entitled To “Reasonable” Accommodation Unless It Results In An “Undue” Hardship

- There are no hard and fast rules about what is “reasonable” or “undue”

EEOC Strongly Dislikes Hard And Fast Rules About Duration Of Leave Policies - It Claims They Violate The ADA

- One of EEOC's six national priorities identified by EEOC's Strategic Enforcement Plan

Simply Satisfying the FMLA 12 Week/Year Rule May Not Satisfy Leave as a Reasonable Accommodation Under The ADA

- EEOC settled with Interstate Distributor for \$4.85 million who had such a policy
- EEOC settled with Princeton Healthcare for \$1.35 million who had such a policy

Length of Leave Must Be Tailored To Each Individual

- EEOC settled with Sears for \$6.2 million challenging “automatic” termination policy
- EEOC settled with Verizon for \$20 million challenging “no fault” attendance policy
- EEOC settled with Supervalu for \$3.2 million challenging termination of 1,000 employees at end of allowed medical leave

- **Lesson:**
The Hallmark of the ADA is Engaging in the
“Interactive Process”

- Certain and Brief Leave is Almost Always Reasonable and Not Undue

- The More Uncertain Length Of The Leave, The More Unreasonable It May Become

- **Question:** What Is The Cost In Terms Of Dollars And Flexibility Of Allowing An Employee To Remain On Leave?

Versus

- What Is The Cost In Terms Of Dollars And Flexibility Of Discharging An Employee While On Leave?

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Wage and Hour Issues: The 24/7 Work World, Overtime Exemptions and Independent Contractors

Presented by
Sarah Clay Leyshock
December 4, 2015

Fair Labor Standards Act of 1938

- Federal law setting compensation standards
- Minimum wage
- Overtime
- Applies to all workers, except:
 - Exempt “white collar” employees
 - Independent contractors
- **Enforced by:**
Department of Labor (“DOL”)
Wage and Hour Division
(“WHD”)



FLSA Misclassification: What's the Risk?

- One employee complaint can spark:
 - Collective action lawsuit
 - DOL investigation or audit
- Back wages over 2-3 year period
- Liquidated (double) damages
- Attorney's fees and costs
- Burden of proof on employer
 - Employees can use their recollections and testimony



Minimize FLSA Litigation Risk

- Focus on “off the clock” work by 24/7 employees, overtime exemptions, and independent contractors
 - Permit 24/7 work only by exempt employees or require non-exempt employees to record all 24/7 work to ensure proper pay for all hours worked
 - Correctly classify their employees as either exempt or non-exempt
 - Correctly classify their workers as either independent contractors or employees

The 24/7 Work World

24/7 Expectations...

- Employers' expectations are high
 - Easy to communicate 24/7 with smartphones, laptops, tablets
 - Different time zones and flexible work schedules
 - Immediate response often expected
- With today's technology, the worksite is conveniently anywhere and everywhere...and whenever!
 - Work from home, while traveling, on vacation, driving
 - Outside regular work hours, nights and weekends, lunch breaks

Legal Risks of 24/7 Work World

- Safety and liability issues while using technology outside of workplace and work hours
- Workers' compensation
- OSHA
- Insurance coverage for property damage
- ADA or FMLA
- FLSA wage and hour issues

24/7 Exempt Employees

- Exempt employees must be paid their full salary for any week in which any amount of work is performed
- Exempt employees may perform compensable work while on unpaid leave
 - Responding to emails, calls or texts
 - Working on documents remotely
- Improper deductions destroy exempt status
- Policy to promptly correct any pay errors

24/7 Non-exempt Employees

- All time worked that is compensable must be paid
 - Minimum wage and overtime
 - Employees can work “off the clock” with technology
 - Work time that does not get reported and for which the employee does not get paid
- Work not requested but suffered or permitted to be done is work time and employee must be paid
 - If the employer knows, or has reason to know that work is being performed, it is compensable work time
- Violation of policy prohibiting 24/7 work can result in discipline, but still compensable time

What is Compensable Time?

- “De minimis” time is not compensable work time
- Three factors:
 - Practical administrative difficulty of recording the additional time;
 - Aggregate amount of compensable time; and
 - Regularity of the additional work.
- A single task may not be de minimis “in the aggregate”



Managing the 24/7 Work World: Non-exempt Employees

- Decide whether your organization wants non-exempt employees to have remote access or respond outside normal work hours
- Develop procedures and a policy to implement your decisions
 - Recording Time
 - Managers' Records

Classification of Employees as Exempt or Non-Exempt

Only “Exempt” Employees are Not Entitled to Overtime

- Must meet one of the "white collar" exemptions:
 - administrative, professional, executive employees
 - computer and outside sales employees
 - highly compensated employees
- Must satisfy both 2-part test:
 - Minimum compensation (salary basis) test
 - Duties test



Proposed Regulations

- Increase salary basis test
 - From \$455 per week (\$23,660 per year)
 - To \$921 per week (\$47,892 per year)
- Increase highly compensated employee's total compensation
 - From \$100,000 to \$122,148
- Automatic annual updates
 - \$970 per week (\$50,440 per year) in 2016

Impact of Proposed Regulations

- In the first year:
 - 5 million employees could lose exemption
 - \$2 billion in wages
- Regulatory familiarization costs
- Time and administration costs
- DOL suggests overall reduction in litigation costs
- More non-exempt employees =
More wage and hour risk for 24/7 work



Preparing for Final Regulations

- Review exempt job descriptions so they accurately reflect duties
- Identify exempt employees at or below \$50,440
- Evaluate non-discretionary bonuses and possible impact on salary level
- Analyze options:
 - Increase salary to maintain exempt status?
 - Convert to non-exempt status?
 - Other options? Fluctuating work week?

See 29 CFR § 778.114



Maintain Exempt Status

- Raise exempt employee's salary above \$970 per week for 2016
- Don't ignore existing wage and hour risk—
Review job descriptions to ensure they accurately reflect exempt employee's duties
- How much time is spent on exempt duties?
More or less than 50%?

Reclassify as Non-Exempt

- Convert to hourly rate
- Predict and manage hours to maintain budget
- Begin tracking hours now
- Non-discretionary bonuses impact hourly rate for overtime
 - See 29 CFR § 778.210
- Increased wage and hour risk due to 24/7 work world

Frequent 40+ weeks may require redistribution of duties among employees or new hires

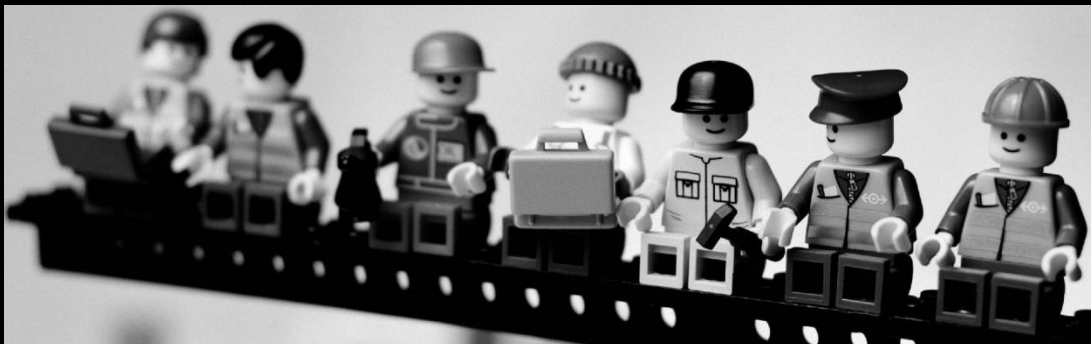
Classification of Workers as Independent Contractors

Who is an Independent Contractor?

- IRS test looks at behavioral control, financial control and nature of relationship
- FLSA “economic realities” test looks at whether the worker is economically dependent on the employer or really in business for him or herself

DOL Interpretive Guidance

- Administrator's Interpretation No. 2015-1 (July 15, 2015)
- All factors must be considered in light of FLSA's broad definition of "employ"
 - No one factor is determinative (especially control)
 - An economically dependent worker is "suffered or permitted to work" by the employer
- DOL: "Most workers are employees under the FLSA"



Economic Realities Test - Factors

1. Is the work integral to employer's business?
2. Does the worker have any opportunity to influence profit or loss?
3. What is the workers relative investment compare to the employer's investment?
4. Does the work involve special skill and initiative?
5. Is the relationship permanent or indefinite?
6. What is the nature and degree of the employer's control?

Do...

- Hire economically independent contractors
 - Already in business, have other clients
- Put Independent Contractor agreement in writing
 - No non-competes, restrictions on outside work
- Use 1099's
- Relinquish control over means to the end
- Allow managerial discretion over work
 - Subcontractors, methods, quality
- Allow contractor to bear risk of profit or loss
 - Pay a project-based fee, not hourly



Do Not...

- Hire contractors for integral business tasks
- Dictate job performance, schedules, work place
- Use W-2's
- Provide tools, equipment, instruction, training, financial investment
 - Cell phones, laptop, internet
- Continuously or repeatedly hire the same contractor
- Underestimate factors suggesting economic dependence



24/7 Work World Is Here to Stay

- Everyone is connected through technology
 - Employees, independent contractors, business associates, customers
- More employees will be non-exempt soon
- Minimize wage and hour issues by focusing on:
 - 24/7 Work World
 - Overtime Exemptions
 - Independent Contractors

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OSHA ENFORCEMENT: RECENT INITIATIVES

Presented by
Mark J. Stepaniak
December 4, 2015

OSHA RELEASES ITS “TOP TEN” FOR FISCAL 2015

	HAZARD	REGULATION	TOTAL CITATIONS*
1	Fall Protection	29 C.F.R. § 1926.501	6,721
2	Hazard Communication	29 C.F.R. § 1910.1200	5,192
3	Scaffolding	29 C.F.R. § 1926.451	4,295
4	Respiratory Protection	29 C.F.R. § 1910.134	3,305
5	Lockout/Tagout	29 C.F.R. § 1910.147	3,002
6	Powered Industrial Trucks	29 C.F.R. § 1910.178	2,760
7	Ladders	29 C.F.R. § 1926.1053	2,489
8	Electrical—Wiring Methods	29 C.F.R. § 1910.305	2,404
9	Machine Guarding	29 C.F.R. § 1910.212	2,295
10	Electrical—General Requirements	29 C.F.R. § 1910.303	1,973

*Because inspectors have six months to issue citations, adjusted numbers may issue later in the calendar year.

WHAT'S HOT FOR 2015-16?

New Reporting Requirements

OLD	NEW
Any Fatality – 8 hours	Any Fatality – 8 hours
Hospitalization of <u>3 or more</u> persons – 8 hours	<u>Any</u> Inpatient Hospitalization of even <u>one</u> employee – <u>24 hours</u>
	<u>Any</u> Amputation – 24 hours
	Any Loss of an Eye – 24 hours

- Don't confuse "Reportable" with "Recordable"
- If you report when you don't have to report, you likely will be inspected
- OSHA is able to inspect many more workplaces

FATALITIES

- If the injured employee lingers longer than 30 days before expiring – not reportable
- Ouch, inpatient, and expires 31 days later; Report as inpatient but not as fatality
- Ouch, treated and released (not inpatient), expires 10 days later, reportable
- Ken Montgomery told me:
 - Of 14 fatalities – 11 were cited
- Heart attack – yes;
Traffic death on public street – no

INPATIENT

- If held solely for observation or testing – not reportable
 - Difficult to know
- If first admitted as inpatient more than 24 hours from incident, not reportable

AMPUTATION

- Traumatic loss of limb or body part
- “Loss” includes severed, cut-off, completely or partially amputated
- Fingertip loss, even without bone loss, is an amputation
- Smashed or otherwise injured part that is surgically removed is an amputation
- Amputations where the body part is reattached surgically is still an amputation

AMPUTATION

- You will be pleased to learn that:

- Avulsions
- De-glovings
- Scalpings
- Severed (but not removed) ears
- Broken or chipped teeth

ARE NOT REPORTABLE AMPUTATIONS

- To be reportable, the amputation must occur within 24 hours of the accident

LOSS OF AN EYE

- Means removed, not loss of vision even if permanent; Includes “enucleation”
- Reportable only if the loss occurs within 24 hours of accident
- May be an inpatient reportable
- Of course, still recordable

METHOD OF REPORTING

OLD

- In person
- Telephone

NEW METHOD OF REPORTING

NEW: 3 OPTIONS

1. Nearest Area Office by phone (513-841-4132) (Cincinnati Area Office)
 - You must talk to a human; No messages if closed
 - or-
2. OSHA HOTLINE (1-800-321-OSHA)
 - 24 hour line
 - or-
3. Website (OSHA.gov)
 - Careful; written form may include admissions regarding causation



OSHA

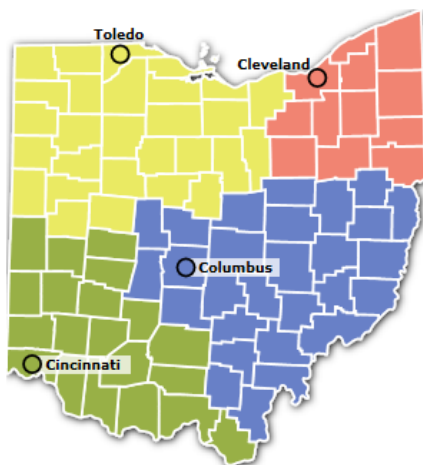


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OHIO



County List

Contact the office nearest you.

OSHA Area Offices

These four federal OSHA offices cover private sector employers and workers in Ohio:

● Cincinnati Area Office

36 Triangle Park Drive
Cincinnati, Ohio 45246
(513) 841-4132
(513) 841-4114 FAX

● Cleveland Area Office

Essex Place
6393 Oak Tree Blvd., Suite 203
Independence, Ohio 44131-6964
(216) 447-4194
(216) 520-1624 FAX

● Columbus Area Office

200 North High Street, Room 620
Columbus, Ohio 43215
(614) 469-5582
(614) 469-6791 FAX

● Toledo Area Office

420 Madison Avenue, Suite 600
Toledo, Ohio 43604
(419) 259-7542
(419) 259-6355 FAX

On-Site Consultation Program

[Ohio On-site Consultation Program](#)

YOU WILL BE ASKED

- Name & Contact Information
- Location
- Date/Time
- Nature of Accident
- Total Employees Involved and Names
- Description
 - Careful with conclusions
 - Radio and television
 - Scanner monitoring

SURPRISE! THE LAW OF UNINTENDED CONSEQUENCES

- Local office @ 9,000 self-reports since January
 - Most are amputations!
- No new staff
 - 4 Construction Inspectors
 - 10 others
- Likely result: fewer inspections; but greater scrutiny and higher penalties
- Enforcement Weighing System:
“quality vs. quantity”

TRIAGE: THREE CATEGORIES

Category 1: Definite Inspection

- Fatalities
- 2 or more inpatient
- Minors
- Employers with prior cases of multiple injury
- Repeat offenders
- National Emphasis Program
- Severe Violator Enforcement Program (SVEP)
- Imminent Danger – OSHA SHUT DOWN

TRIAGE: THREE CATEGORIES

Category 2: Area Director's Discretion

- Not a category one but exposure continues
- Safety program failure (LOTO; confined space)
- Explosives, combustibles
- Bad actor
- Chemicals or heat

TRIAGE: THREE CATEGORIES

Category 3: Rapid Response Investigation

- Phone call and letter with questionnaire
- Cincinnati Area: if fall or fork truck, we are coming out
- Written response
- Be careful of admissions (consult legal counsel)
- Be careful of OSHA 11(c), workers' compensation retaliation and the isolated employee misconduct defense
 - OSHA conducted interviews: “we do it that way all the time”
 - Discipline without injury is useful
 - Training and audits

ENFORCEMENT EMPHASIS

- General Duty
- Ergonomics (logistics, beverages)
 - Building consensus through NIOSH and settlement on industry minimums
- Workplace Violence
- Hospitals
- Amputation National Emphasis Program
 - Guarding and LOTO

ODIOUS EMPLOYER SAFETY INCENTIVES

- 11(c) of the Act prohibits discrimination because of reporting an injury or illness. 29 C.F.R. § 1904.36
- Certain employer practices “discourage” reporting and can violate the Act
 1. Discipline of injured employees regardless of circumstances or fault
 2. Discipline for delay in reporting an injury deserves scrutiny
 3. Disciplining injured employees for violating safety rules
 - Does the employer audit compliance absent injury?
 - Does the employer discipline violators who are not injured?
 4. Prizes and awards for employees or teams who work without injuries discourage reporting
 - OSHA favors prizes for awareness and reporting violations
- Few “straight-up” enforcement cases

OSHA DID WHAT?

- “Guide to Restroom Access for Transgendered Workers”
 - 29 C.F.R. § 1910.141 requires employers to provide employees with toilet facilities in order to protect them from ill health effects such as urinary tract infections and bowel and bladder problems
 - OSHA claims that a core principle is that “all employees, including transgender employees, should have access to restrooms that correspond to their gender identity”

OSHA AND CONTINUING VIOLATIONS

- 29 U.S.C. § 658(c) “No citation may be issued under this section after the expiration of six months following the occurrence of any violation.”
- *AKM, LLC v. OSHRC* (“Volks”) the D.C. Circuit rejected extending the limitation period where OSHA unaware of the record keeping violation where Volks failed to record injuries on Form 300

OSHA AND CONTINUING VIOLATIONS

- OSHA plans rulemaking to clarify that the duty to make and maintain accurate records is ongoing – even though the limitation is in the statute
- OSHA has argued that employer's failure to follow its own self-analysis recommendations leads to a "continuing violation" that effectively tolls the limitations period

DO YOU USE TEMPS?

