The absence of an adverse employment action by an employer routinely is fatal to a claim of discrimination (absent proof of constructive discharge). This bedrock principle was reiterated recently in a case where an applicant alleged that she was forced to resign after failing a physical abilities test. *Jane D. Dicocco v. William P. Barr* (E.D. Va.) All new hires were required to pass the test because the job itself involved “hazardous duty law enforcement positions.” After this female applicant failed the test, she was permitted to retake it within 24 hours, but declined to do so. While the applicant claimed she was too tired to retake test, the Court found that “her decision to resign rather than retake the exam and potentially fail a second time” was too speculative to support her claims.

The take-aways are significant. First, a test must be job-related and adverse impact on the basis of gender or other characteristic should be explored and addressed. Second, after failing, offering a second chance helps to avoid charges of unfair administration. Third, if an applicant cannot perform essential job functions for non-
medical reasons, he or she is not qualified.

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