MICHIGAN ASSOCIATION OF COMMUNITY COLLEGES

Legal Update

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I. Title IX/Violence Against Women Act

II. Stump the Stars

5 Cases

TITLE IX

- Past and Initial Focus
  - Athletes and equal opportunities on campus for men and women
- Current Focus
  - How colleges and universities must respond to complaints of sexual harassment and sexual violence
  - First time a sitting president has personally adopted an enforcement issue in higher education

TITLE IX ENFORCEMENT

- Sexual violence against students and employees is sex harassment covered by Title IX
- Must have a Title IX coordinator.
- Must investigate and resolve all alleged sexual assaults promptly and fairly, whether or not police are involved.

VIOLENCE AGAINST WOMEN ACT (VAWA)

Regulations Effective July 1, 2015 (in addition to Title IX)

- New Requirements
  - Must include definitions of dating violence, domestic violence, sexual assault and stalking in college and university policies
  - Must include definition of consent
  - Must describe safe and positive options for bystander intervention
  - Must provide all information about on and off-campus procedures, reporting, preserving evidence, disciplining process, etc. **cont'd**

VIOLENCE AGAINST WOMEN ACT (VAWA)

Regulations Effective July 1, 2015
(in addition to Title IX)

- Primary training to "all incoming and new employees"
- Ongoing training to "all students and employees"

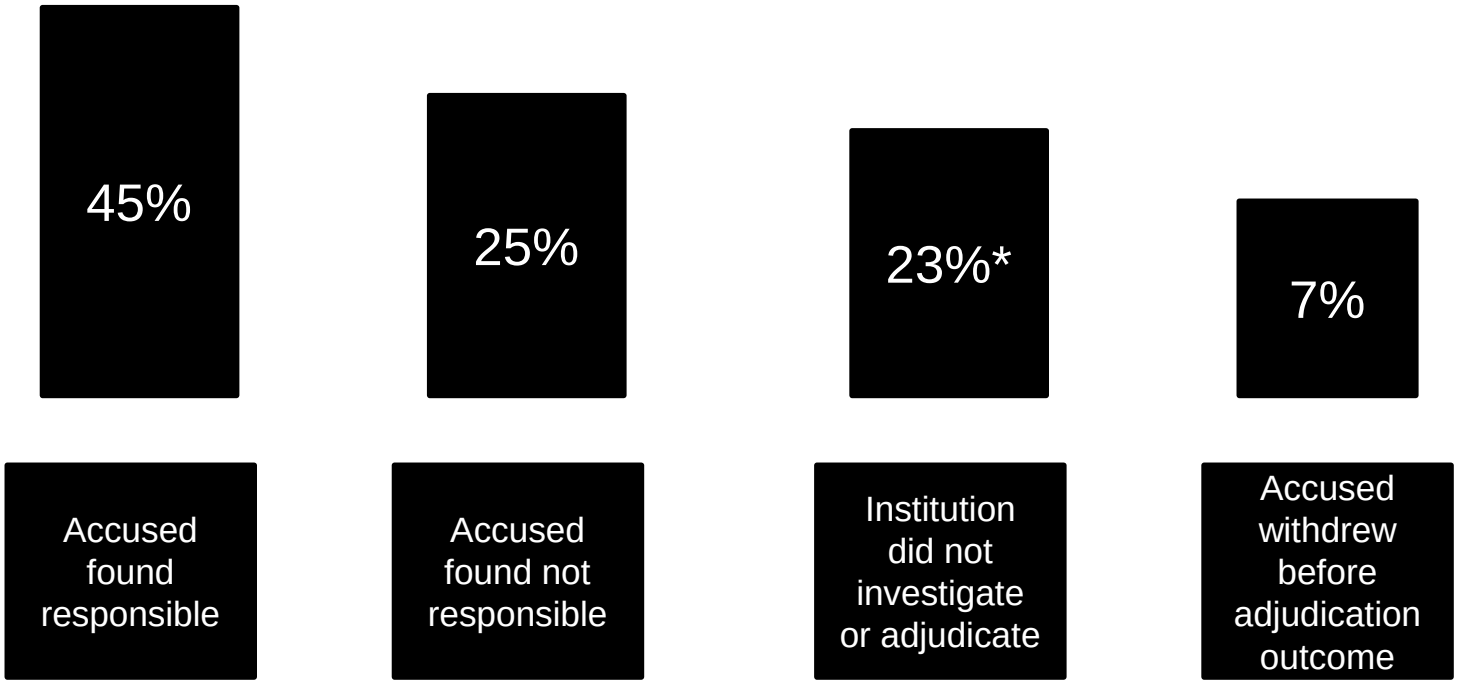
Chronical of Higher Education

Published a United Educators 3-year study of 305 reports of sexual assault at 104 colleges.

