Stormy Waters: Navigating the Rising Tide of Employment Litigation

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THE EMPLOYMENT RELATIONSHIP

• At-Will Employment

• Limitations on Employment At-Will Relationship
ILLEGAL (AND DUMB) REASONS FOR EMPLOYMENT DECISIONS

- Race
- Religion
- National Origin
- Sex
- Age
- Disability
- Workers’ Compensation Claim
- Military Service
- Genetic Information
- FMLA Leave
- ... and more!
RISK REDUCTION
STRATEGY #1

OBEY THE LAW!
OBEY THE LAW

- Be Sure Supervisors and Managers KNOW the Law
  - Clear Policy Statements
  - Periodic Training
RISK REDUCTION STRATEGY #2

HIRE THE RIGHT PEOPLE!
HIRE THE RIGHT PEOPLE

• Applications
  – Read it to see purpose of question
  – Arrests and convictions
  – Age/Race/Sex/Religion/National Origin/Disability
  – Military Discharges
HIRE THE RIGHT PEOPLE

• Applications
  – To Your Advantage
  – EEO Legend
  – Verification
  – Get Consent
  – Blank Page for Comments
  – Truth or Consequences
HIRE THE RIGHT PEOPLE

• Interviews
  – Similar to Applications
  – Tailor Process to Needs
  – Employment Gaps
  – Prepare!
ASK THE RIGHT QUESTIONS

- Ask performance-based questions.
- Once an impression is formed about a specific performance skill, ask a question that seeks contrary evidence to be sure you have not received an erroneous conclusion. However, don’t try to seem like you’re trapping the applicant.
- Listen carefully and evaluate the information you are obtaining. Follow-up questions may be needed to obtain additional information.
- If you don’t understand a response, ask about it.
In seeking information from a job applicant, you should ask yourself:

• Will the answer to this question, if used in making a selection, have an inequitable effect in screening out minorities or members of one sex?

• Is this information really needed to judge an applicant’s competence or qualifications for the job in question?
DON’T ASK THE WRONG QUESTIONS

Stay away from any question that concerns:

• Race
• Religion
• Age
• Ethical background
• Gender
• Martial Status
• National origin
• Sexual orientation
Some questions that could be considered discriminatory include:

- Are you married?
- What is that accent you have?
- Where is your spouse from?
- Are you engaged?
- Do you have children?
- Where are you from?
- Were you born here?
- What is your ethnic heritage?
- What church did you go to?
- How old are you?
- When were you born?
- When did you graduate from high school?
- How many 12-step programs do you attend?
- Do you really have to wear that on your head?

DON’T ASK THE WRONG QUESTIONS
HIRE THE RIGHT PEOPLE

• Reference / Background Checks
  – Protects You Against Negligent Hiring
  – Weed Out Problem Employees
  – Get Consent & a Release
  – Be Consistent / Don’t Single Out Groups
  – Potential Legal Challenges
HIRE THE RIGHT PEOPLE

• Testing
  – Will It Help?
  – Hire a Professional
    • Disparate Impact
  – It’s a Tool; Not a Guarantee
HIRE THE RIGHT PEOPLE

• Credit Reports
  – Fair Credit Reporting Act
  – Applies to Many Employment Related Reports
  – Must Get Consent – Separate Document
  – Use the Right Forms
HIRE THE RIGHT PEOPLE

• Job Descriptions
  – Helps Supervisors Think Through What is Needed
  – “Essential Functions”
  – Tailor Interview Process
HIRE THE RIGHT PEOPLE

• SUMMARY
  – Think Things Through
    • Not Ad Hoc
  – Hire on the Record
    • Back Up Decisions with Paper
  – Have Good Records
  – Be Consistent
The Company has 3 equally qualified applicants for a receptionist position. One is a white male, one is a white female, and one is a black female. The white female is over 50. The Company believes that older women make better receptionists, but also believes that their clients would prefer to see a black receptionist because the clients prefer diversity. The Company hires the black female.

Question: Is this legal?
The Company starts as a small family bakery. Their first hire was a young immigrant from Mexico, José. The baked goods are delicious and the business booms. 30 years later, the Company has over 200 employees, and José is head of the production department, which is 80% Hispanic. José prefers to hire by word of mouth, and that is the way most employees have come to the department. Because of the demographics of the production workforce, the Company prefers to promote people who are bilingual.

