

EMPLOYMENT LAW HOT TOPICS 2015

31st Annual Employment Law Conference

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April 29, 2015

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CONNIE AND DAVE ARE?

1. Husband and wife.
2. Brother and sister.
3. Cousins.
4. No relation, but co-conspirators.

TELECOMMUTING/WORKING FROM HOME

Jane was employed by Acme as a Resale Buyer. Resale Buyers are responsible for purchasing steel from steel suppliers and then reselling the steel to parts manufacturers known as stampers. The Resale Buyers meet with the steel suppliers at their sites, and with Acme employees and stampers at Acme's site. Acme requires the Resale Buyers to work in the same building as stampers so they can meet at a moment's notice. Jane has irritable bowel syndrome. Jane's condition made it difficult for her to be at work on a regular and consistent basis. As a result, Jane was disciplined for poor attendance. Thereafter, she requested to work from home, as needed, up to four days per week. Acme denied Jane's request on the basis that regular and predictable on-site attendance was essential to her job. Although Acme denied the request, it had previously allowed Jane to telecommute on an *ad hoc* basis. Acme also had a policy that permitted for telecommuting and other Resale Buyers were permitted to telecommute on occasion.

DID ACME VIOLATE THE ADA BY DENYING JANE'S REQUEST?

1. No, telecommuting and other similar forms of job restructuring are not reasonable accommodations under the ADA.
2. Yes, Acme has a specific policy that allows for telecommuting and other Resale Buyers are permitted to work from home on occasion.
3. Yes, modern day technology allows most jobs to be performed at home.
4. No, because regular and predictable on-site attendance were essential to Jane's job.

WELLNESS PROGRAMS

Acme offers a wellness program to its employees as part of its group health plan. The purpose of the program is to encourage healthier lifestyles and prevent disease. This, in turn, helps to reduce health care costs and lower premiums. The program includes nutritional classes, weight loss programs and smoking cessation courses. The wellness program also includes health risk assessments and biometric screenings to determine an employee's health risk factors by measuring body weight and testing for cholesterol, blood glucose, and blood pressure levels. The program offers financial and other incentives for employees who participate in the program and/or achieve certain health outcomes. These incentives include opportunities to reduce the employee's health insurance premiums, cash prizes and financial awards.

DOES THE WELLNESS PROGRAM COMPLY WITH THE ADA?

1. No, wellness programs are impermissible under the ADA because they involve health-related inquiries and examinations.
2. Yes, the ADA does not extend to wellness programs.
3. Yes, but only if participation in the program is voluntary.
4. No, because the wellness program uses health risk assessments and biometric screenings to determine an employee's health risk factors.
5. None of the above.

DRESS CODES / TITLE VII

Amiee (formerly William Anthony) was employed by C & H as a funeral director for six years. C & H's dress code distinguished between what male and female funeral directors must wear and required men to wear suits and ties. Amiee informed C & H and her co-workers, in writing, that she was undergoing a gender transition from male to female and intended to dress in appropriate business attire as a woman at work. Amiee explained she had a gender identity disorder and intended to live and work full time as a woman. Fifteen days later the owner of C & H terminated Amiee, telling her that what she was "proposing to do" was unacceptable. All of the documentation in C & H's possession identified Amiee (or William Anthony) as a male. When terminated, Amiee was also married to a woman.

WAS AMIEE'S TERMINATION PERMISSIBLE?

1. Yes. Like sexual orientation, transgender status is not a protected status under federal law (Title VII).
2. No. Amiee's transgender status is irrelevant to the availability of protection under federal law (Title VII).
3. Yes. By dressing as a woman at work, when Amiee was biologically and legally still a man, she violated C & H's dress code.
4. No. Amiee was terminated for failing to conform to sex- or gender-based preferences, expectations or stereotypes and C & H violated federal law (Title VII).

RESTROOMS / TITLE VII

Amiee is a civilian employee with the Department of the Army. She begins the process of transitioning her gender. She legally changes her name and requests that the government change her name and sex on all personnel records. Amiee meets with two division chiefs to discuss the transition process, including the timeline for medical procedures and which bathrooms she will use. The plan, which is placed in writing and mutually crafted and agreed to by Amiee and the division chiefs, states she will use a single-user restroom (referred to as the “executive restroom”) until her surgery, rather than the common women’s restroom. On all but three occasions, Amiee used the executive restroom. On these occasions, the restroom was out of order or being cleaned. After each time she used the common women’s restroom, Amiee was confronted by a technical chief who told her she was making people uncomfortable and that she had to use the executive restroom until she could show proof of having undergone her final surgery. Each time, Amiee responded, ‘I am legally female. I have used it.’