- Temporary Work Initiative
 - Temps suffer more injuries
 - OSHA concludes both parties are responsible if receiving employer exercises any degree of supervision
 - “Don’t rely on general LOTO or other training”
- Will OSHA apply NLRB’s Browning-Ferris to cement joint employment?
 - Statutory differences

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Immigration Law

Presented by
Antonia Mitroussia
December 4, 2015

Foreign Workers

Recruitment, Hiring and Employment Application Practices

Recruitment/Interview/Pre-Hire Questions - Allowed

- Education, experience, strengths/weaknesses, promotions, current/required salary, reasons for leaving a position
- Eligibility to be/become lawfully employed in the U.S. - no document inquiries
- Conviction record for “security sensitive” jobs
 - “Security sensitive” jobs include not only the obvious – treasurer, cashier, etc. – but peripheral positions as well – janitor, typist, trucker or other jobs where the employee would be working near a security sensitive area
- Ability to read, write and speak English or foreign languages when required for a specific job

Hire / I-9 Verification

- Employer is responsible for the completion and retention of Form I-9 for all employees, regardless of citizenship or national origin, hired for employment in the United States
- Employer may not request employment authorization documents until the job candidate has accepted the employment offer

Completing the I-9

Section 1: Employee Information and Attestation

- Employers must ensure that Section 1 of the I-9 is completed by the employee no later than the 1st day of work for pay
- Employees must provide the information in Section 1, noting that they are:
 - A Citizen or national of the United States
 - A lawful permanent resident with a green card; or
 - An alien authorized to work in the United States until a specified date
- Employer must complete Section 2 no later than the 3rd business day after employee started work for pay

Section 2: Employer Review and Verification

- Employers must ensure employment authorization documents provided by the employee are proper:
 - either a single document from List A; or
 - one document from List B and one document from List C
- Employers must reject expired documents (with few exceptions, such as TPS EADs)
- Presented documents must be originals

Section 3: Updating and Re-verification

- Employers are required to re-verify (with some exceptions) employment eligibility when an employee's employment authorization or evidence of employment authorization has expired
- Employers do not need to re-verify U.S. passports or permanent resident ("green cards") after expiration

Rehires

If employee is rehired within three years of the date that a previous Form I-9 was completed, Employer may complete a new Form I-9 or complete Section 3 of the previously completed Form I-9.

- **Who is an *Employee*?**
 - Any individual compensated for services or labor by an Employer, whether in the form of wages or other remuneration
- **Employers' Parameters**
 - Employers are prohibited from contracting for the labor of individuals that they know are not work authorized
 - Employers who violate this prohibition may be subject to civil and criminal penalties
 - Employers cannot request more or different documents from “foreign” workers than are required from U.S. workers
 - Employers must accept documents which “reasonably appear to be genuine” on their face and to “relate to the employee”

Who is NOT required to complete a Form I-9

- Workers hired before November 6, 1986, and continuously employed by the same employer
- Individuals who provide sporadic, irregular or intermittent domestic services in private homes
- Independent contractors
- Workers provided to employers by temporary agencies or entities providing contract services

I-9 Document Retention and Storage Requirements

- **Retention of I-9 Records**

Employers must retain Form I-9 for each employee on paper, or microform or electronically for either:

- 3 years after the date of hire; or
- 1 year after the employee is terminated

Whichever is later

- **Missing I-9 Forms**

Employer should request the employee to complete Section 1 of an I-9 form immediately and submit documentation as required in Section 2 (no back-dating)

- **Discovering an Unauthorized Employee**

- Employer should re-verify work authorization by allowing the employee another opportunity to present acceptable documentation and complete a new I-9
- If employee provides unacceptable documentation, the Employer must terminate employment or risk becoming subject to penalties for knowingly continuing to employ an unauthorized worker

E-Verify & Pre-Screening

What It Is?

E-Verify is an Internet-based system that compares information from an Employee's Form I-9 to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility

How E-Verify Works

- The Employer enters the employee's information on Form I-9 into E-Verify and submits the information to create a case
- E-Verify compares the employee information to records available to the U.S. Department of Homeland Security, including:
 - U.S. passport and visa information
 - Immigration and naturalization records
 - State-issued driver's licenses and identity documents
 - Social Security Administration records

How E-Verify Works

- If the information matches, the case will receive an Employment Authorized result almost immediately
- If the information does not match, the case will receive a Tentative Non-Confirmation (TNC) result (“no match” letter)

Employer Responsibilities

Employers Must

- Inform all applicants of the company's participation in E-Verify
- Use E-Verify regardless of national origin or citizenship status
- Provide the E-Verify written notice to every employee who receives a TNC
- Provide the E-Verify referral letter to every employee who contests the TNC
- Allow employee 8 federal work days to initiate contact with the appropriate federal agency to begin resolving the TNC

Employers Must **NOT**

- Use E-Verify to pre-screen job applicants
- Use E-Verify to verify existing employees
- Selectively run new hires through E-Verify based upon national origin or citizenship/immigration status
- Terminate, suspend or withhold training, hours, or pay because/while an employee contests a TNC
- Take adverse action against an employee who timely contests a TNC, even if the resolution of the TNC takes the government more than 8 days
- Discourage employees from contesting TNCs

The Office of Special Counsel Investigates

under the anti-discrimination provision of the
Immigration and Nationality Act

8 U.S. Code § 1324b:

- Charges of document abuse discrimination
- Charges of employment discrimination related to an individual's immigration status or national origin
- Charges of retaliation/intimidation

Document Abuse

- **Unfair documentary practices in employment verification**
 - Employers may not request more or different documents than are required to verify employment eligibility and identity
 - Employers may not reject reasonably genuine-looking documents or specify certain documents over others

Citizenship vs. National Origin Discrimination

- **Citizenship Discrimination**
 - U. S. citizens, recent permanent residents, temporary residents, asylees, and refugees are protected from citizenship status discrimination
 - **Exceptions:**
 - Permanent residents who do not apply for naturalization (US Citizenship) within 6 months of eligibility
 - Citizenship status discrimination which is otherwise required to comply with law, regulation, executive order, or government contract is permissible by law

- **National Origin Discrimination**

- Employers are prohibited from treating employees differently because of their place of birth, country of origin, ancestry, native language, accent, or because they sound "foreign"
- Employers may not treat job applicants or employees unfavorably because they are married to (or associated with) a person of a certain national origin

Retaliation/Intimidation

- The Immigration Reform and Control Act of 1986 (IRCA) prohibits retaliation against employees for asserting their rights under the Act, or for filing a charge or assisting in an investigation or proceeding under IRCA
- Employers may not retaliate against employees for filing charges with the OSC

Best Practice

Exercise due diligence to prevent
unfair immigration-related
employment practices
starting with recruitment.

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A Year of NLRB Developments

Presented by
Justin D. Flamm
December 4, 2015

Use of Employer's E-Mail Systems

Purple Communications, Inc., NLRB 12/11/14

- Overruling a 2007 NLRB decision known as *Register Guard*, the Board held: “we will presume that employees who have rightful access to their employer’s email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time.”

Conduct Policies Found Unlawful

General Counsel's Report Concerning Employer Rules, 3/18/15

- “Be respectful to the company, other employees, customers, partners, and competition.”
- No “defamatory, libelous, slanderous, or discriminatory comments about the company, its customers and/or competitors, its employees, or management.”

Conduct Policies Found Unlawful

General Counsel's Report Concerning Employer Rules, 3/18/15

- NLRB GC: “Unlawfully overbroad since employees would reasonably construe them to ban protected criticism or protests regarding their supervisors, management, or the employer in general”

Conduct Policies Found Unlawful

- “Refrain from any action that would harm persons or property or cause damage to the Company’s business or reputation”
- “Practice caution and discretion when posting content on social media that could affect the Employer’s business operation or reputation”
- NLRB GC: “Insufficient context” to show that the rules were aimed only at unprotected conduct (e.g., criticism of employer’s products or services)

Conduct Policies Found Unlawful

General Counsel's Report Concerning Employer Rules, 3/18/15

- Do not make “insulting, embarrassing, hurtful, or abusive comments about other company employees online”
- NLRB GC: Debate about unions is often contentious, so employees would read this rule as “limiting their ability to honestly discuss such subjects”

Conduct Policies Found Lawful

General Counsel's Report Concerning Employer Rules, 3/18/15

- “Each employee is expected to work in a cooperative manner with management/supervision, co-workers, customers, and vendors”
- NLRB GC: Employer's expectation of “civility” did not interfere with Section 7 rights

Conduct Policies Found Lawful

General Counsel's Report Concerning Employer Rules, 3/18/15

- “Being insubordinate, threatening, intimidating, disrespectful, or assaulting a manager/supervisor, co-worker, customer, or vendor”
- NLRB GC: Prohibition of “disrespectful” conduct would ordinarily be found unlawful, but the context here “is clearly focused on serious misconduct”

Unlawful Policies Re: Photography

General Counsel's Report Concerning Employer Rules, 3/18/15

- “Taking unauthorized pictures or video on company property”
- NLRB GC: Unlawful because employees would read the rule to prohibit “attempts to document health and safety violations and other protected concerted activity”

Employer Policies

Remington Lodging & Hospitality, NLRB 6/8/15

- Employer's policy prohibiting employees from having a "conflict of interest" found unlawful because employees could interpret the rule as banning "informational picketing, strikes, or other economic pressure."

Social Media

Pier Sixty, LLC, NLRB 3/31/15

- Catering manager (Bob) directed servers to spread out amongs event guests
- Server went outside and posted on Facebook

Bob is such a NASTY MOTHER F_____ don't know how to talk to people!!!!!! F___ his mother and his entire f_____ family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!

- NLRB found the employee's resulting termination unlawful

Joint Employers

Browning-Ferris Industries of California, Inc., NLRB 8/27/15

- Overruling two 1984 NLRB decisions, the Board broadened the standard for finding joint employer status
- Two or more entities can be joint employers “if they share or codetermine those matters governing the essential terms and conditions of employment”
- “[T]he right to control is probative of an employment relationship – whether or not that right is exercised”

Joint Employers

Browning-Ferris Industries of California, Inc., NLRB 8/27/15

- Browning-Ferris and its staffing service were joint employers
- The labor services contract included numerous conditions that the staffing service had to follow, and Browning-Ferris also assigned specific tasks and exercised “near-constant oversight” of the employees’ work

Joint Employers

Miller & Anderson, Inc., NLRB briefing invitation, 7/6/15

- A 2004 NLRB decision known as *Oakwood Care Center* requires consent of all joint employers where a bargaining unit would combine direct employees and joint employees
- In July 2015, the NLRB issued an invitation to file briefs on whether “the Board should continue to adhere to the holding of *Oakwood*”

Independent Contractors

Sisters' Camelot, NLRB 9/25/15

- Nonprofit engaged independent contractors to solicit donations door-to-door
- Applying an 11-factor analysis, NLRB found the individuals were employees subject to the protections of the Act

Dues Checkoff Survives CBA

Lincoln Lutheran of Racine, NLRB 8/27/15

- Overruling a 1962 NLRB decision, the Board held that employers “must continue to honor a dues-checkoff arrangement” in an expired labor contract absent an overall impasse

“Quickie Election” Regulations

- Effective April 2015
- Drastically shortened timeframes
- October 2013 – September 2014:
1,260 elections
- October 2014 – September 2015:
1,490 elections

Voter Lists

Danbury Hospital, Regional Director (Region 1) 10/16/15

- Employer used its HR database to search for phone numbers and personal e-mail addresses
- Information produced to the union for 94% of voters
- By failing to consult other internal sources, RD found the employer “clearly, by any standard” failed to make a “good faith effort”
- RD directed a new election after the union lost

Supervisory Status

Cook Inlet Tug & Barge, Inc., NLRB 6/30/15

- Tugboat captains were not supervisors.
- Only one deckhand to supervise per boat.
- “This alone precludes a finding that the captains exercise supervisory assignment authority.”

Supervisory Status

Cook Inlet Tug & Barge, Inc., NLRB 6/30/15

- Employer witnesses: captains had “full authority” to assign work and total control over safety decisions
- NLRB: No showing of independent judgment or accountability as to captains

A nighttime photograph of a city skyline reflected in water. The skyline includes several skyscrapers, with one prominent blue-glass building in the center. A large, ornate stone bridge with arches is visible on the right side of the image. The lights from the buildings and bridge are reflected in the calm water in the foreground.

Annual Labor & Employment Seminar

Taft Stettinius & Hollister LLP
December 4, 2015

***Obergefell v. Hodges* and its Impact on the Workplace**

Presented by
Conor H. Meeks
December 4, 2015

***Obergefell v. Hodges* – Same-Sex Marriage is a Constitutional Right**

What the Supreme Court did decide on June 26, 2015

All states are required to:

- License same-sex marriages
- Recognize same-sex marriages lawfully performed out-of-state



- Arose from challenges to same-sex marriage bans in Ohio, Michigan, Kentucky, and Tennessee

The Court ruled:

- The right to marry is a fundamental right
- The Fourteenth Amendment prohibits states from depriving same-sex couples of that right and liberty

■ Same-sex marriage legal ■ Same-sex marriage not legal
■ Pending court action



What The Supreme Court Did Not Decide

- *Obergefell* **was not** an employment case – employment discrimination laws and employee benefits not at issue
- BUT, it is the Supreme Court's second major decision in favor of same-sex marriage, just two years after *United States v. Windsor*
 - Signal of changing views on homosexuality and same-sex marriage
- PLUS, following *Obergefell*, the EEOC declared Title VII prohibits sexual orientation discrimination

Employee/Spousal Benefits

- Most employee benefits issues for same-sex spouses settled by *United States v. Windsor*
 - Under federal law, the definitions of “marriage” and “spouse” must include same-sex married couples
 - IRS and DOL adopted the “state of celebration” rule
- Pre-*Obergefell*, same-sex and opposite-sex spouses treated equally for employee benefits governed by federal law
 - FMLA leave to care for spouse
 - ERISA retirement plan provisions
 - Benefits to same sex spouse excluded for federal tax purposes
 - HIPAA mid-year enrollment and COBRA continuation coverage

State Income Taxes And Benefits For Same-Sex Spouses

- Pre-*Obergefell*, in states that did not recognize same-sex marriage, employers had to ignore married status for state tax purposes
 - Withholding rates based on single status
 - Cost of benefits provided to same-sex spouses imputed as income to employee
- Post-*Obergefell*, states must provide equal tax treatment to same-sex married couples
 - Withholding rates must reflect the married status
 - Benefits provided to a same-sex spouse must receive the same tax treatment as those provided to opposite-sex spouses

Healthcare Benefit Plans

- No federal law requires employers to offer or subsidize healthcare coverage for spouses, period
- Employers previously offering same-sex spousal benefits - review state tax treatment in states that did not previously recognize same-sex marriage
- Employers that offer benefits to opposite-sex spouses but not same-sex spouses risk violating federal, state, or municipal antidiscrimination laws
 - If plan funded by insurance, employer may be in violation of state insurance laws that require equal treatment of same-sex spouses
- *Obergefell* and *Windsor* do not extend protections to domestic partners.
 - Employers may phase out benefits to same-sex domestic partners since they may now legally marry

LGBT Discrimination In Employment

- *Obergefell* did not address employment discrimination based on sexual orientation
 - But decision may impact thinking of lower courts
- Title VII prohibits discrimination in employment “because of . . . race, color, religion, sex, or national origin.”
 - Sexual orientation not included
 - Congress has refused to amend Title VII since 1994

Sex-Stereotyping Claims

- *Price Waterhouse v. Hopkins* (Supreme Court, 1989) – Sex discrimination includes discrimination based on sex-stereotyping or gender non-conformity
 - Title VII prohibits taking sex or gender into account when making employment decisions
 - Discrimination “because of . . . sex” goes beyond simple male v. female discrimination
- *Barnes v. City of Cincinnati* (6th Circuit, 2006) and *Smith v. City of Salem* (6th Circuit, 2004)
 - Sex-stereotyping theory applies to claims by transgender individuals
 - Transgenderism is protected non-conforming gender behavior

Sexual Orientation – Courts Divided

- *Vickers v. Fairfield Med. Ctr.* (6th Circuit, 2006) – Sex-stereotyping claims do not cover discrimination against homosexuals based on sexual orientation alone
 - Absent allegations of discrimination for gender non-conforming behavior, Title VII does not prohibit discrimination simply because an individual is (or is perceived to be) homosexual
- *Terveer v. Billington* (DC District Court, 2014) – Sex-stereotyping claims do cover sexual orientation discrimination
 - Employee alleged hostile work environment after supervisor found out he was gay
 - Court ruled he stated a claim under Title VII by asserting that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles.”

Sexual Orientation – Courts Divided

- *Hall v. BNSF Ry. Co* (W. District of Washington, 2014)
Gay man sufficiently pled sex discrimination under Title VII, where employer failed to provide health insurance coverage for same-sex spouse
 - Court construed claim as based on plaintiff's sex or gender (not sexual orientation), because he claimed that as a male who married a male, he was treated differently in comparison to female coworkers who also married males
- *Muhammad v. Caterpillar, Inc.* (7th Circuit, 2014)
 - Initially dismissed plaintiff's sex discrimination claim, based on sexual orientation
 - Title VII's "prohibition on discrimination based on sex extended only to discrimination based on a person's gender, and not that aimed at a person's sexual orientation."
 - EEOC filed amicus brief in support of a petition for rehearing, arguing that sexual orientation discrimination is prohibited sex discrimination under Title VII
 - Petition for rehearing denied, but the court amended its opinion to remove its original holding that Title VII does not cover sexual orientation discrimination, and affirmed on other grounds

The EEOC's Position

Title VII's prohibition on sex discrimination includes discrimination based on sexual orientation and gender identity.

- *Macy v. Holder* (2012) – following *Price Waterhouse*, discrimination based on gender identity, change of sex, or transgender status is discrimination based on sex under Title VII
- 2013-2016 Strategic Enforcement Plan – High enforcement priority: “addressing emerging and developing issues” including “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.”

The EEOC's Position

- *Baldwin v. Foxx* (July 2015)
Sexual orientation discrimination is a form of sex discrimination under Title VII, apart from the sex-stereotyping theory
 - “Sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”
 - A complainant need only allege that the employer took his or her sexual orientation into account in an employment action, which necessarily alleges the employer took his or her sex into account
- Not binding on the courts, but EEOC expected to begin suing private sector employers for sexual orientation discrimination
- Backdrop of Supreme Court's decision in *Obergefell* may sway lower courts

A nighttime photograph of a city skyline reflected in water. The skyline includes several skyscrapers, with one prominent blue glass building in the center. A large stone bridge with arches is visible on the right side of the image. The lights from the buildings and bridge are reflected in the calm water in the foreground.

