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Discrimination on the Basis of Sexual Orientation — Be Careful

By Richard Tuttle

This edition of the Employment Law Insider surveys the growing trend in state legislation which offers protection to employers who provide truthful job references. We discuss the issue of employment discrimination on the basis of sexual orientation or preference. We also summarize recent employment cases dealing with medical exams under the ADA, awards of "front pay" in discrimination cases, and the obligation under the National Labor Relations Act for the purchaser of a business to honor a collective bargaining agreement. Finally, our Case Study deals with the liability which may arise from assertions made by an individual who has been accused of sexual harassment.

If you have any questions or comments about the articles contained in this edition of Employment Law Insider or about topics that you would like to see addressed in future editions, please feel free to contact me.

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For now, proposed federal legislation protecting sexual orientation as a civil right is on hold. There are, however, at least 9 states (California, Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Rhode Island, Vermont and Wisconsin) and various municipalities (New York City, Philadelphia, Pittsburgh, Denver, Washington, D.C.) which prohibit discrimination by employers on the basis of sexual orientation. As more employees become aware of their rights under various state and municipal laws, the possibility of liability for discrimination is growing.

Sexual orientation is an unusual protected trait. Most protected classes are defined by (and most employment discrimination cases involve) immutable and readily identifiable characteristics such as race, sex, age, or physical disability. Sexual orientation, on the other hand, is frequently not apparent unless the employee discloses it. Indeed, an employer can be held liable for inquiring about it. *Soroka v. Dayton Hudson Corp.*, 6 IER Cases (BNA) 1491 (Cal. Ct. App., 1st Dist. 1991).

It is therefore, relatively easy for supervisors to take adverse employment actions (e.g., termination, denial of promotion) against members of the protected class without realizing they have done so. It is entirely possible for an employee to make remarks that are offensive to a gay or lesbian employee without realizing that the listener is gay or lesbian. Significantly, discrimination on the basis of sexual orientation or conduct, or disapproval of homosexuality

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Legislative Update:

States Move Toward Protecting Companies Which Release Truthful Job References

By Ben Ellenbogen

According to a 1995 survey by the Society for Human Resource Management, 63% of personnel managers refused to provide any information about former employees for fear of being sued by these employees. Most employers that do release information on former employees limit their responses to employees "name, rank and serial number." As a result, it has become increasingly difficult to obtain a candid assessment of a job applicant's prior work history Nearly one-half of the states in this country, however, now have laws on their books specifically offering employers who release truthful information about their former employees some protection against lawsuits alleging defamation and other claims. And similar bills are pending in other states.

The following is a list of those states (and their respective statutes) which, to date, have enacted legislation providing some protection for their employers from employee lawsuits based upon truthful disclosure of employee records:

- Alaska (Alaska Stat. § 09.65.160);
- Arizona (Ariz. Rev. Stat. § 23-1361 (West 1996));
- California (1996 Cal. Legis. Serv. Ch. 1055 (West));
- Colorado (Colo. Rev. Stat. Ann. § 8-2-114 (West 1996));
- Delaware (1996 Del. ALS 367, approved by the Governor, June 17, 1996);
- Florida (Fla. Stat. Ann. § 768.095 (West 1996));
- Georgia (Ga. Code Ann. § 34-1-4 (1996));

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generally, is not yet as socially stigmatized as racism, sexism or religious discrimination. There is thus a substantial risk, especially in larger workplaces, that worlds will collide in a way that may result in liability for the employer.

For example, as the United States Court of Appeals for the Third Circuit recently acknowledged, many person have deeply held religious convictions against homosexuality (see *Presbytery of New Jersey v. Whitman*, 99 F.3d 101 (3d Cir. 1996)). The quiet expression of such religious beliefs by a supervisor may well be protected under federal and state civil rights laws from persecution by an employer. Meanwhile, a gay or lesbian subordinate may have the right, depending on the state in which he or she works, to be free from derogatory remarks about his or her sexual orientation. The employer attempting to protect the rights of one or the other may be damned if it does, and damned if it doesn't.