Question: Does the Company have any issues under Title VII?
The Company needs to hire 3 certified welders for a project. The HR manager wants to encourage more diversity in the workforce. She analyzes the workforce demographics and finds that 90% of the non-exempt employees are Hispanic. She tells the project manager that he should not hire Hispanic employees until the statistics are more balanced. The project manager prefers to hire Hispanics because most of the employees speak Spanish during the work day, and because Hispanic workers work harder. The HR manager and the project manager come to you to seek your opinion. What do you tell them?
Joe Bob applies for a food server position at a certain family restaurant that is famous for chicken wings and attractive waitresses who wear distinctive outfits, and who are working their way through law school and medical school. The hiring manager does not think Joe Bob will look good in the outfit.

Question: Is the company obligated to hire Joe Bob?
RISK REDUCTION STRATEGY #3

DOCUMENT TO REDUCE LIABILITY
• Offer Letters
  – Why Wouldn’t You Do This?
  – Expressly State Employment is At-Will
  – State Compensation in Weekly or Monthly Terms
  – Former Employer Provision
• **Arbitration**
  – Favored under Texas Law
  – **Halliburton**: Handbooks
  – Some Pitfalls
  – Language is Key
  – Better if Part of a Dispute Resolution Program
  – Class Action Waiver
• Performance Management
  – Contemporaneous
  – Annual
Billy Ray is a sales professional. His job sometimes involves drinking adult beverages with prospective customers. He has demonstrated an aptitude for that activity, and often tells stories about his adventures. He comes in late every Monday, reeking and looking disheveled. He usually takes a short nap at his desk, and then leaves for lunch. He is fine on the other days. His boss is concerned because he thinks Billy is an alcoholic. What should the boss do?
Joe is a man but his boss Donny thinks Joe is not very manly. Donny thinks this because Joe records and watches “The View” every day, Joe reads and discusses fashion blogs, Joe eats salads even though he has low cholesterol, and Joe’s favorite sport is synchronized swimming. Donny supervises a crew that has 10 men and 2 women. All of the crew members (except Joe) think Donny is very fair and impartial in the way he makes decisions, and they all (except Joe) love the funny nicknames he has for everybody. Joe’s nickname is swisher sweet. Joe calls the employee hotline to complain about sexual harassment. Does he have a legitimate complaint?
RISK REDUCTION
STRATEGY #4

FIRE WITH CARE
EVERY TERMINATION HAS THE POTENTIAL TO LEAD TO AN ADVERSARIAL LEGAL PROCEEDING
FIRE WITH CARE

• REMEMBER - TERMINATION OF EMPLOYMENT IS A VERY SERIOUS MATTER.

• NEVER FIRE IN HASTE OR ANGER.
FIRE WITH CARE

5 KEY QUESTIONS

QUESTION # 1

• WHY DO YOU WANT TO FIRE THE EMPLOYEE NOW?
FIRE WITH CARE

QUESTION # 2

IS THERE ANY EVIDENCE OF UNLAWFUL DISCRIMINATION?

• DIRECT EVIDENCE – “SMOKING GUN”
• DISPARATE TREATMENT OF SIMILARLY-SITUATED EMPLOYEES
Sunshine is Vegan. She owns a fair trade social justice resale shop. She cannot stand the smell of meat eaters, and she refuses to hire non-Vegans. Last night, she fired her cashier because she saw him leaving Gatlin’s BBQ with a smug meat-eating grin on his face.

Question: Did Sunshine violate Title VII?
The CEO’s trophy wife left him for a 38 year old polo player. The CEO decides to fire every 38 year old in the company, and also fires a 41 year old guy because he always wears polo shirts.

Question: Is the CEO breaking the law?
FIRE WITH CARE

QUESTION # 3

IS THE TERMINATION DECISION CONSISTENT WITH THE COMPANY’S POLICIES?
FIRE WITH CARE

QUESTION # 4

DO THE DOCUMENTS SUPPORT THE TERMINATION DECISION?
FIRE WITH CARE

QUESTION # 5

ARE THERE ANY UNUSUAL ASPECTS TO THE TERMINATION?
Johnny tells a co-worker that he hurt his back playing rugby over the weekend. Later that day, Johnny tells his boss that he just hurt his back lifting some pipe. The boss is suspicious and asks the other employees if they know anything about this alleged injury. The co-worker reports what Johnny told him about rugby. The boss fires Johnny that same day. What happens next?
TERMINATION MEETING

• Know Yourself – How do you handle a hard conversation?
• Prepare
• Have a Witness
• Be Respectful
• Do Not Apologize
• Do Not Argue