Annual Labor & Employment Seminar

Taft Stettinius & Hollister LLP
December 4, 2015

Workplace Investigations: Tips, Common Issues, and Interesting Cases

Presented by
Evan T. Priestle
December 4, 2015

Introduction

- Workplace investigations play an increasingly important role in managing an employer's business
- Poorly conducted investigations impact employee morale and can result in increased employer liability



Effective Investigations

- **Prompt:** Employer must promptly investigate and implement remedial measures – particularly with claims of harassment and discrimination
- **Fair:** Employer must treat complaints seriously and remain neutral throughout investigation
- **Thorough:** Thorough investigations help formulate appropriate remedial action and minimize employer liability

Pre-Investigation

- Planning the investigation includes:
 - Choosing an *appropriate* investigator
 - Creating a written plan
 - Identifying and reviewing relevant policies, standards of conduct, agreements and/or procedures



Interviews

Interview the following parties:

- ➡ **Complainant**
- ➡ **Alleged offender**
- ➡ **Witnesses and authors of relevant documents**
- ➡ **Supervisors**
- ➡ **Witnesses**

Conducting Interviews

- Have two employees conduct interviews
- Develop questions for each witness:
 - Avoid accusatory questions
 - Avoid leading questions
 - Ask open-ended questions
 - Use follow-up questions to develop facts

Interviews – The Complainant

- Has complainant heard of anyone else complaining of similar conduct?
- How did conduct affect complainant?
- Has complainant previously complained about conduct?
- Has complainant discussed alleged conduct with anyone else?
- Is there documentation to support complainant's allegations?

Interviews – The Complainant

- Inform complainant that retaliation will not be tolerated
- Inform complainant that you will talk with alleged harasser to get his/her side of story
- Tell complainant that you will follow-up
- **KEY:** Tell complainant to report immediately if conduct continues or if complainant is subjected to retaliation

Interviews – Third Parties

- Interview all third parties who have relevant information
- Consider interviewing:
 - Co-workers;
 - Individuals identified by complainant;
 - Supervisors of individuals involved; and
 - Any other individuals who may have relevant information

Interviews – The Accused

- Advise accused purpose of investigation
- Explain to accused ***all*** of the allegations
- Assure accused you are conducting an impartial investigation
- Ask accused to explain his/her side of the story as to each allegation
- Ask accused to identify witnesses
- Ask accused if there is any documentation to support his/her version of events

Interviews – The Accused

- Inform accused that you may want a written statement
- Inform accused of the confidentiality of the investigation and the consequence of breaching confidentiality
- Remind accused of prohibition against retaliation

Interviews: Follow-Up

- Interview witnesses identified by accused
- If warranted, re-interview complainant
- If warranted, re-interview accused



Review Relevant Documentation

- Review any documents relevant to investigation, including:
 - Documents identified by witnesses
 - Relevant rules, policies or procedures
 - Documents relating to incident
 - Employee time cards
 - Diaries or journals
 - Prior complaints
 - Personnel files and supervisor notes

Documenting Investigation

- Investigator should thoroughly document each stage of investigation
- Investigator should take careful notes (consider using standardized intake form)
- Investigator should consider obtaining signed statements
- At conclusion of investigation, investigator should draft a thorough, fair and concise report
- **Key:** Stick to facts and AVOID legal conclusions

Confidentiality is Critical

- Confidentiality minimizes risk of libel/slander claims
- Only those people who need to know should be told about investigation
- Request that those interviewed keep investigation confidential



Issues With Confidentiality

- The National Labor Relations Board *Banner Health Systems*, announced a new rule prohibiting blanket policies mandating confidentiality during work place investigations
- Must be able to present real proof of: (1) the need to protect witnesses; (2) the need to prevent destruction of evidence or a cover-up; (3) the need to avoid fabrication of testimony

Issues With Confidentiality

- This year, the NLRB overruled a 1978 decision, holding that witness statements obtained during a company investigation were subject to disclosure to the union
- “If the requested information is relevant, the party asserting the confidentiality defense has the burden of proving that it has a legitimate and substantial confidentiality interest in the information, and that it outweighs the requesting party’s need for the information.”

Searching Employee Workspace

- Often comes down to whether the employee has a “reasonable expectation of privacy”
- Easiest way to ensure that you can avoid issues and conduct the investigation in the manner you prefer is to educate your employees through an acceptable-use policy

Investigating on Social Media

- Also often involves whether the employee has a reasonable expectation of privacy in his or her social media presence
- *Pearce v. Whitenack*
 - An individual does not have a right to privacy while he is walking on a public highway and “[b]y analogy, [the plaintiff’s] Facebook posting was a walk on the Internet, the information superhighway”

Investigating on Social Media

- **Stored Communications Act**
 - Courts have held that Facebook posts made on a “private” profile may be covered by a federal statute known as the Stored Communications Act
 - Liability under the SCA may come down to whether access to the employee’s “private” social media post was authorized.

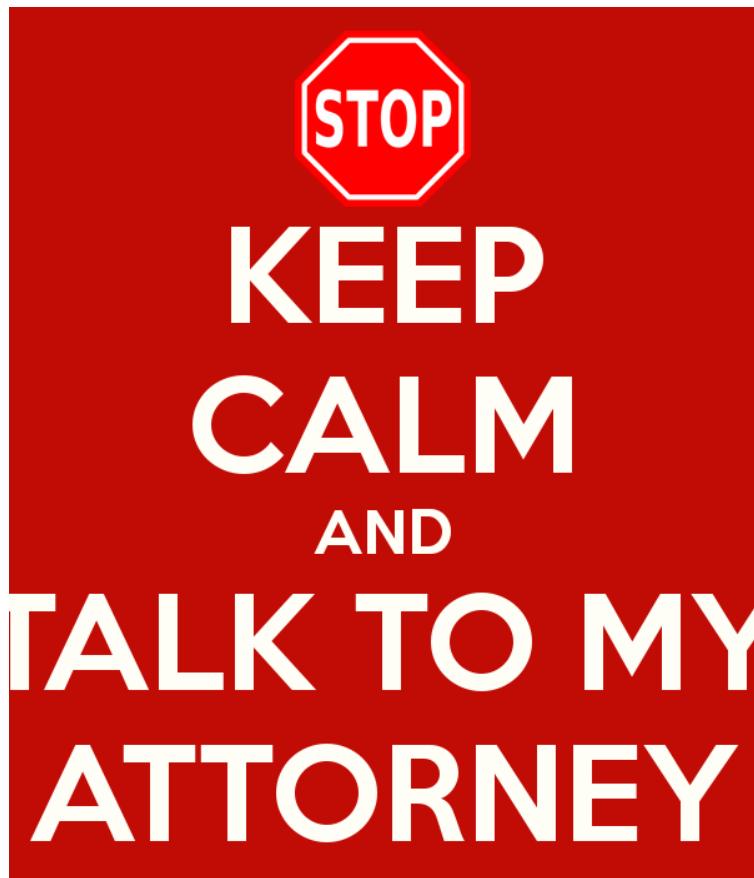
Investigating on Social Media

- Is the employee engaging in “concerted activity for the purpose of . . . mutual aid or protection . . .”?
- *Three D, LLC v. NLRB*
 - The NLRB and the Second Circuit held that statements by co-workers on Facebook about the company’s pay practices were regarding the terms and conditions of the employees’ employment and was for the purpose of mutual aid or protection, and ordered that the employees be reinstated

Right to Counsel or Representation

- Usually hinges on whether you are a public or private employer and whether or not you have a unionized workforce
- Generally, private, non-union employers have no obligation to permit employees from being represented by anyone during an employer's investigative interview

Right to Counsel or Representation

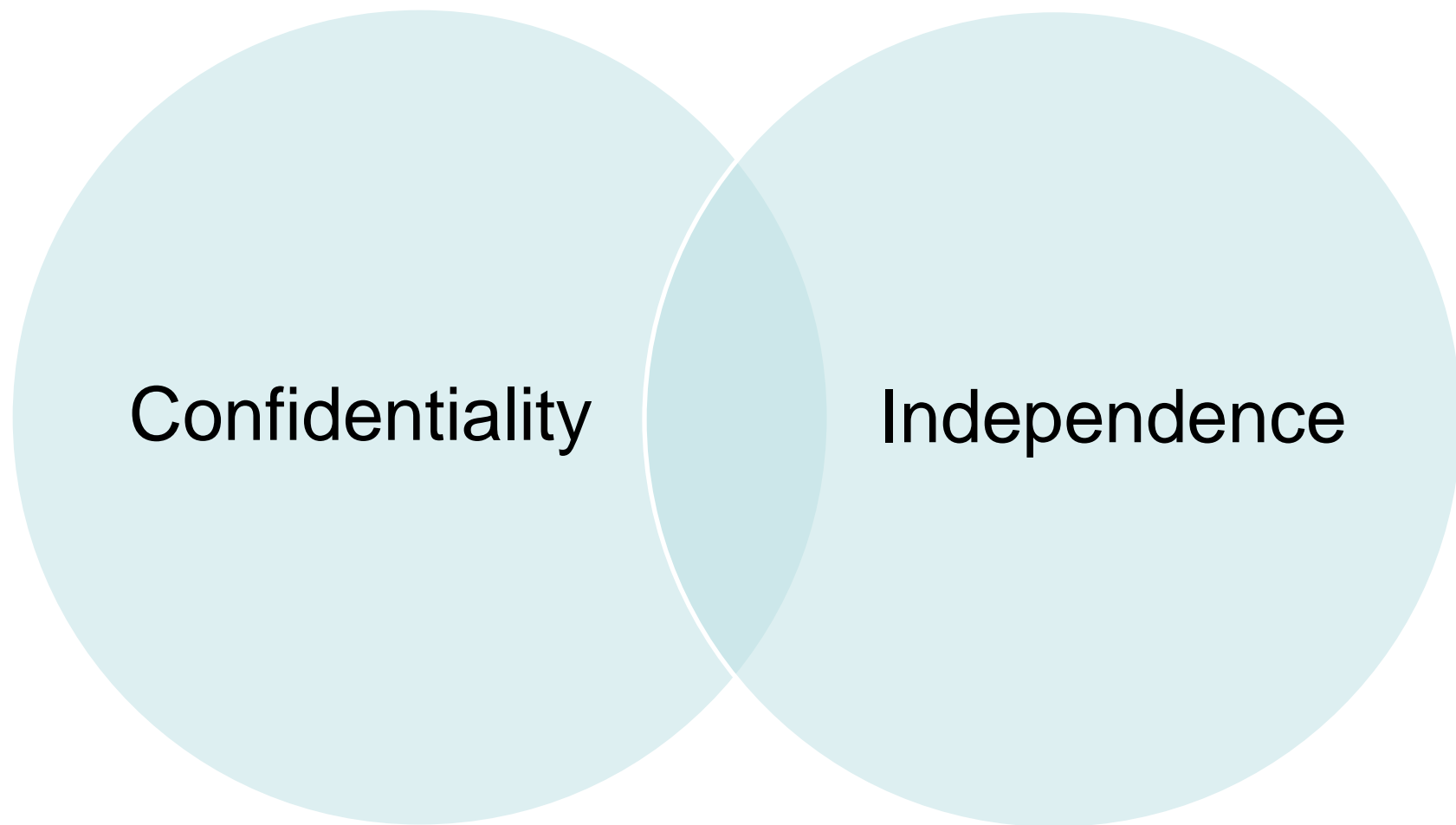


- However, you cannot retaliate against an employee because he or she has requested an attorney or has hired counsel

Right to Counsel or Representation

- *Weingarten* Rights
 - For a union workforce, an employee has the right to insist upon union representation during an investigatory interview if the employee “reasonably believes” the interview “might result in disciplinary action”

Use of Outside Counsel



Use of Outside Counsel

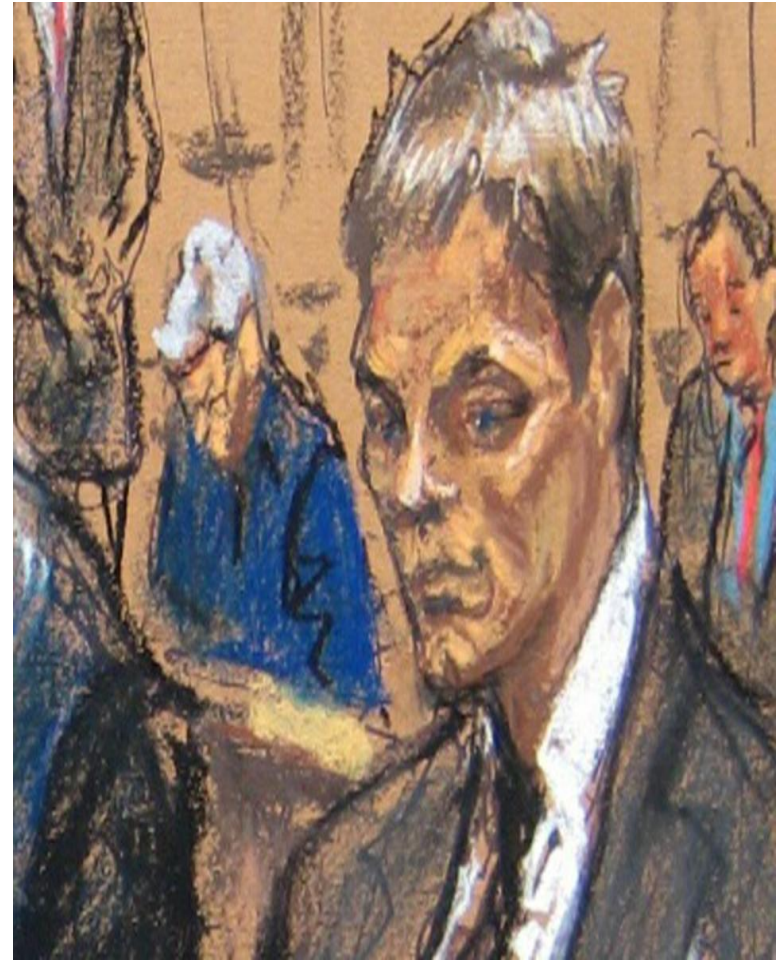
- The purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their client and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
- But, the attorney-client privilege only protects legal advice, not advice regarding business or internal policy

Use of Outside Counsel

- Deflategate
- The Court noted that Mr. Wells' firm performed "dual and seemingly inconsistent roles as 'independent' investigator and counsel to the NFL"



Use of Outside Counsel

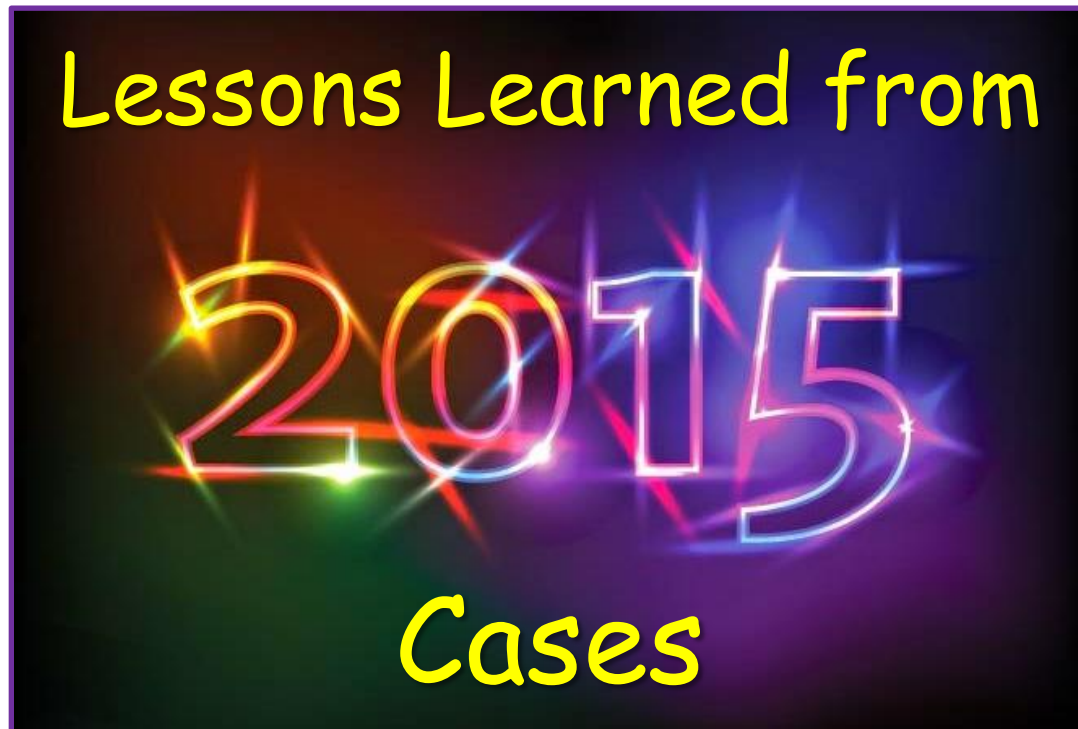


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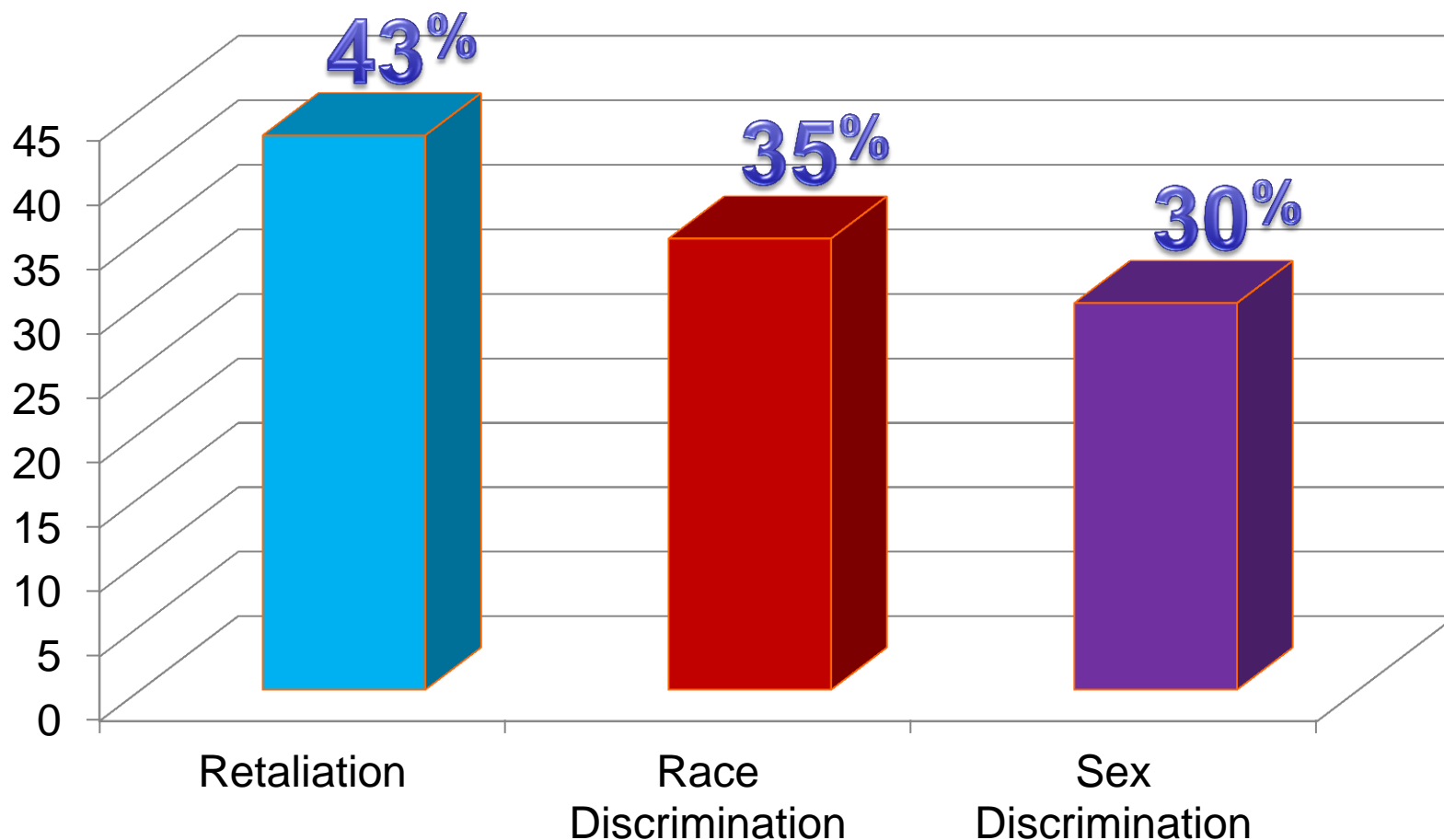
Taft Stettinius & Hollister LLP
December 4, 2015