"Botching Sexual Assault Complaints Is Costly—Study Finds"

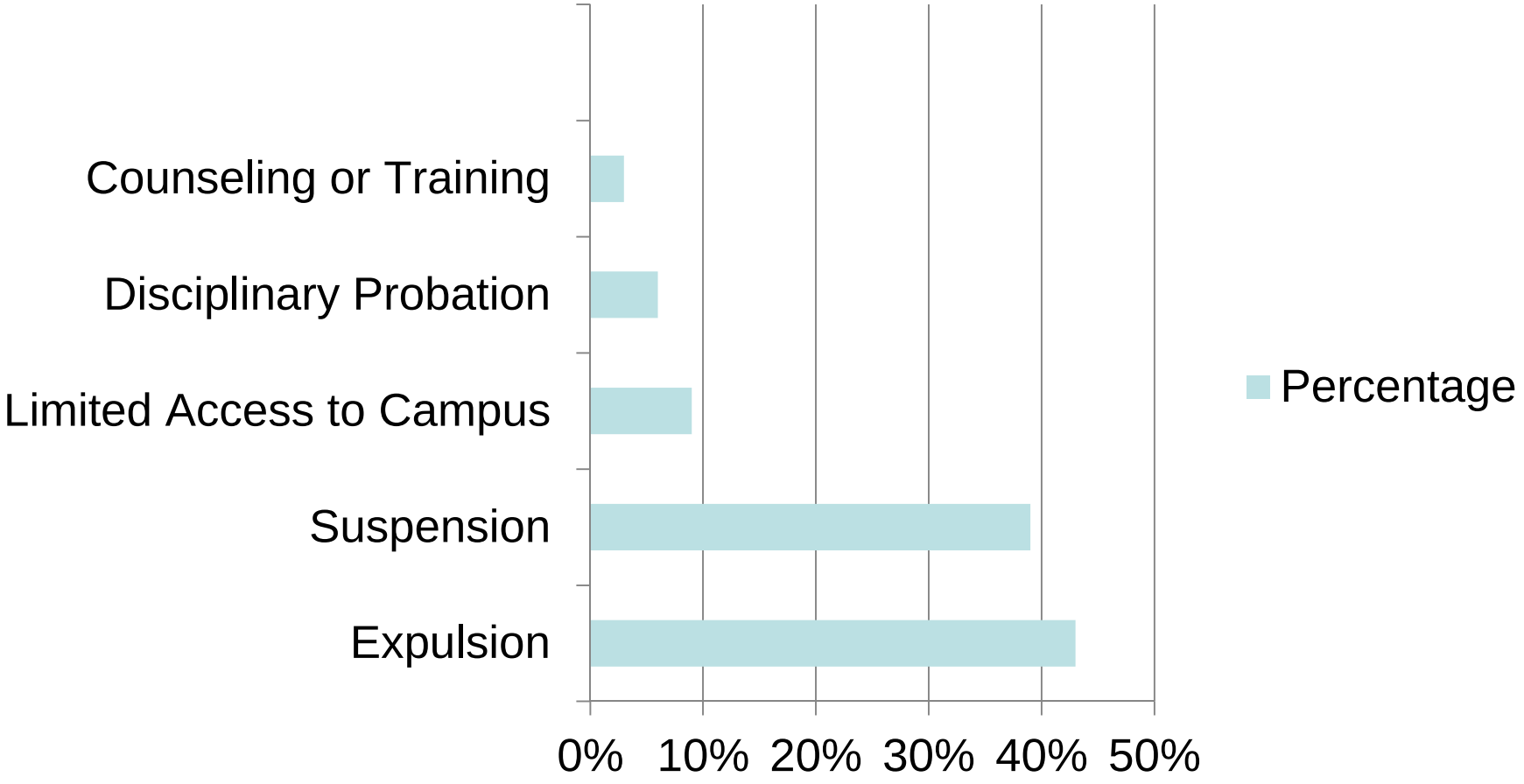
Jan. 28, 2105

What happened to the 305 Reports of Sexual Violence



*Primary reason – alleged victim has not cooperated. The institution was unable to identify the alleged perpetrator or the victim withdrew.