CAN AMIEE'S USE OF THE COMMON FEMALE RESTROOM BE RESTRICTED UNTIL HER SURGERY?

1. Yes. The Department of the Army took into account the legitimate concerns of her female co-workers and Amiee agreed to use the executive restroom until her surgery was complete.
2. Yes. There is no law that requires employers to allow transgender individuals to use restrooms consistent with their gender identity and Amiee was still a male.
3. Yes. Under the ADA gender identity disorders are not disabilities and do not have to be accommodated.
4. Yes, because all of the above (1., 2. and 3.) are correct.
5. No. Restricting Amiee's access to the common women's restroom because of her gender identity violates Title VII.

EXHAUSTION OF FMLA LEAVE

Bruce was an employee at Acme Company. He was diagnosed with cancer and took 12 weeks of FMLA leave. Acme also offers up to six months of short-term disability leave. After exhausting his FMLA leave, Bruce applied and was approved for three additional months of short-term disability leave. At the conclusion of his short-term disability leave, Bruce did not return to work. As a result, Acme's HR Director sent Bruce a letter notifying him that his employment was being terminated because he had exhausted all leave available under company policy.

DID ACME VIOLATE THE LAW?

1. No, because Acme policy applies neutrally to all employees taking medical leave.
2. Yes, because Acme policy fails to leave room for the possibility that Bruce may be entitled to additional leave.
3. No, because Bruce has not told Acme that he suffering from a disability.
4. No, because Acme provided Bruce with additional leave beyond his 12 weeks of FMLA leave.

COMPANY EMAIL SYSTEM

Acme provides its employees with a work email account. The company's electronic communications policy prohibits employees from "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company" and sending "uninvited email of a personal nature." The company permits limited personal use of the company e-mail by employees.

The union files a representation petition. Several employees send uninvited e-mails to co-workers urging them to vote for the union. They also send e-mails informing employees of the time and place of union meetings. When Acme learns of the emails, it disciplines the employees who sent the emails for violating the company's electronic communications policy. After the union loses the election, it files an unfair labor practice charge with the NLRB alleging that Acme's electronic communications policy violated the NLRA.

DID THE COMPANY ACT IMPERMISSIBLY?

1. No, the company owns its e-mail system and can prohibit the employees using it for any purpose, including union purposes.
2. No, the union lost the election so federal labor laws do not apply.
3. Yes, employees have the right to use their employer's e-mail system in course of their work have right to use e-mail system to communicate about the union during non-work time.

PREGNANCY / LIGHT DUTY

Peggy is a driver. Her job responsibilities include the pickup and delivery of packages. C & H requires drivers to lift, push, pull, and otherwise manipulate packages weighing up to 70 lbs., and to assist in moving packages up to 150 lbs. Peggy became pregnant and her doctor imposed lifting restrictions. Peggy could not lift more than 20 lbs. during the first twenty weeks of her pregnancy or more than 10 lbs. for the balance of her pregnancy. In the CBA, C & H's light duty policy reflects it will accommodate employees injured on the job, those with a disability under the ADA, and those who lost their DOT certifications. Peggy was told she could not return to work because she could not satisfy the lifting requirement. When she asked C & H to accommodate her disability, she was told she was "too much of a liability" and could not return until she was no longer pregnant.

WAS C & H REQUIRED TO OFFER PEGGY LIGHT DUTY WORK?

1. No. Peggy's lifting restrictions were temporary and not a disability under the ADA.
2. No. C & H was required to abide by the applicable collective bargaining agreement which did not extend light duty work to pregnant workers.
3. No, because of (1.) and (2.) above.
4. Yes, if Peggy can show C & H accommodates most non-pregnant employees while failing to accommodate pregnant employees, significantly burdening pregnant workers.
5. Yes, if accommodating Peggy's lifting restrictions does not create an undue hardship on C & H and light duty work is available.

RELIGIOUS DISCRIMINATION

When hired by C & H, Donald refused to provide his social security number. Donald explained that he did not have a social security number because he had disclaimed and disavowed it on account of his sincerely held religious beliefs. C & H terminated Donald without considering whether it could accommodate his religious beliefs.

WAS DONALD'S TERMINATION PERMISSIBLE?

1. No. C & H did not make any attempt to determine whether it could accommodate Donald's religious beliefs before terminating him.
2. Yes. The Company was not required to accommodate Donald's religious beliefs if by doing so, it would violate a federal statute.
3. No. Refusing to provide a social security number is not a legitimate reason to terminate any employee.
4. Yes, only if C & H determined that his religious beliefs were not sincerely held and he was trying to avoid paying taxes.