The Year in Review



Presented by
Doreen Canton
December 4, 2015

EEOC Fiscal Year 2014



Age Discrimination



- Age discrimination is pervasive in the U.S.
 - Especially for older women.
- 10,000 Baby Boomers turn 65 each day.
 - Many are not opting for retirement.
- Job application study.
 - Call back rates much higher for younger workers.
 - National Bureau of Economic Research Study 10/26/15.



Retaliation

- **First**, you need **protected activity**:
 - Refusal to:
 - Search employee computer
 - Scrub manager computer
 - Demand that superior cease his harassing conduct.
 - “I will have my attorney respond”
 - “Hostile work environment”
- Includes complaints to HR, managers, co-workers, EEOC, OCRC, KCHR, reporters

Retaliation *(continued)*

- **Then**, you need an **adverse action**:
 - Demotion
 - Reduction in duties
 - 3 columns per week to 2.
 - Negative performance review after years of good performance
 - Discipline record “changed drastically”
 - Shift change
 - Having to use up paid time while on suspension
 - No training
 - Sudden monitoring
 - Termination

Timing is Everything!

Discrimination



- Comments continue to hurt employees:
 - “Don, you’re a dinosaur”
 - “It’s time to bring in younger employees to take the company into the future”
 - *Dinkgrave v. Genova Products, Inc.*
(Mich. Cir. Ct. 10/29/15) \$550,000 verdict.
- Older workers considered “dinosaurs” who “the company is looking to get rid of”
 - *Kosh v. American International Group, Inc.* (S.D.N.Y. 2015)
In mediation

Discrimination (continued)

- “Lazy black bitch”
- “Nappy hair”
- “Get your black ass back to work”
 - *Goode v. Donahoe* (C.E.D.N.Y. 11 Summary judgment denied)
- “Uppity”
 - *Charles v. City of Boston* (Mass. Super. Ct. 10/23/15) \$10.9 million verdict



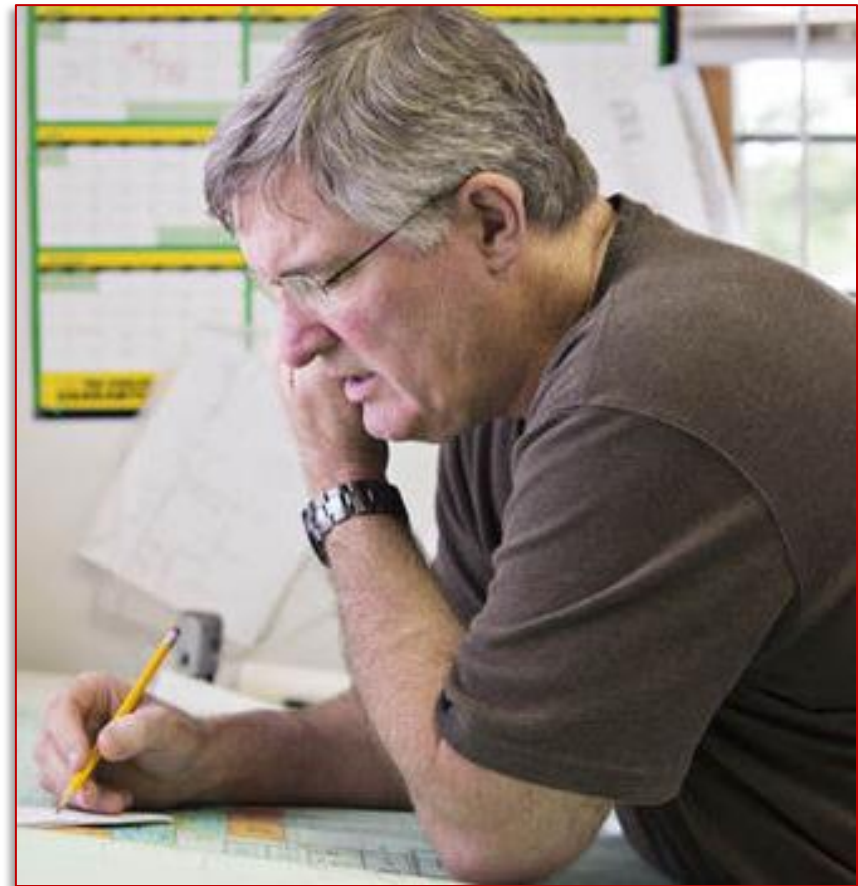
Discrimination (continued)

- “Old, short blond girl.”
- “Older people don’t work as fast and aren’t as productive.”
- “He likes to keep himself surrounded with young people.”
 - *Thomas v. Heartland Employment Services* (8th Cir. 8/13/15).
Summary judgment reversed.



Discrimination (continued)

- “Old and set in his ways”
- “We need to move in a new direction”
 - *McCartt v. Kellogg USA, Inc.* (E.D. Ky. 10/14/15)
 - Summary judgment denied



Discrimination: Showing Pretext

- When the jury can disbelieve your reason
 - Insufficient grounds
 - *Moffet v. Wal-Mart Stores, Inc.* (6th Cir. 2015)
- Incredible
 - Plaintiff fired for shouting in fight
 - Other employee who used physical violence not fired
 - *Wheat v. Fifth Third Bank* (6th Cir. 2015)
- Acquiescence.
 - Employee chronically late for 27 years
 - Why start documenting now?
 - *Wallner v. Hilliard* (6th Cir. 2014)

Showing Pretext *(continued)*



- Changing Reasons.
- Position elimination v. poor customer service

– Inconsistent Reasons

- “Difficult times” require “difficult financial decisions” v. net increase in department employees after reorganization
 - *Milillo v. Thomas Jefferson University Hospitals, Inc.* (E.D. Pa. 10/13/15)
- Employee told university “had to let her go because of the budget,” but her replacement was paid a higher salary
 - *Wilkins v. Harris-Stowe State University* (Mo. Cir. Ct. 10/30/15)

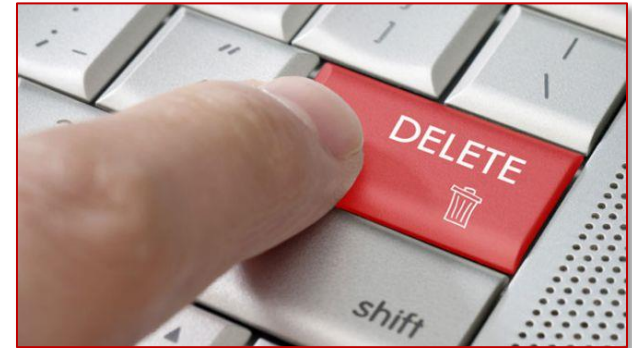
Showing Pretext *(continued)*

- Not following policy.
 - “Final” warning on day back from FMLA when policy required written warning before final warning
 - *Wallner v. Hilliard* (6th Cir. 2014)
- Final written warning before even issuing a first warning
 - *Simers v. Tribune Co.* (Superior Court Ca. 11/14/15)
\$7.1 million verdict
- Manager did not consult with HR about termination when policy required HR to approve terminations
 - *Moffat v. Wal-Mart Stores, Inc.* (6th Cir. 2015)

Showing Pretext (continued)

- Disappearing Documents

- No documentation to show how job cuts were decided
- Hard drives wiped
- E-mails deleted



- *Wilkins v. Harris-Stowe State University* (Mo. Cir. Ct. 10/30/15)

- False Reasons

- Employee fired for no-call, no-show even though he asked for and was approved for a day off
- Company policy did not require termination for one no-call, no-show
 - *Isenhouse v. RML, Inc.* (M.D. Pa. 10/26/15)
Summary judgment denied

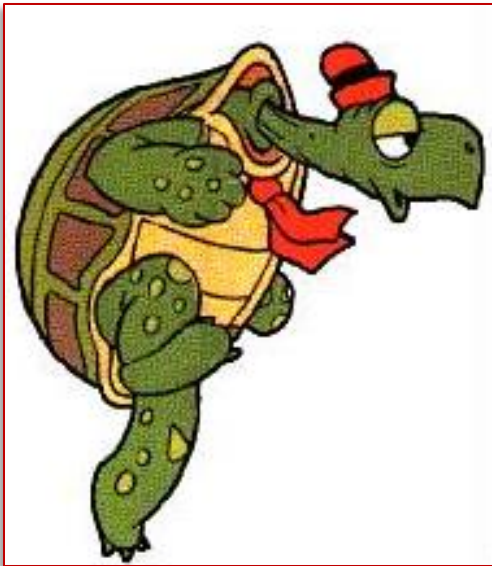
Showing Pretext *(continued)*



Conflicting Stories.

- About who...
 - ...made the termination decision. (No one!)
 - ...was consulted in the decision.

Sexual Harassment



Slow Response.

- Employee complaint about co-worker
- Supervisor of team:
 - “Think carefully about filing a complaint because team leader has a wife and three kids and complaint would end his career”
 - *Mack v. City of Chicago* (N.D. ILL. 10/23/15)
 - Summary judgment denied

Sexual Harassment (continued)



Prompt Response.

- Employer promptly:
 - Investigated
 - Interviewed employees
 - Reassigned harasser
 - Disciplined harasser
 - *Davenport v. Nissan North America, Inc.* (S.D. Miss. 10/22/15)
 - Summary judgment granted

Religious Discrimination

Key issue: Is the need for an accommodation a motivating factor in the employer's decision?

– *EEDC v. Abercrombie and Fitch Stores, Inc.* (135 S. Ct. 2028 (2015))

- Muslim female with headscarf interviewed for floor sales job



Religious Discrimination (continued)



- Muslim drivers fired for refusing to transport shipments of beer
- Managers did not:
 - Understand company's legal obligations
 - Research the matter
- HR department lacked training.
 - *EEOC v. Star Transport Inc.* (C.D. ILL. 10/20/15)
 - \$240,000 verdict

Religious Discrimination (continued)

North Somalia v. South Somalia.

- *Farah v. JBS USA LLC.*
(D. Col. 2015)



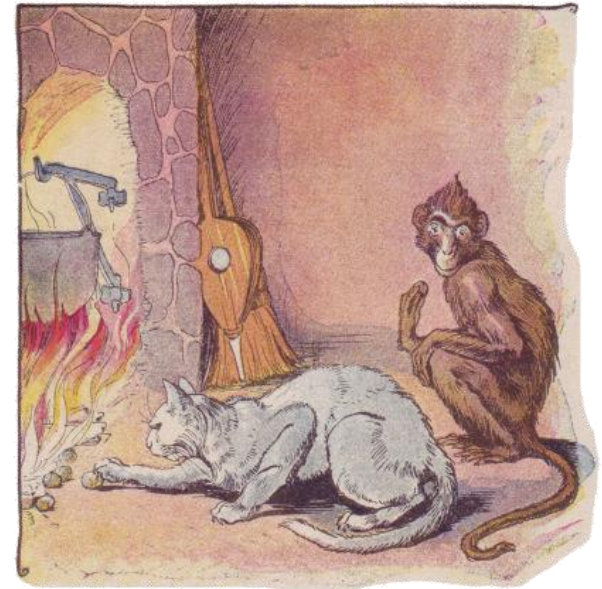
Social Security numbers

- *Yeager v. First Energy Generations Corp.*
(6th Circuit 2015)



Cat's Paw Theory

- Employers can break the chain between biased subordinate's unlawful action and the adverse action by independently investigating
 - Ask employee for his/her version
- Termination review panel
 - 2 independent managers, 2 days after termination, reviewed entire disciplinary history, talked to employee, and got his story
 - *Thomas v. Berry Plastics Corp.* (10th Cir. 2015)
 - Summary judgment granted



Cat's Paw Theory (continued)

- Investigator's bias can taint investigation
 - Decision-makers acted on basis of false premise because the information on which they relied was tainted
 - *Mason v. SEPTA* (E.D. Pa. 2015)
 - Summary judgment denied
- “If Kellogg wished to ‘insulate’ itself, it should have relied on evaluations by others, or it should have ensured that objective criteria were used, rather than rely on [zone manager who made ageist comments] word”
 - *McCartt v. Kellogg USA, Inc. et al*, No. 5:2014cv00318
 - Document 69 (E.D. Ky. 2015)

Really?

- Honey Baked Ham gift certificate \neq Religious discrimination

- *Yazdian v. ConMed Endoscopic Tech, Inc.*
(6th Cir. 2015)

- Female supervisors asked male subordinate to send them pictures of his genitalia, approached him with a ruler...

- *Tripp Isenhour*



- Borgata Babes were back in court
 - *Schiavo v. Borgata Hotel Casino and Spa.*
(N.J. ct. App. 2015).
 - Personal appearance standards

Really? (continued)

- Jewish Global Manager fired in retaliation for complaining about a training video depicting competitors as Nazis

- *Orlando v. BNP Paribas N.A.* (S.D.N.Y. 10/22/15)
- Summary judgment denied



- The first GINA jury verdict

— \$2.3 million

to 2 employees ordered to provide saliva samples as part of a company investigation to determine who was defecating on warehouse floor

- *Lowe v. Atlas Logistics Group Retail Services.* (N.D. Ga. 6/22/15).



Questions?



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PSYCHOLOGICAL SAFETY :

The Canary in the Coalmine

Presented by: Kevin Willmarth, Psy.D.

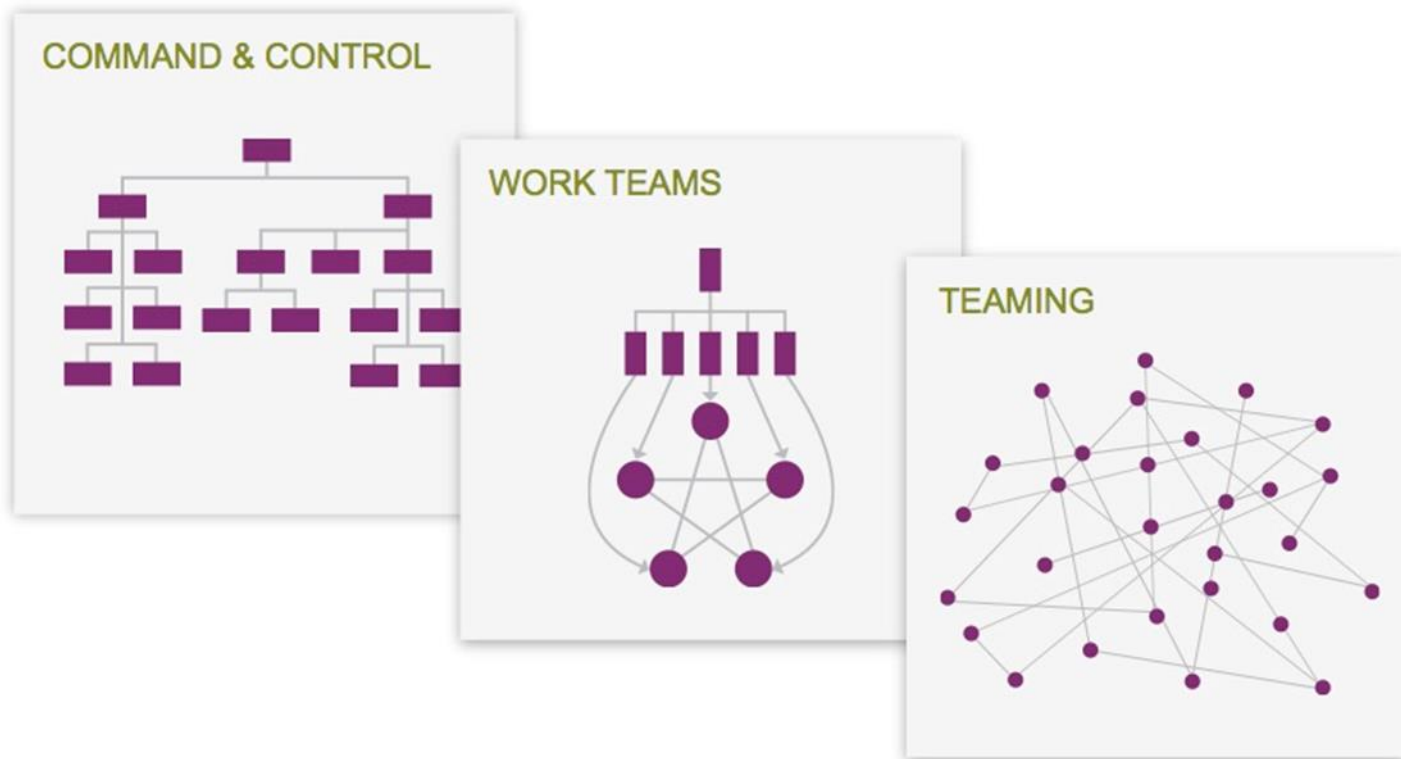


Areas to Cover

- Teaming
- What is psychological safety and why is it important?
- What influences psychological safety?
- What can get in the way?
- Leadership mindset
- What about accountability?
- Assessing psychological safety

What is Teaming?