Penalties for Those Found Responsible



Methods of Assault

Drug Facilitated – Victim was incapacitated due to continuously ingesting a knock-out or date rape drug.

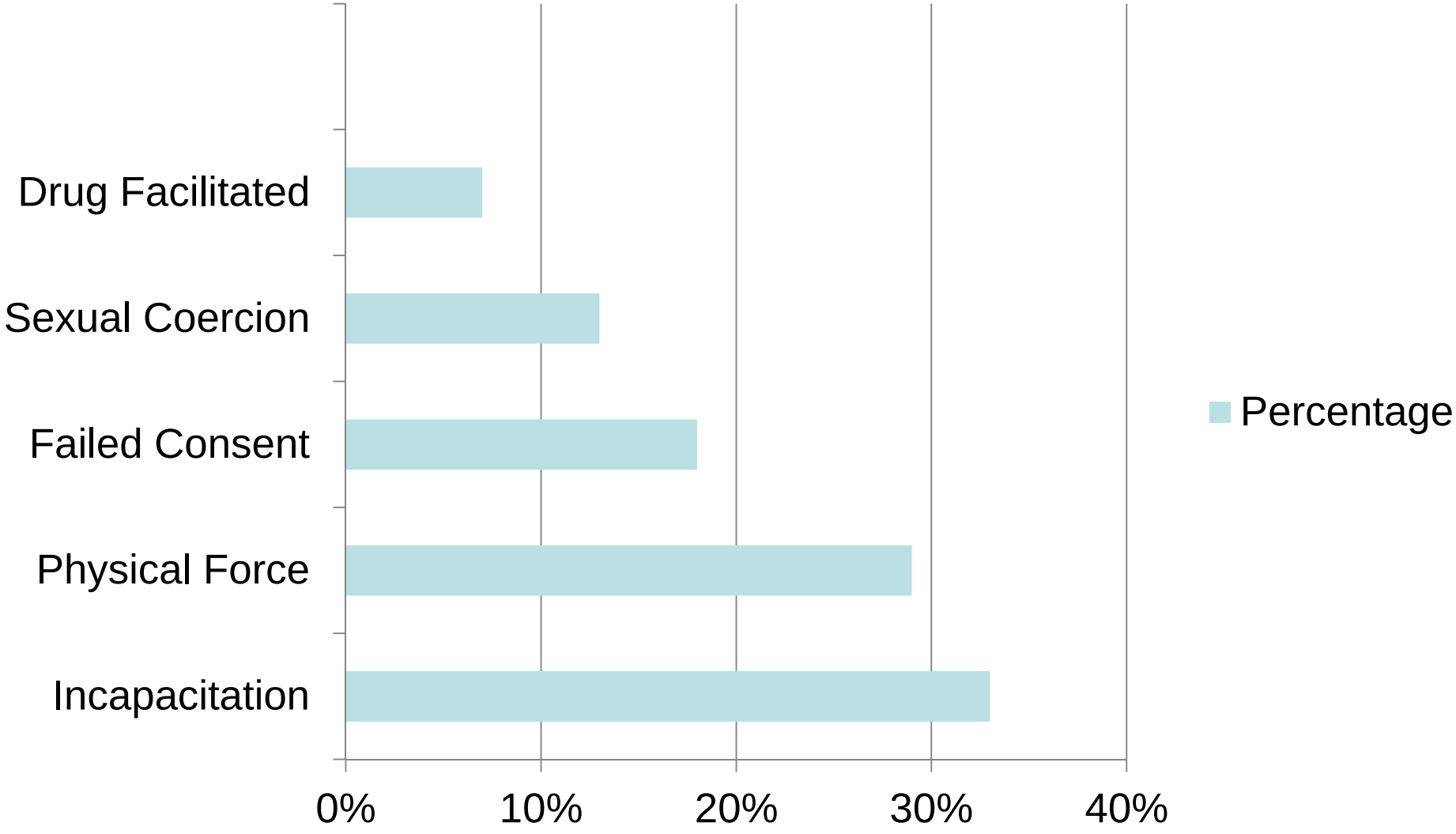
Sexual Coercion – Perpetrator continued to engage in sexual contact after victim hesitated or refused, but did not use force.

Failed Consent – No force or threats or coercion – perpetrator ignored or misinterpreted clues or inferred consent from silence or lack of resistance.

Physical Force – Perpetrator used physical force or threats of force to carry out assault.