FACEBOOK POSTS

Acme operates a catering service. Several of its employees presented a petition to the Director of Banquet Services raising complaints about how they were mistreated by management. Months later, during a catering event, an exchange took place between Sally and her manager about the manner in which Sally was doing her job. Following the exchange, Sally posted the following message on her Facebook page, which was viewed by some of her coworkers: “Bob is such a NASTY MOTHER F*&^ER don’t know how to talk to people!!!!!! F&#\$ his mother and his entire f#%@ing family!!!! What a LOSER!!!!!!” Sally’s post was visible to her Facebook friends. Sally removed the post from her Facebook page three days later. Before the post was removed, a senior manager at Acme and the company’s HR Director learned of it. As a result, Sally was terminated for violating Company policy.

WAS SALLY'S TERMINATION PERMISSIBLE?

1. No, because Sally's Facebook post related to mistreatment by a manager.
2. No, Sally did nothing wrong. She was simply blowing off steam.
3. Yes, Sally crossed the line by using profanity.
4. Yes, the NLRA does not cover posts on social media websites, including Facebook.

CRIMINAL HISTORY

Acme has offices all over the country, so it recruits nationally. Its employment application is maintained on-line. Any interested applicant can complete the application and submit it electronically. Acme employment application contains the following question: “Have you ever been convicted of a crime. If so, please explain.” Bob, who is from Illinois, completes the application in connection with a customer service position. He answers “yes” to the question regarding his criminal history and explains that he was convicted of aggravated assault nine years ago.

CAN ACME REFUSE TO HIRE BOB?

1. Yes, because Bob was convicted of a violent crime.
2. Yes, but only if the application is revised to state “answering ‘yes’ to this question is not an automatic bar to employment.”
3. No, the question regarding criminal history is illegal.
4. No, “ban the box” legislation prevents employers from refusing to hire individuals who have criminal convictions.

IMAGE / RELIGIOUS ACCOMMODATION

Zeena is Muslim and wears a headscarf in accordance with her religious beliefs. She applies for a sales position at a national clothing store that carries fashions for teens. Based on its marketing strategy, C & H requires its sales employees to wear only clothing sold in its stores, nothing in the color black and no headgear. C & H does this so employees will look like the models in its catalogues and promote its brand. Zeena never tells C & H she wears the scarf because of her beliefs and never asks for an accommodation. C & H believes Zeena wears her headscarf for religious reasons, but does not hire her because it does not want to make any exceptions.

WAS C & H WRONG IN FAILING TO HIRE ZEENA?

1. No. C & H did not know for certain if Zeena wore her headscarf for religious reasons and Zeena did ask for an accommodation.
2. Yes. C & H was obligated to ask Zeena about her headscarf because she wore it at the interview.
3. Yes. Once C & H suspected Zeena wore her headscarf for religious reasons, it was required to make an exception for her as a religious accommodation in the absence of undue hardship.
4. Yes, because of (2.) and (3.) above.

THE DEFINITION OF SPOUSE UNDER THE FMLA

Paul and Tom met in New York, fell in love, and got married. They later decided to move to Texas, where same-sex marriages are not recognized. Tom began working as a state police officer. Paul, an accountant, remained unemployed, hoping C & H would act on his employment application. Paul became ill. Tom requested leave under the FMLA to care for Paul because of his serious health condition. Although Tom was employed for more than 12 months, had worked the requisite 1,250 hours, and was at a site with 50 or more employees, his request was denied.

WAS TOM ELIGIBLE FOR LEAVE UNDER THE FMLA?

1. No. Under the FMLA, a spouse does not include an employee in a same sex marriage.
2. Yes. Under the FMLA, spouse includes employees in a same sex or common law marriage regardless of where they live.
3. No, because Texas currently does not recognize same sex marriages.
4. No, because of (1.) and (3.).

QUESTIONS?

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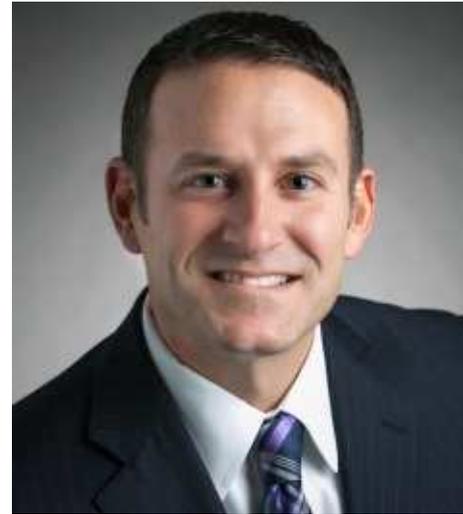
Thank You



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