The Changing Nature of Work



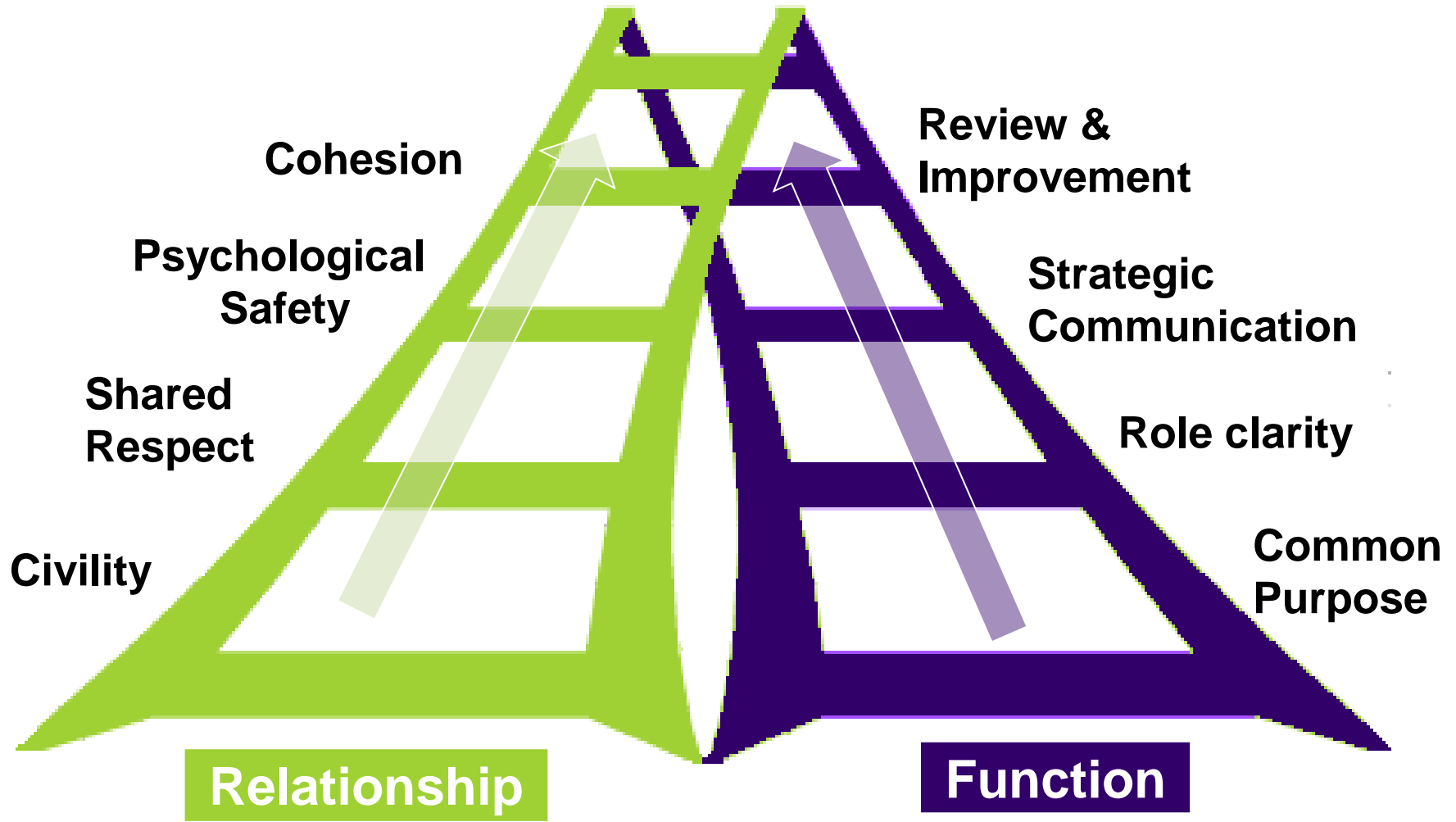
Teaming is a Verb

Team • ing (v.)

Teaming is teamwork on the fly-coordinating and collaborating, across boundaries, without the luxury of stable team structures

Teaming is especially needed when work is
COMPLEX
and **UNPREDICTABLE**

Engaged, Effective Teams



What is Psychological Safety and Why is it Important?

Making it Safe to Team

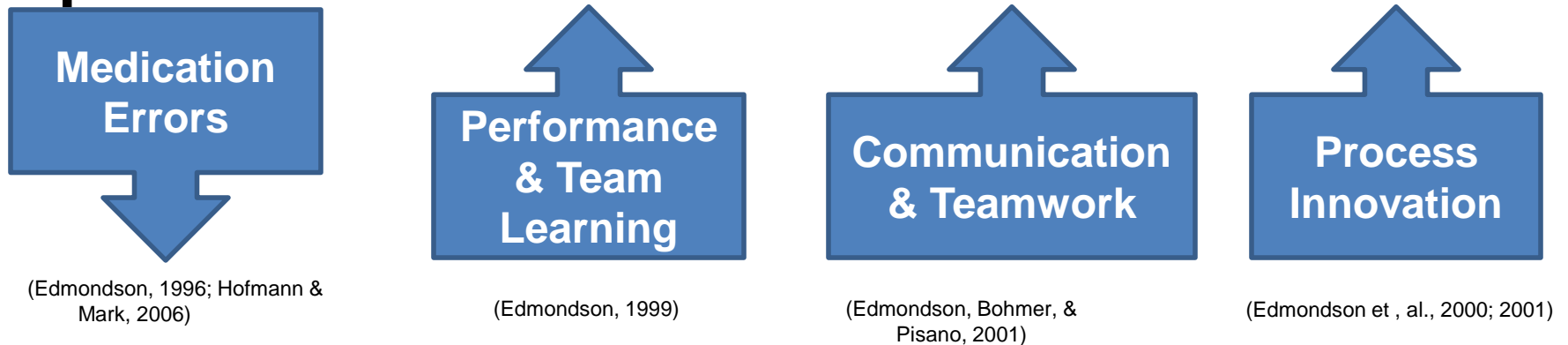
Psychological safety is the degree to which employees trust that asking questions, sharing new ideas, raising concerns, disclosing honest mistakes and reporting violations will not be penalized or perceived negatively in the workplace.

**IT'S ESSENTIAL
TO TEAMING**



Psychological Safety - Business Case

Psychologically-safe healthcare environments experience:



In VA, greater psychological safety is related to:



(Measuring Psych Safety in VA, NCOD Report, 2014)

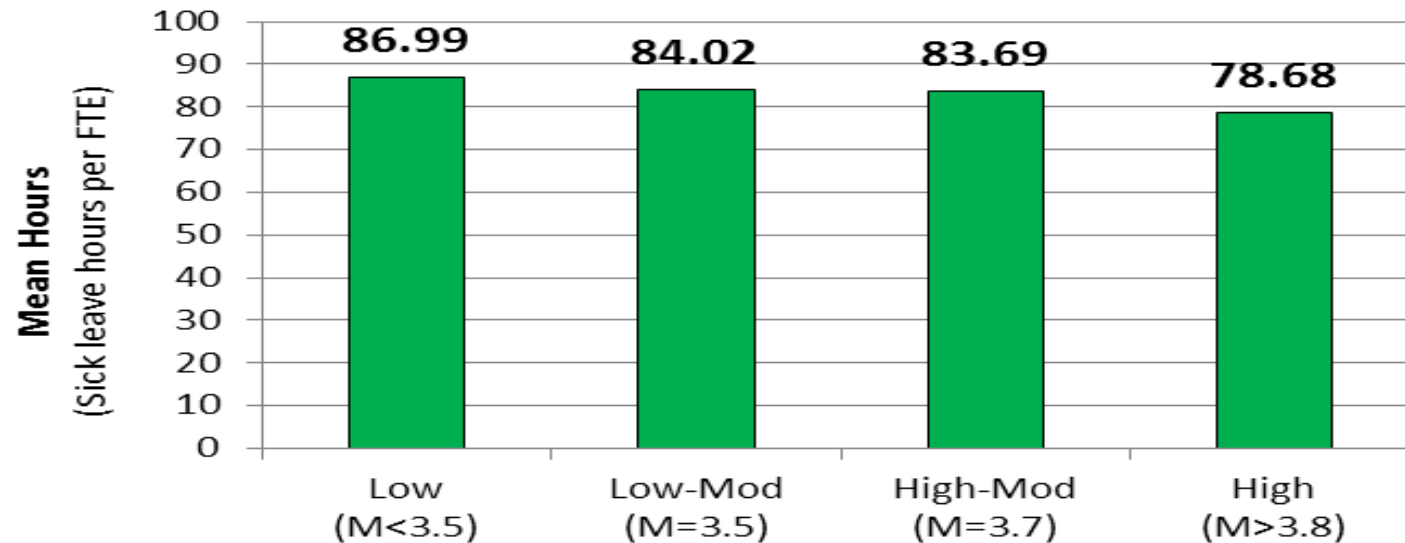
The Business Case

Relationship of Civility to Sick Leave Usage

- ❖ In VA, as workplace civility increases there is a positive decline in sick leave usage. The difference in sick leave usage between facilities with “high” and “low” civility is a cost-savings of \$241 per employee*.

Relationship between Workplace Civility and Sick Leave Usage, 2013 VA AES and PAID, VHA/VBA facility-level.

All scores significantly ($p < .05$) different.



Average #
SL hours
per 1,000
employee
s

Mean Hours
(Sick leave hours per FTE)

* Average
employee salary
FY2013 =
\$29.00/hour
excluding
benefits.

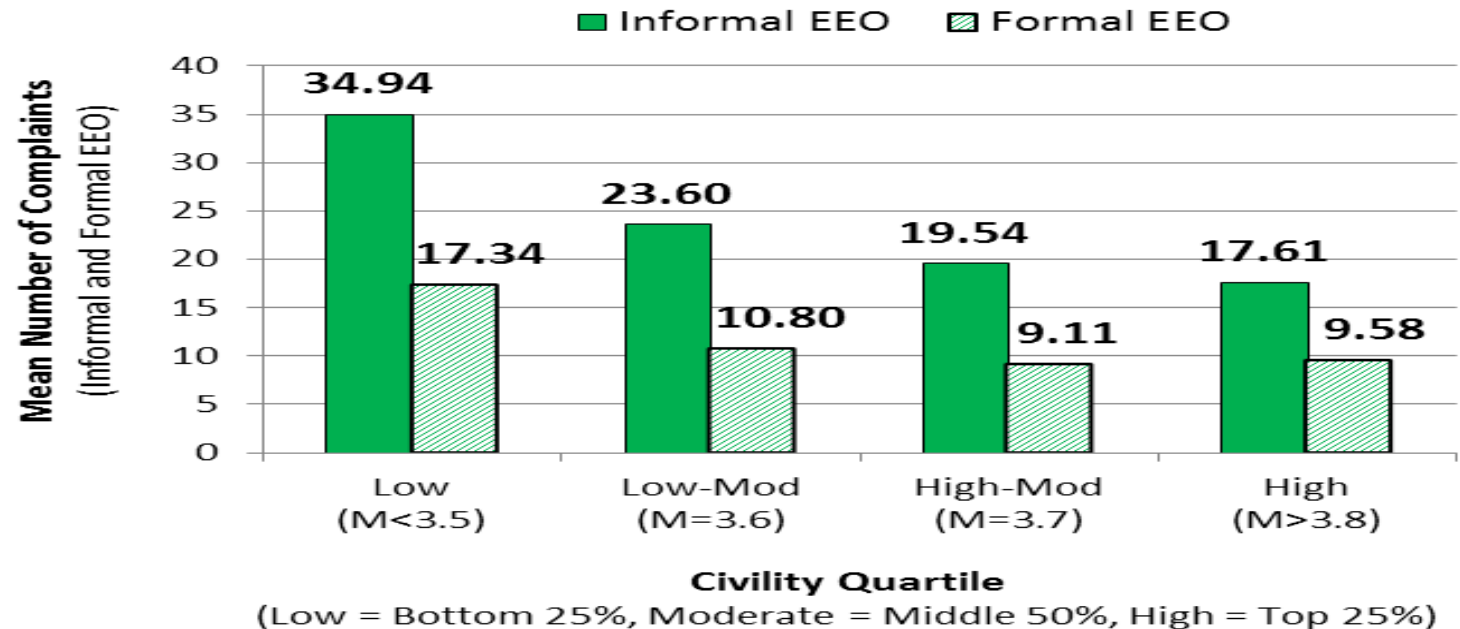
Civility Quartile
(Low = Bottom 25%, Moderate = Middle 50%, High = Top 25%)

The Business Case

Relationship of Civility to Formal EEO Complaints

- ❖ In VA, as workplace civility increases there is a positive decline in formal and informal EEO complaints. Reducing one EEO complaint is associated with a \$17,000 cost-savings (2011)

Relationship between Workplace Civility and Informal/Formal EEO Complaints, 2013 VA AES and EEO, VHA facility.



Average #
formal EEO's
per 1,000
employees

Relationship of
Civility to
Formal/Informal EEO
Complaints (per
capita), VA
facility/office-level
data, FY2011. (Data
Source: VA All
Employee Survey,
EEO-CATS Tracker
Database)

The Canary in the Coalmine

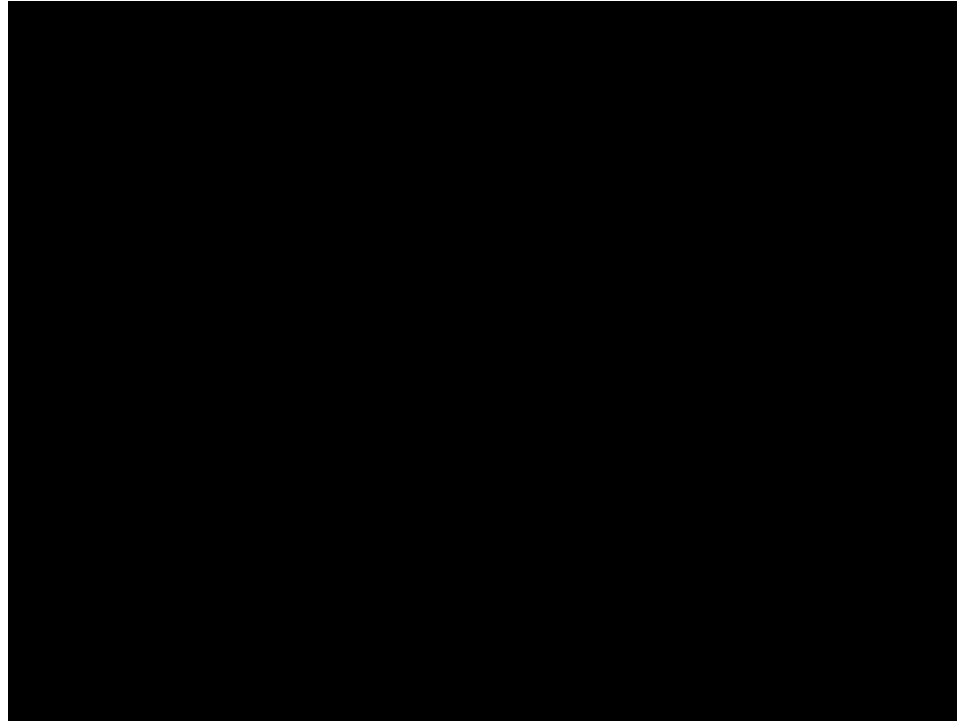
Psychological Safety is not
an end in and of itself

It can act as a
barometer of
organizational health



What influences Psych
Safety?