Incapacitation – Victim was unable to consent because he/she was drunk, passed out, or asleep

305 Cases – Methods of Assault



DELAY A PROBLEM

Four in 10 of the alleged victims in the study delayed reporting the assaults of those delaying – on average delay a year.

Reasons for delaying – blaming themselves because they had been drinking or labeling the incident an assault only after talking with friends or attending prevention training

STUMP THE STARS

Case #1: "Nail in the Head" ADA case

Case #2: "Campus Cop Love Triangle" First Amendment case

Case #3: University Professor "Fear Monger" First Amendment case

Case #4: "New Blood" Age Discrimination case

Case #5: "This Year's Crappiest Call" Bowel discuss offensive comment – ADA claim

Case #1: *Stragapede v. City of Evanston*, 201 & BL 208, 395 (ND. Ill. 9/26/14)

- ISSUE

  Does an employee who is "regarded as" disabled (although not actually disabled) have a right to a jury trial over his ability to perform the essential elements of the job, when discharged for poor performance?

Stragapede v. City of Evanston

- FACTS
  - Plaintiff suffered "mild cognitive deficits" as a result of an off the job accident in which he lodged a 4" nail in his head.
  - Court found he was not disabled under the ADA because the "mild cognitive deficits" did not substantially limit a higher life activity and his doctor cleared him for work.
  - His employer, the water authority, did however regard him as disabled.
  - He was a city water service worker whose job was to read water meters, install and remove meters, shut-off delinquent accounts, and locate water mains.
  - He passed his initial three-week trial period upon return to work.

(cont'd)

Stragapede v. City of Evanston

- FACTS (cont'd)
  - He was terminated for poor performance three months after returning to work after incidents involving failure to shut off a meter and going to the wrong water meter location for further work.
  - Employer concluded he was no longer able to perform the essential elements of the job.
  - Plaintiff had non-head injury excuses for his error (i.e., his key did not work to shut off a meter and his GPS gave him the wrong location when he went to the wrong water meter.

Is he entitled to an ADA jury trial?

Stragapede v. City of Evanston

- HOLDING
  - Plaintiff is entitled to a Jury Trial as to whether his discharge violated the ADA because his employer "regarded him as disabled" even though he was not, and he is entitled to have a jury decide whether he can perform the essential elements of the job, because there is conflicting evidence as to whether the incidents cited by his employer were caused by factors other than his perceived disability.

Case #2: *Goff v. Kutztown University & its Police Chief*, (E.D. Pa., 10/22/14)

- ISSUE

Is a campus policeman's domestic violence call-in complaint to the State Police accusing a fellow campus patrolman, protected speech relating to a community concern (domestic violence) and therefore protected by the First Amendment and grounds for overturning his termination?

Goff v. Kutztown University

- FACTS
  - Plaintiff was a campus policeman at Kutztown University.
  - Plaintiff received a distressed telephone call from the estranged wife of a fellow campus police officer, with whom he was romantically involved, stating that her estranged husband had threatened her with a gun and also received a text message from her son stating that the father was threatening his mother.
  - In addition to the then current romantic involvement, plaintiff had formally been "best friends" with the estranged husband.
  - Plaintiff called the State police, stating he was a campus policeman, and wanted to alert them as a law enforcement officer of a matter of public concern, domestic violence, and then stated that the other campus police officer was threatening his estranged wife with a gun.

Goff v. Kutztown University

- FACTS (cont'd)
  - Plaintiff did not mention that he was romantically involved with the alleged victim.
  - Plaintiff was a probationary employee at the University.
  - Plaintiff was discharged shortly after the incident for failure to adequately complete probation.
  - Plaintiff sued claiming First Amendment retaliation of his right to speak out on a matter of public concern.

Goff v. Kutztown University

- HOLDING

While plaintiff was a probationary employee he cannot be terminated for validly expressing his First Amendment right to speak on a matter of public concern. Here, however, plaintiff made the call to the State police as the then boyfriend of his co-worker's wife, whom he was trying to rescue. While admirable that he believes domestic violence is a matter of public concern, his call was not a "global or societal effort to eradicate domestic violence, but a matter of personal interest." The University's employment decision did not violate plaintiff's First Amendment rights.

Case #3: *Cutler v. Stephen F. Austin State University*, (5th Cir., 9/15/14)

- ISSUE

  Is a University Art Gallery Director's termination because he rejected a local U.S. Congressman's invitation to curate and judge a high school art exhibition and his statement to staffers he didn't want to be associated with a "fear monger" protected First Amendment speech and grounds for a trial over his termination by the University?