Individual Differences



Behaviors that can diminish psych safety

Direct Triggers

- Silence
- Glaring eye contact (“the look”)
- Curtness, abruptness
- Snubbing, deliberately ignoring
- Insults
- Blaming, discrediting, discounting
- Aggressive, controlling manner
- Threats about job security
- Yelling and shouting
- Angry outbursts, physical threats

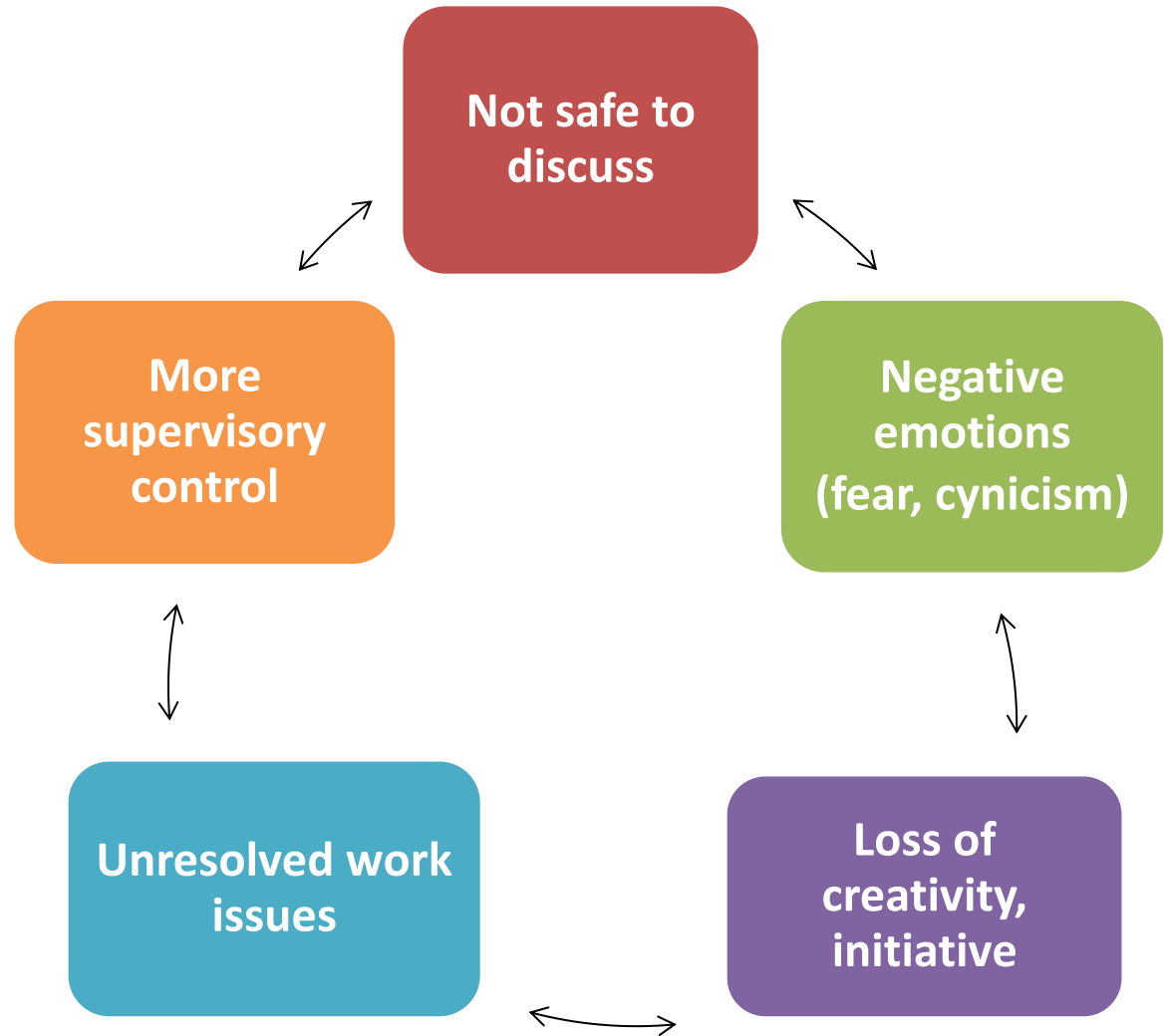
Indirect Triggers

- Selective decision-making, low transparency
- Lack of communication or responsiveness to input
- Inconsistent or mixed messages
- Deliberately distant behaviors
- Unethical conduct
- Self-preservation praise
(e.g., “I don’t see a need for change – do you?”)
- Condoning or contributing to a culture of mistrust

The Downward Spiral

What influences this spiral?

- Personal experience (direct or observed)
- Others' experience (shared stories)
- Negative assumptions based on private interpretations
- Externally imposed change



The Influence of Context

The chess pieces are darker on:

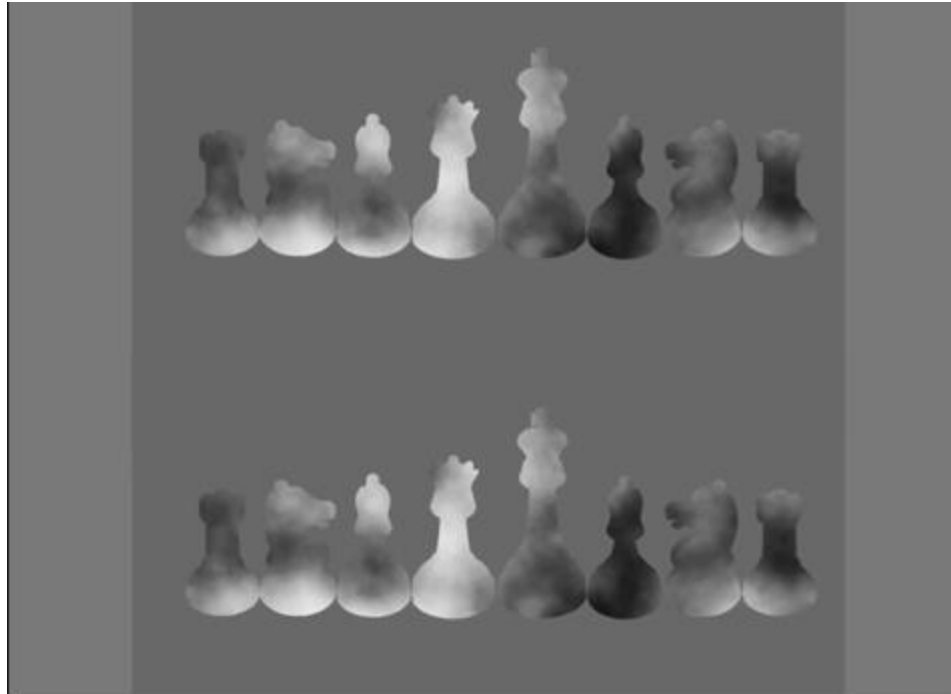
a) Top Row



b) Bottom Row



The Influence of Context



How do you learn best?

Learning Styles



Audio



Visual



Kinaesthetic

Ladder of Inference



Decide on
action

Interpret
meaning

Filter data

Take in data

Our ability to learn and work together is limited by our feelings that:

**The data we
select are the
real data**

**Our beliefs
are based on
real data**

**Our beliefs
are the
truth**

**The truth is
obvious**

The Language of Psych Safety

Inquiry: Asking questions that are designed to solicit the other person's point of view, opinion, judgments, concerns priorities and ideas.

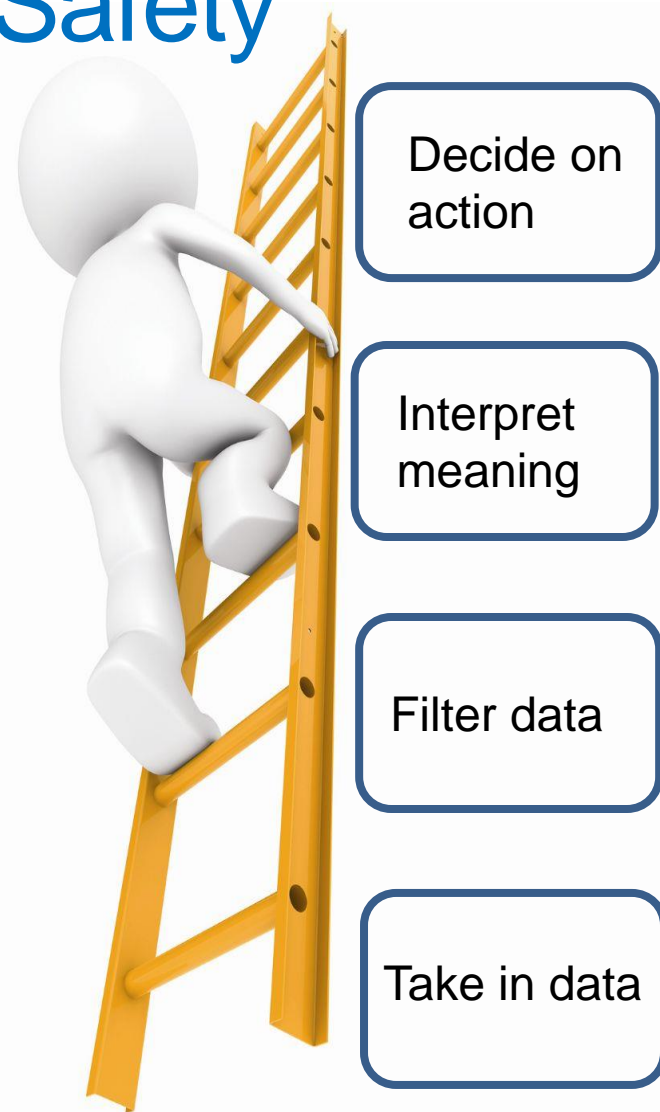


Advocacy: Sharing your expertise, viewpoint, or assessments about a situation in order to influence how others see things and negotiate on behalf of your key concerns.

Summarizing: Sorting out the central aspects of their message and paraphrasing it back to them to test your understanding.

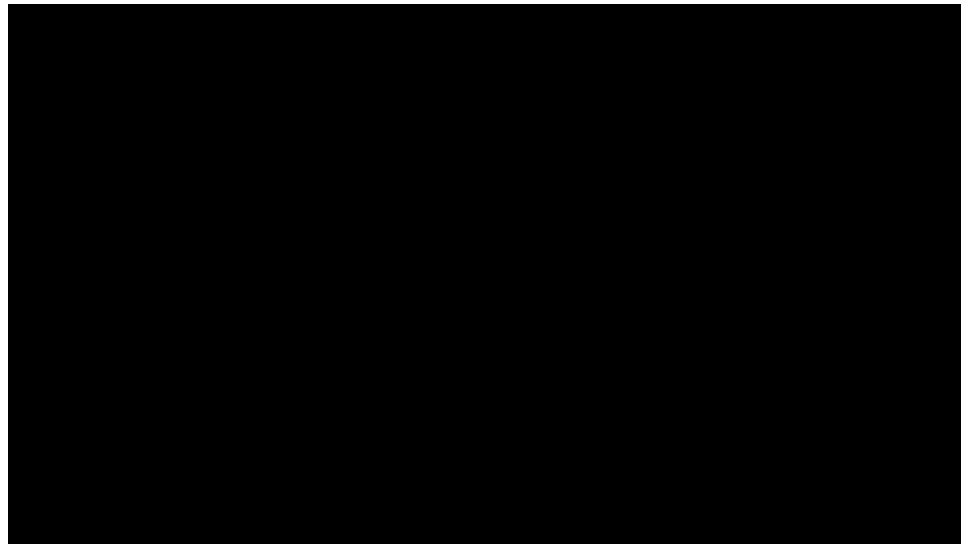
The Language of Psych Safety

- Using the Ladder of Inference to enhance skills of Advocacy and Inquiry
 - Making your thinking and reasoning more visible to others (advocacy)
(i.e. “Here’s what I think, and here’s how I got there.”)
 - Inquiring more effectively into others’ thinking and reasoning (inquiry)
(i.e. “Help me understand your thinking. What leads you to conclude this?”)



What can get in the way?

It Can Be Challenging...



Common Challenges

Impact/Intention

Power
Dynamics



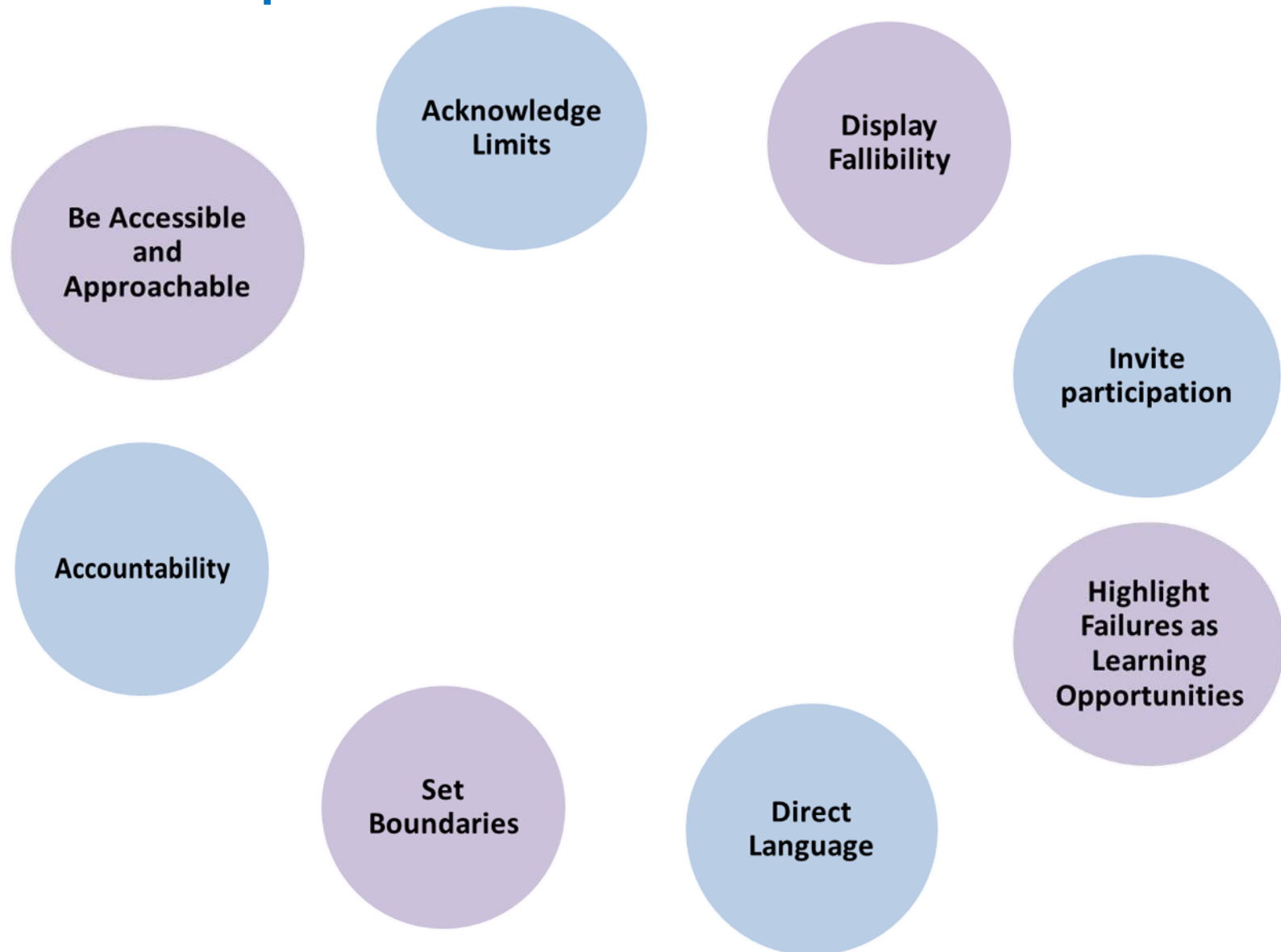
Physiology

Leadership Mindset

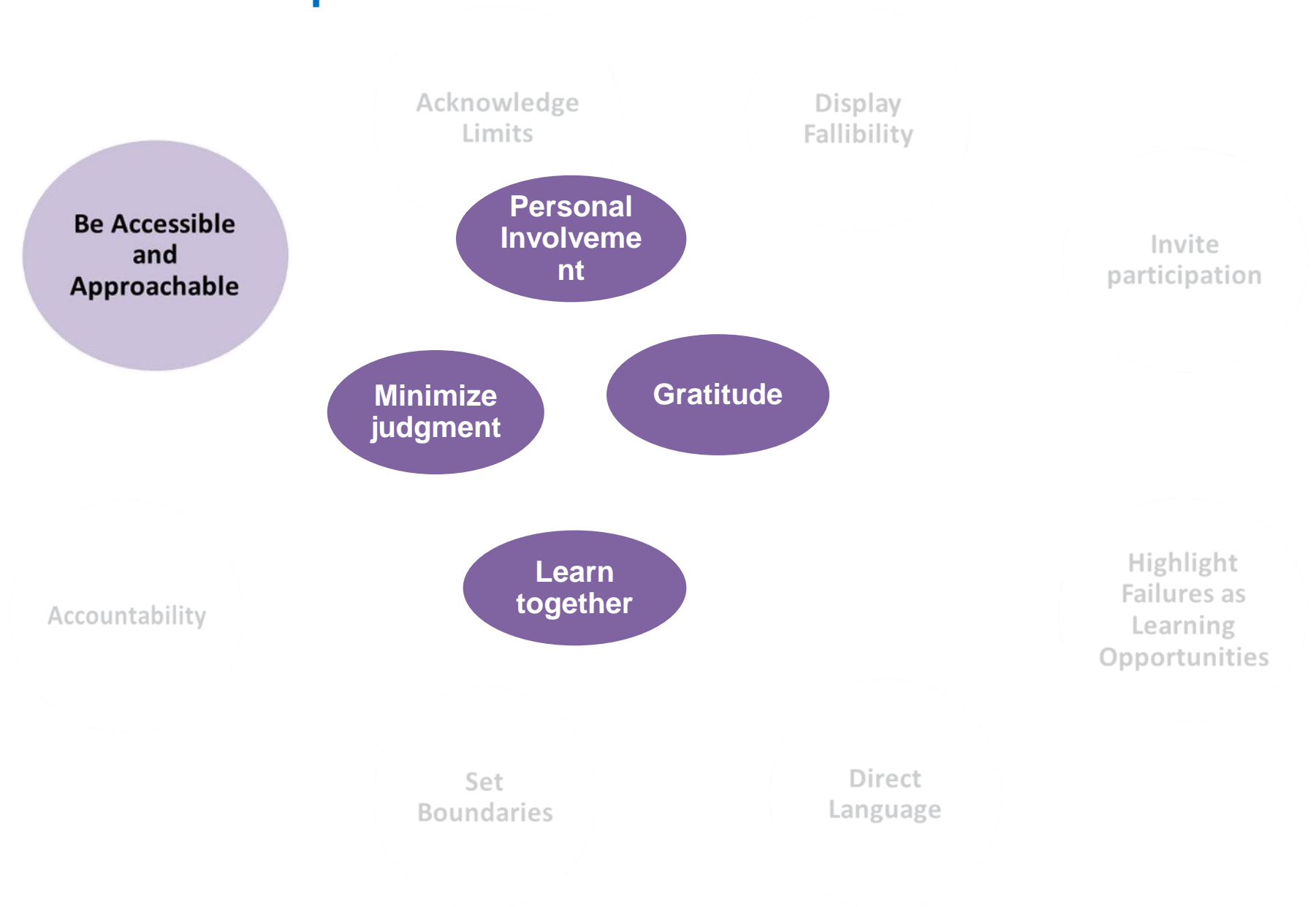
Leadership Mindset

- There really are a defined set of behaviors that can have a positive influence
- They impact not only psych safety, but also employee engagement, quality and safety, and workgroup performance
- They also create an environment that support continuous improvement

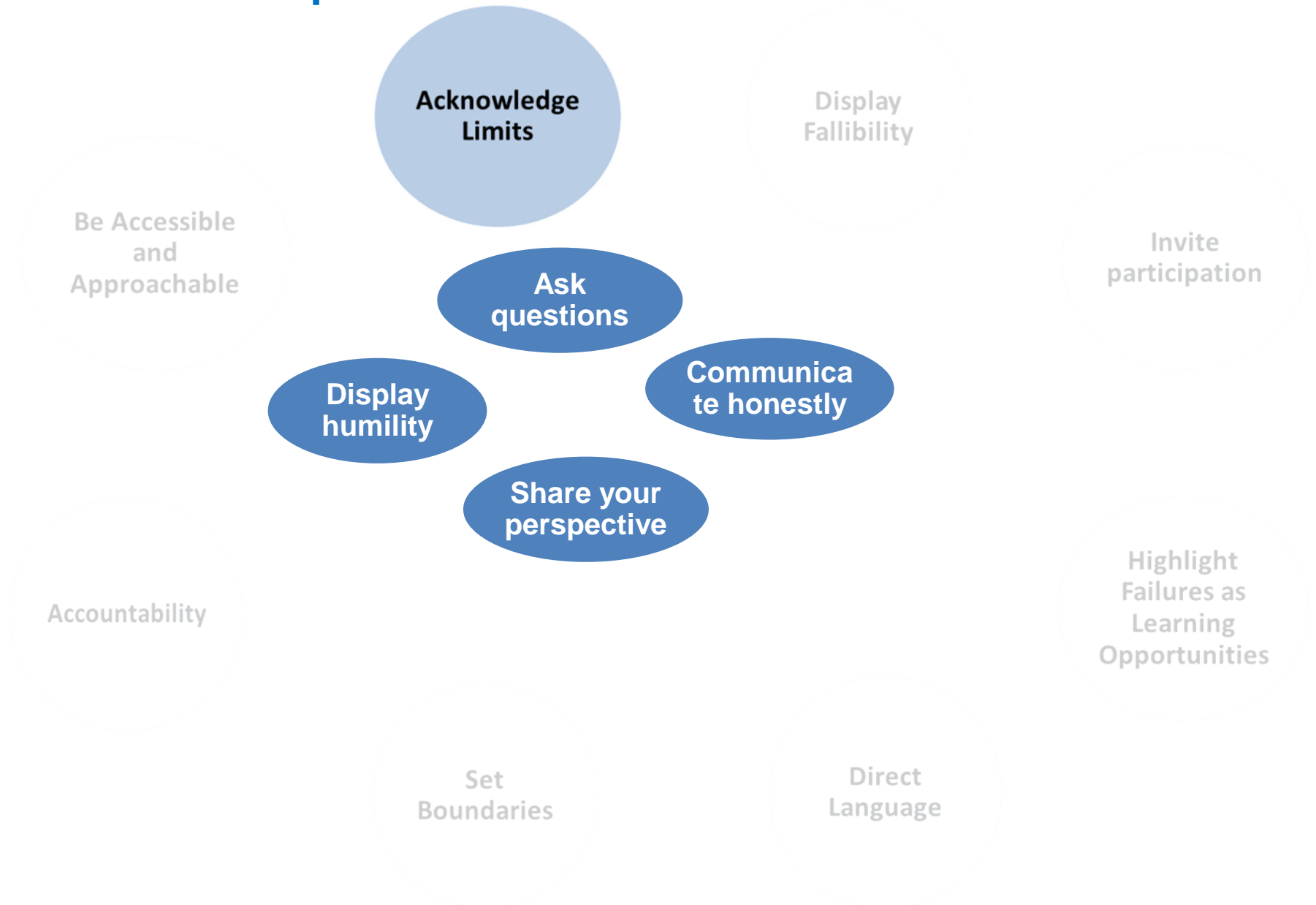
Leadership Mindset



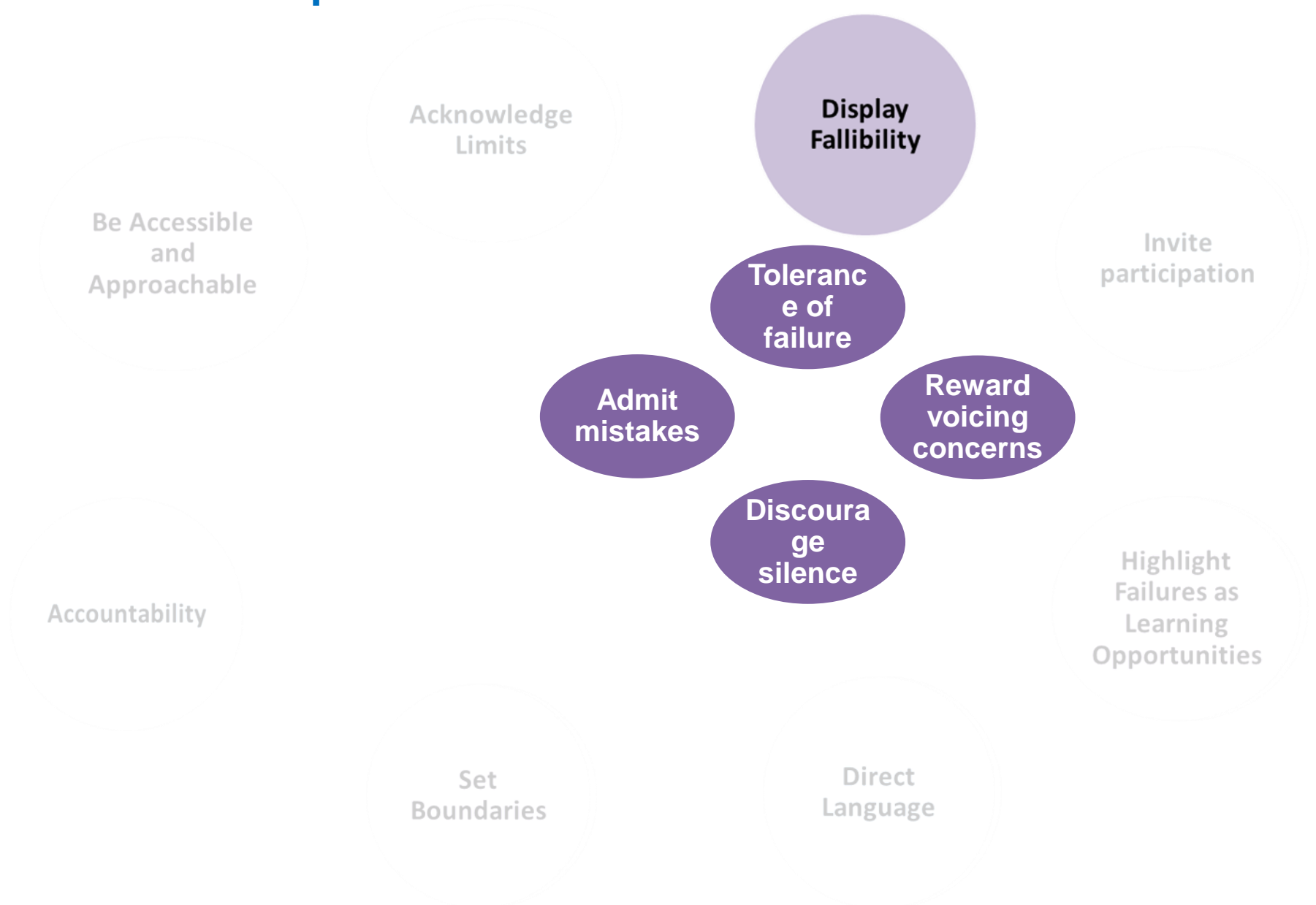
Leadership Mindset



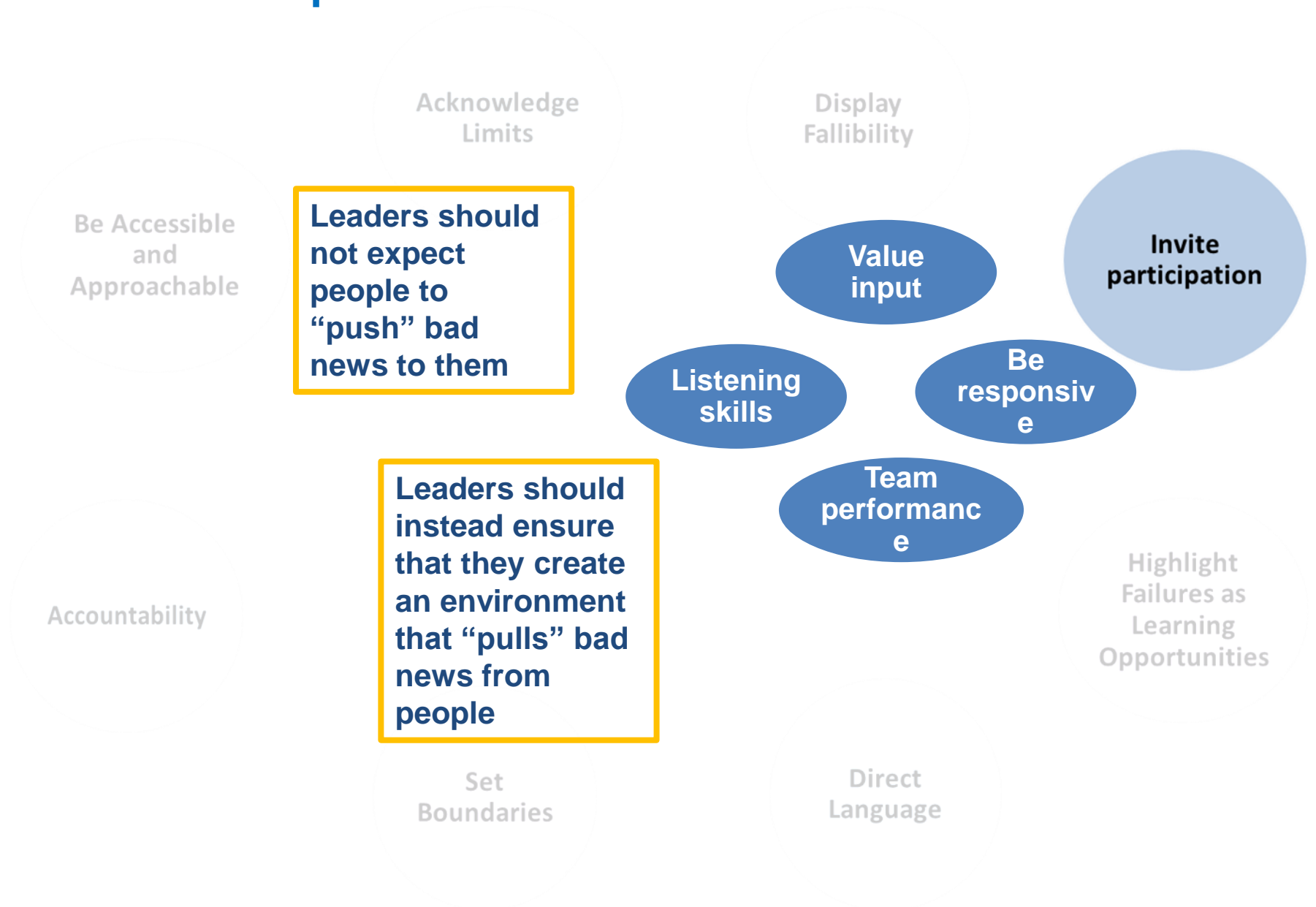
Leadership Mindset



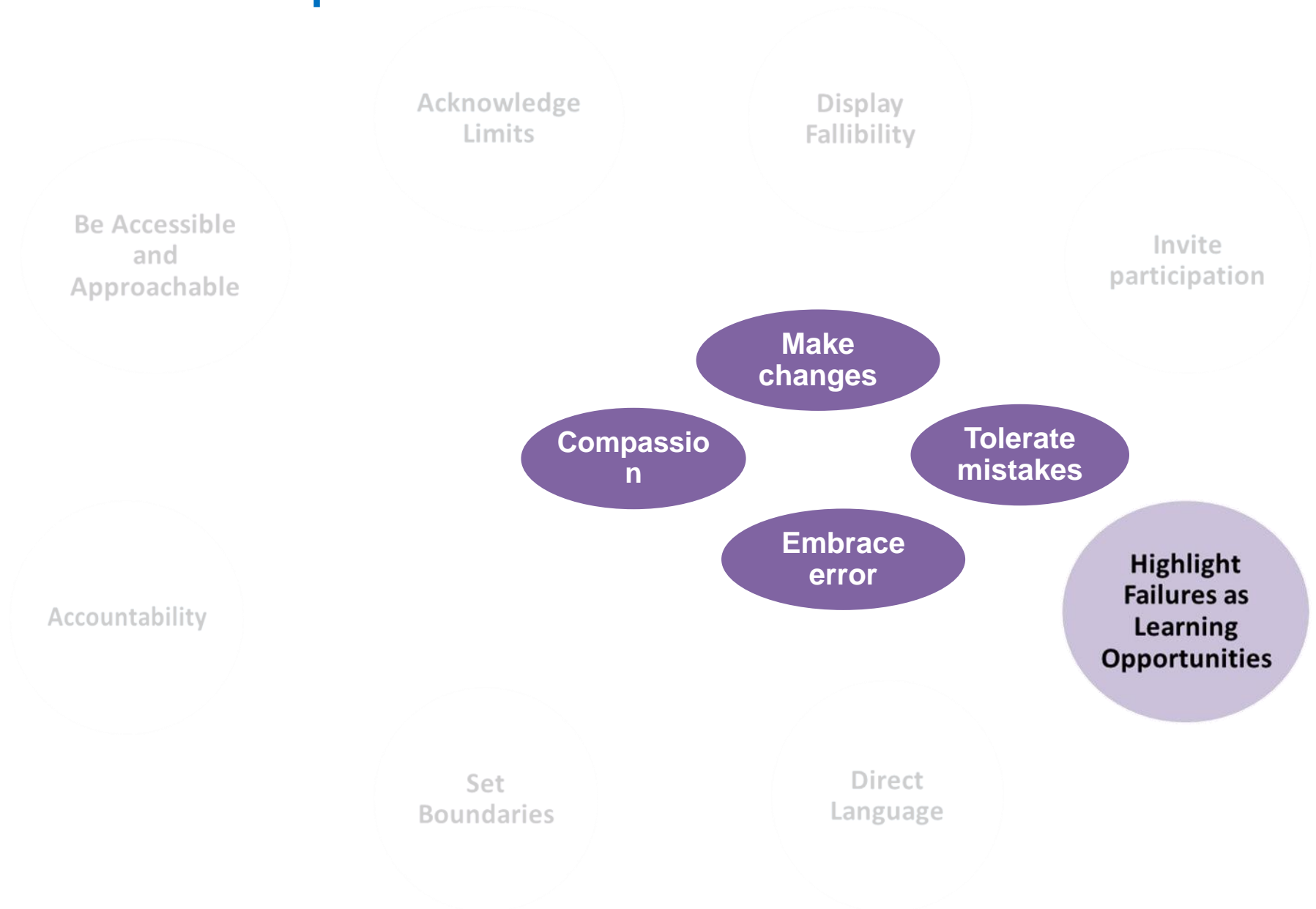
Leadership Mindset



Leadership Mindset



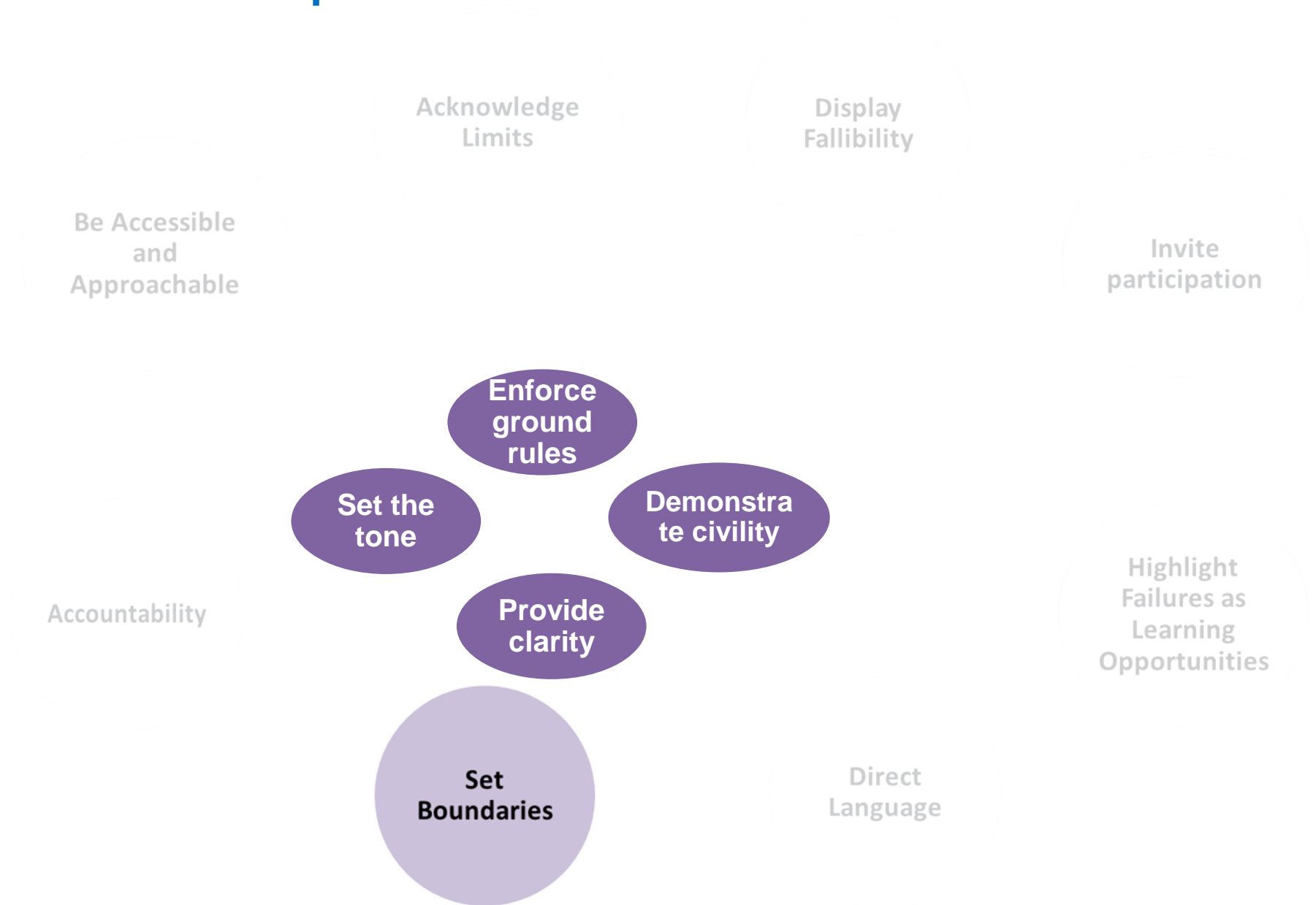
Leadership Mindset



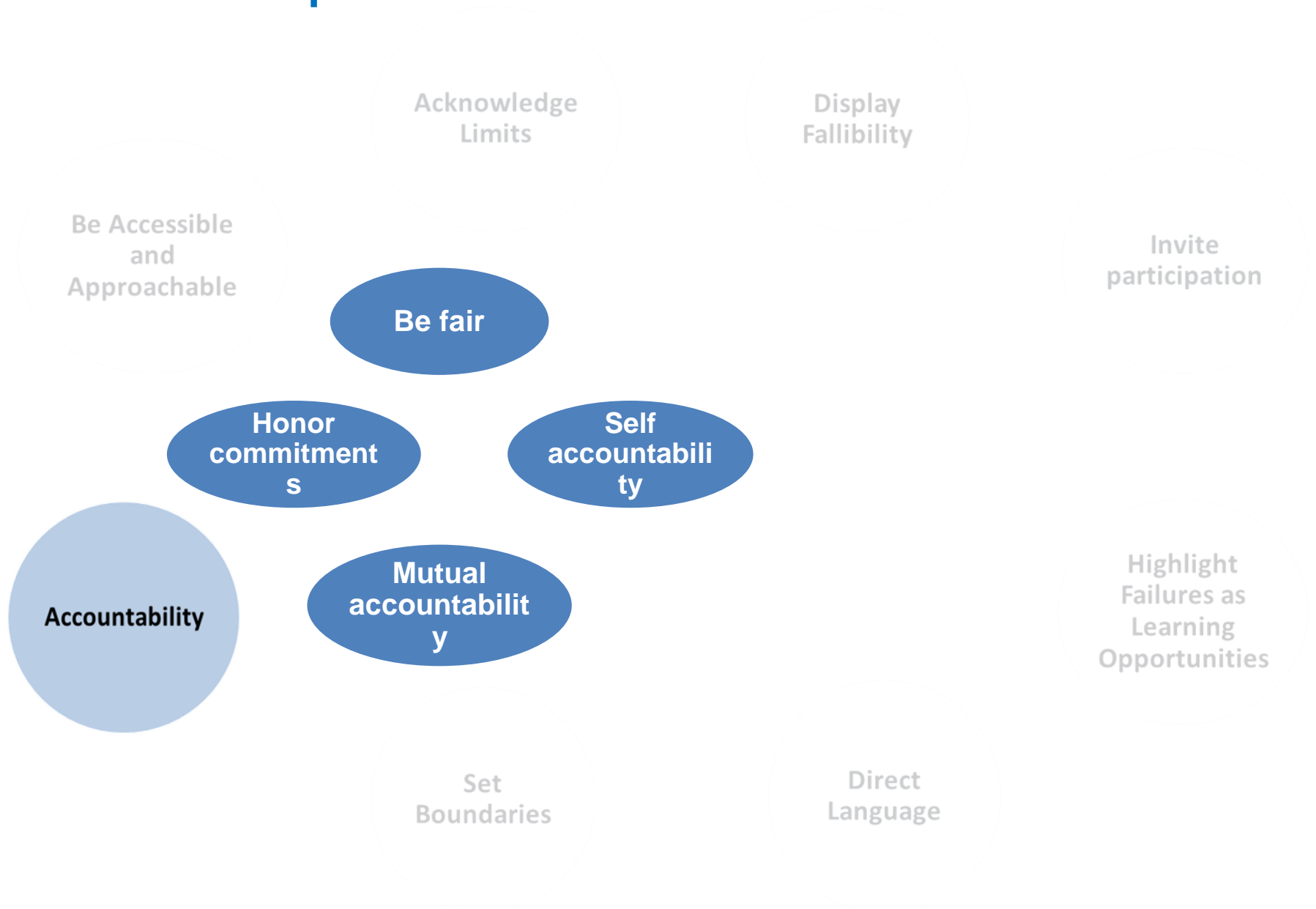
Leadership Mindset



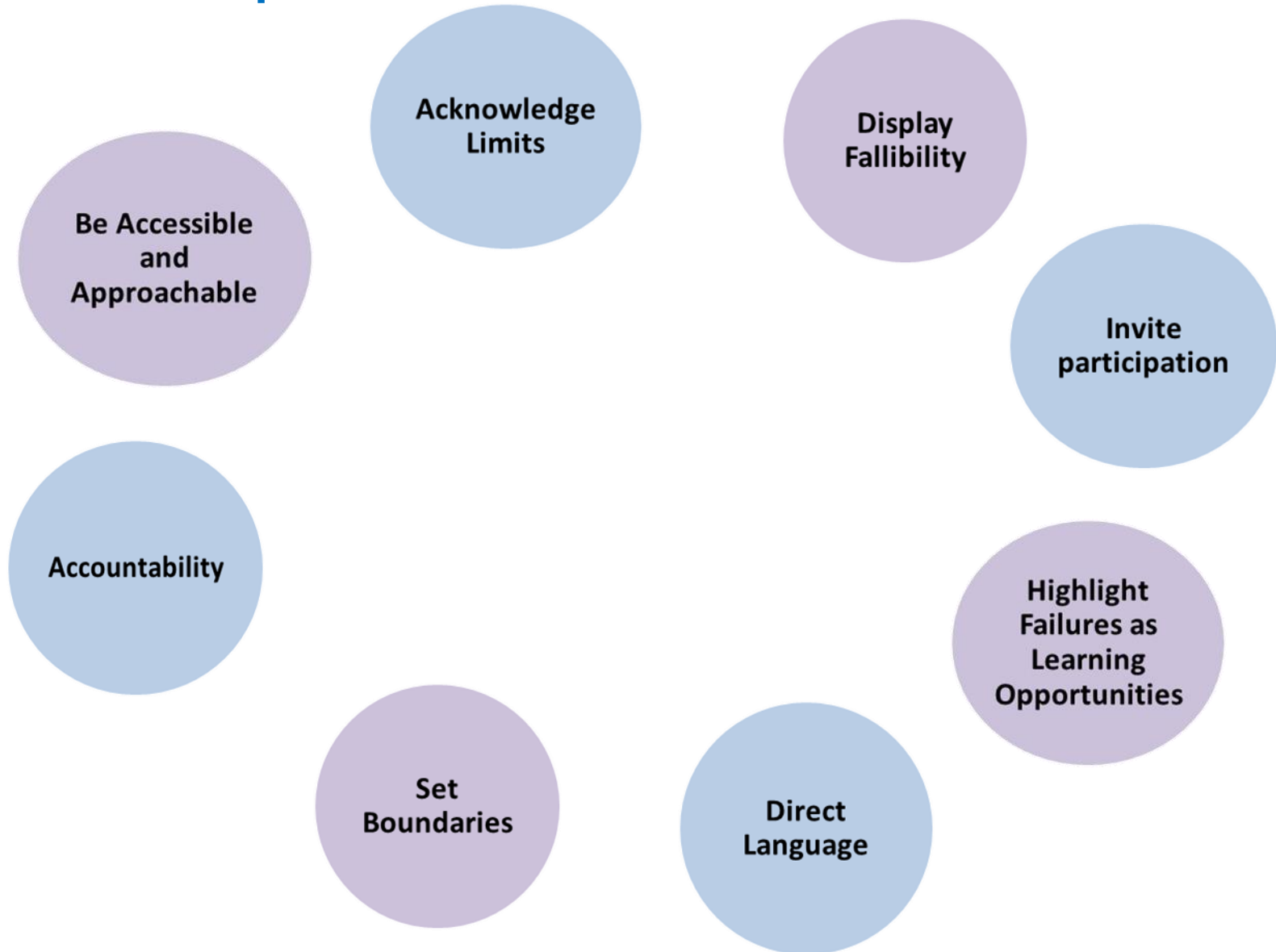
Leadership Mindset



Leadership Mindset



Leadership Mindset



What about Accountability?

The Issue of Accountability

- Achieving psychological safety is not about being 'nice' or about lowering performance standards
- Clarity about consequences related to choices that have inherent risk(s) enhances psychological safety
- Behavioral choices that lead to a punitive response:
 - Intentionally causing harm
 - Reckless behavior
 - Repetitive at-risk behavior despite re-direction
 - Repetitive human errors despite attempts to address them through training, coaching/mentoring, etc.

Just Culture

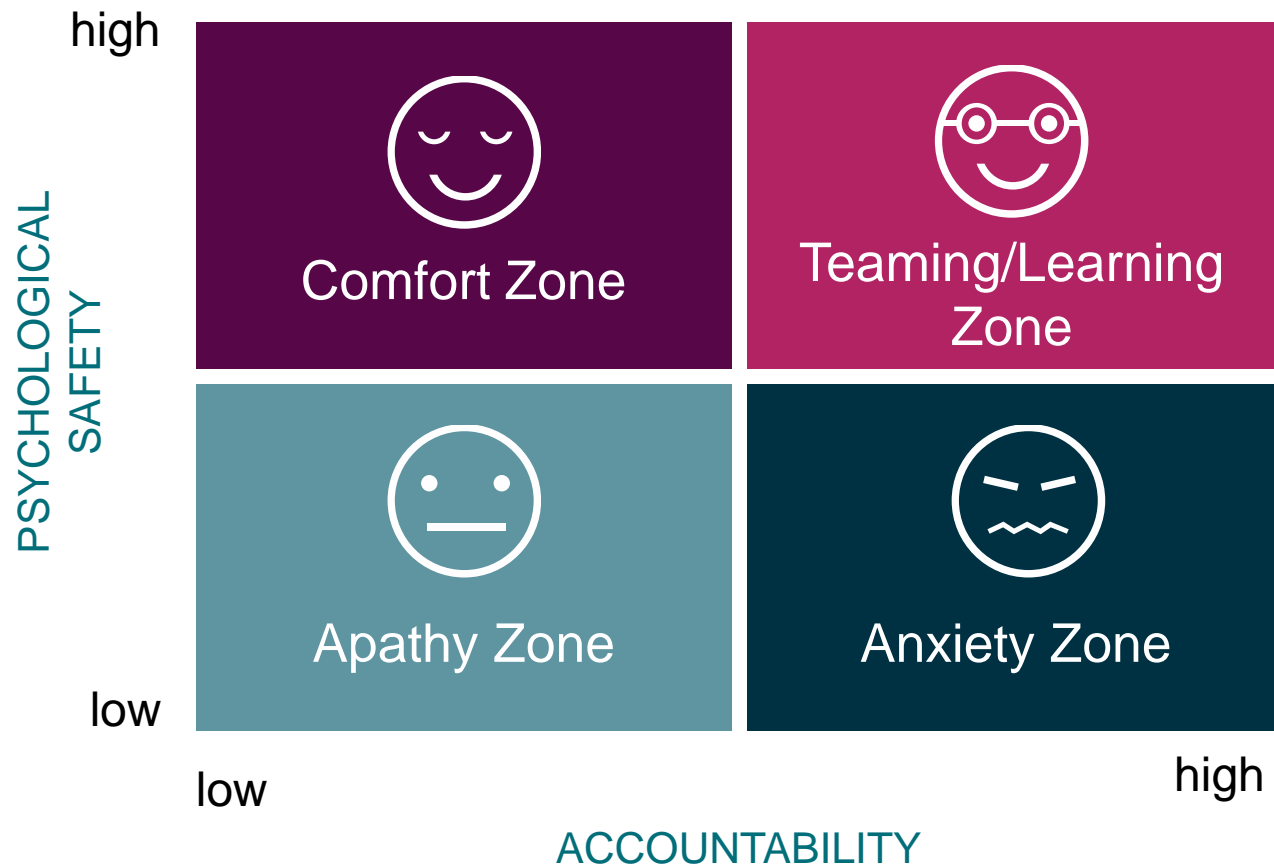
- The concept of a just culture is the intersection of psychological safety and accountability
- A just culture has clearly defined accountability principles
 - Accountability may be seen as a response to behavioral choices that are not in line with the organization's values or level of risk tolerance, but it is more complex than that
 - If a mistake is addressed harshly, people will see this as unjust
 - If reckless behavior is addressed too lightly, people will also see this as unjust
- What matters then is people feel assured that they will receive fair treatment when they are involved in adverse events or report them

Just Culture

- A just culture:
 - recognizes that competent professionals make mistakes