Cutler v. Stephen F. Austin State University

- FACTS
  - Plaintiff was the University's Director of Art Galleries and Stephen F. Austin State University is a public institution.
  - Louie Gohmert is the local U.S. Congressman from the District in which the University is located.
  - Gohmert is a conservative Republican.
  - Gohmert invited the plaintiff to curate and then judge a high school art exhibition which Gohmert was sponsoring.
  - The invitation and work was related to his job at the University not part of his job.

Cutler v. Stephen F. Austin State University

- FACTS (cont'd)
  - Plaintiff researched Gohmert's record and formed a "negative impression" of the lawmaker based in part on the Congressman's flavor statement about "terror babies" who he referred to as such as children born to foreign mothers on U.S. soil and raised overseas to allegedly become "future terrorists," who would return to America and "destroy our way of life."
  - Plaintiff turned down the invitation explaining to the Congressman's staffers that he didn't want to be associated with a "fear monger."
  - Gohmert notified the University of the incident and plaintiff was fired seven days later.
  - Plaintiff sued alleging First Amendment retaliation.

Cutler v. Stephen F. Austin State University

- HOLDING

  Public employees who make statements as part of their official job duties are not protected by the First Amendment. Here, plaintiff's speech "was made externally to a staff member of an elected representative of the people, about appearing in an event that was not within his job requirements." He "spoke about concerns entirely unrelated to his job, emanating from his views as a citizen. The University's investigation was unreasonable and "woefully inadequate." He is entitled to a trial.

Case #4: *Allain v. University of Louisiana System*, (W.D. La., 1/22/15)

- ISSUE

Was the firing supervisor's comments wanting "New Blood" sufficient to raise a triable issue of Age Discrimination to get to a jury?

Allain v. University of Louisiana System

- FACTS
  - Plaintiff was a 59-year old development director for the University-owned radio stations where she had worked for 16 years.
  - She was fired after returning from leave to recover from a back problem and told she was “without cause.”
  - Her job duties were ultimately assumed by a 48-year old employee.
  - She had met her fundraising goals every year of her employment except for 2006 through 2008 during the nationall recession.
  - Her supervisor who fired her told other employees on “numerous occasions” that he wanted “new blood.”

Allain v. University of Louisiana System

- FACTS (cont'd)
  - Just prior to plaintiff's termination, the radio station replaced two other employees over 55 with younger employees.
  - Plaintiff claimed she overheard the Dean tell the radio station Director that he "wished he could get rid of all the old professors, but that he couldn't because they were tenured."

Allain v. University of Louisiana System

- HOLDING

  The radio station's Director's "new blood" comments alone were sufficient and direct evidence of age bias to allow Plaintiff's age claim to proceed to trial. The comments were age-related and made by an individual with discharge authority.

  The Court further stated plaintiff also presented evidence of two other older employees fired and replaced by younger workers and the Dean's statements about older professors show the University "fosters a cultural bias against older employees."

Case #5: *Melin v. Verizon Bus Inc.*

- ISSUE

Are a supervisor's derogatory and offensive remarks about one's disability sufficient to prove an ADA discrimination wage claim in which plaintiff alleged the supervisor assigned him several poor accounts to reduce his commissions?

Melin v. Verizon Bus Inc.

- FACTS
  - Plaintiff was a long-term Verizon employee who was diagnosed with ulcerative colitis.
  - Plaintiff complained to Human Resources, that his supervisor was abusive, made offensive comments and set disproportionately higher sales quotas for him to prevent him from succeeding.
  - Plaintiff did not mention his medical condition to HR in claims that the supervisor's discrimination was because of his medical condition.
  - Plaintiff did produce evidence that his supervisor made derogatory comments about him "sh. . . himself" because of his bowel condition to other employees.

Melin v. Verizon Bus Inc.

- FACTS (cont'd)
  - HR concluded that the supervisor's comments were offensive and violated Verizon's code of conduct.
  - Plaintiff filed a claim with the EEOC, who found that the supervisor violated the ADA confidentiality provisions because of his comments to the other employees.
  - EEOC found no evidence that plaintiff was denied a reasonable accommodation or suffered under the compensation because of his disability.
  - He filed suit in federal court.

Melin v. Verizon Bus Inc.

- HOLDING

  Plaintiff represented no evidence that he suffered wage or other actionable discrimination because of his disability. He presented no affirmative evidence that the disability was a determining factor in the assignment of accounts.