 - acknowledges competent professionals will take short cuts sometimes for a variety of reasons or have to make quick decisions about conflicting priorities
 - has zero tolerance for reckless behavior
- In a just culture, the line between acceptable and unacceptable conduct is both clearly drawn and understood



Just Culture

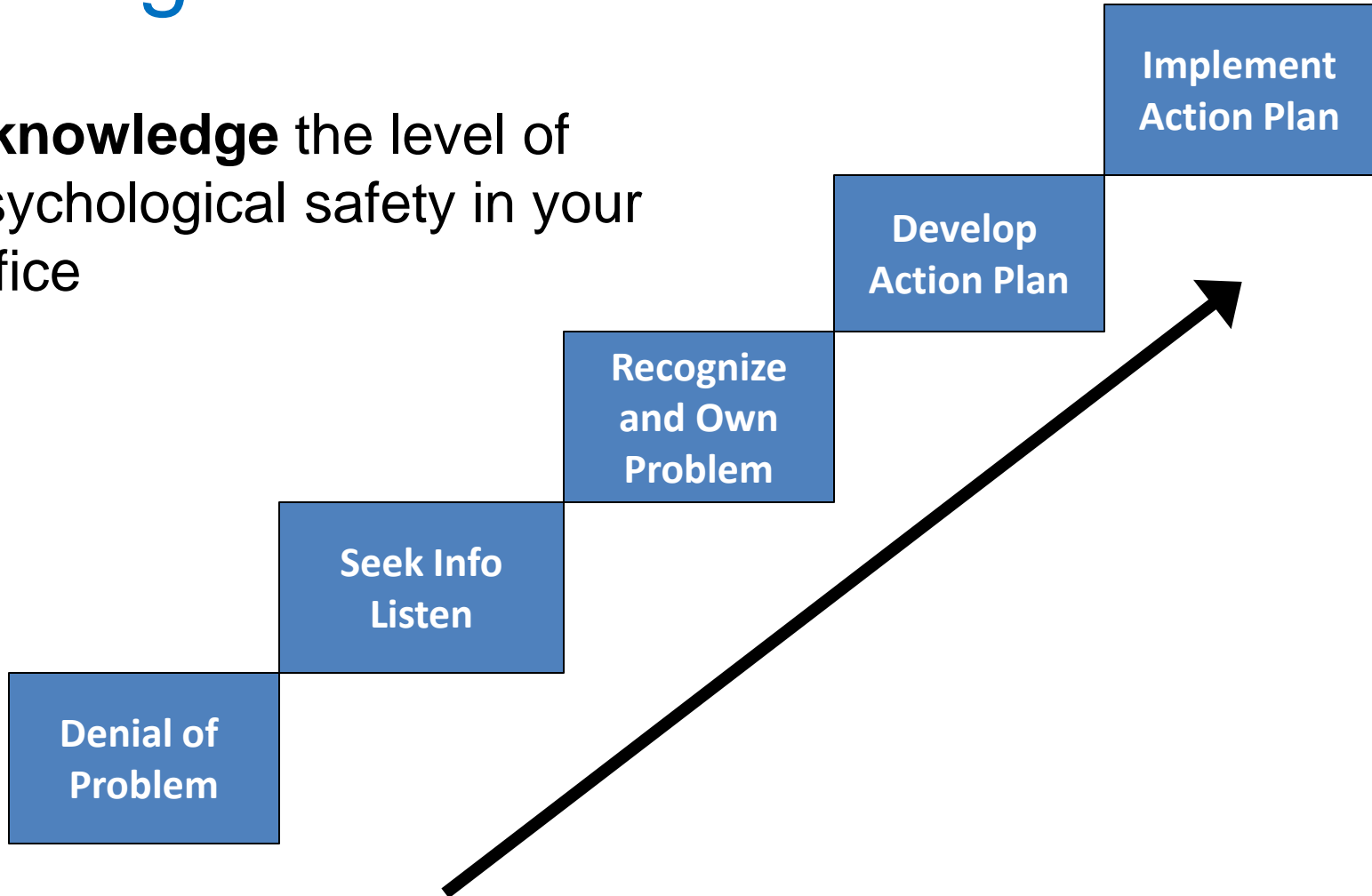


Assessing Psychological Safety

Psychological Safety

Getting Started

Acknowledge the level of psychological safety in your office



Psychological Safety

Getting Started

Assessment

What does lack of psychological safety look like in my office?

- Increased telling of untruths
- Hiding mistakes, not reporting
- Constantly hearing “don’t shoot the messenger”
- Covering up (CYA) behavior
- Hesitation to take initiative or risks
- Blaming others, not taking responsibility
- Informing on others
- General negativity/can’t-do attitude

Psychological Safety

Digging Deeper

Awareness

- Awareness begins with your own personal observations
 - When have you wanted to speak up, but hesitated?
 - What factors contributed to the hesitation?
 - Were there perceived risks?
 - What did you ultimately decide and why?
- Learn about psychological safety in the workplace
- Make psychological safety a safe issue to discuss

Questions?

A nighttime photograph of a city skyline reflected in water. The skyline includes several skyscrapers, with one prominent blue-glass building in the center. A large, ornate stone bridge with arches is visible on the right side of the image. The lights from the buildings and bridge are reflected in the calm water in the foreground.

Annual Labor & Employment Seminar

Taft Stettinius & Hollister LLP
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