Since homophobia is likely to be more visible than other forms of prejudice in the workplace (especially to an employee who is looking for it), a gay or lesbian employee who is the subject of an adverse employment decision may well have evidence readily at hand that the employer "tolerated" discriminatory attitudes among its workforce. Thus, a lawsuit alleging discrimination on the basis of sexual orientation may be more difficult to defend than a more traditional discrimination case in which circumstantial evidence of discriminatory animus may be harder to come by. Moreover, because sexual orientation is not an immutable characteristic, it is conceivable that a non-homosexual employee could "opt in" to the class if evidence of homophobia were available, and if the employee felt that he or she needed an evidentiary basis for a suit alleging discrimination.

As protections increase, protected conduct is likely to become more visible. In California, for example, it is unlawful to take adverse action against an employee who publicly champions homosexuality as a protected right. *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458 (1979). An employer, in other words, may not have the option of insisting upon "don't ask, don't tell" as a means of keeping peace among various camps on the question of gay and lesbian rights. To the extent that an employee allows discussion of personal relationships by heterosexuals, it must allow the same discussions by gays and lesbians. The employer that permits a heterosexual employee to tell her co-employees about a romantic weekend with her husband (in whatever level of detail may be acceptable under the norms of that workplace) must accord the same privilege to a gay or lesbian who wishes to describe a romantic weekend with his or her partner (in the same level of detail).

If your company has operations in states in which sexual orientation is a protected trait, make sure that all human resources personnel and all supervisors are fully aware of the requirements of the law. Homophobic speech — at least homophobic speech that does not appear to spring from religious convictions — should be strongly discouraged at every level. Employment decisions should be made entirely without consideration of an employee's sexual orientation. Social policy may still be evolving nationally, but in states and cities with laws against discrimination on the basis of sexual orientation, competing views about social policy are not largely irrelevant. The law is the law, and violations can be expensive. Your EEO rules and practices must reflect that reality. ■

Required Exam for Absent Employee Does Not Violate ADA

By Bennett Pine

A federal appeals court has ruled that a state employer may require a worker who is chronically absent to submit to a medical exam without violating the Americans With Disabilities Act. A state tax auditor with a history of absenteeism refused to let her employer review her medical records, according to the court. She then refused the state's request to undergo a medical exam so it could determine if she was physically able to perform her assigned duties. She filed suit to prevent the state from requiring her to release her medical records or submit to an exam, or from disciplining her for not complying. The district court dismissed the suit, reasoning that the state was exempt from the ADA's prohibition on such conduct based on business necessity. The auditor appealed.

The ADA prohibits employers from requiring medical exams to determine whether an employee has a disability or the "nature and severity" of a disability unless the exam is "job-related" and "consistent with business necessity." Given that the auditor's excessive absenteeism significantly reduced her productivity over a four- or five-year period and had caused disruption and morale problems in the office, the Ninth Circuit said the state had good reason to determine the nature of her disability and her ability to perform her job. When an employee's health problems have a "substantial and injuries impact" on the person's ability to perform job duties, the ADA's business necessity exception allows the employer to require a medical exam even if it might disclose a disability or the extent of any disability, the court explained. (*Yin v. State of California*, CA 9, 1996, 5 AD Cases 1487). ■

Jury Awards 25 Years of "Front Pay"

By David Dretzin

Under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA"), victims of unlawful employment discrimination may be awarded lost future earnings or "front pay" in addition to back pay. However, front pay is generally available only when reinstatement is not a practical remedy: for example, where reinstatement would force an innocent employee out of his/her job or where the relationship between the employer and employee has become so acrimonious or tenuous as to make reinstatement unworkable. Even then, some courts have been reluctant to allow awards of front pay arguing that such awards require the court or jury to guess (a) how long the employee would have worked at his former job and what he would have earned in the future, absent the unlawful discrimination, and (b) whether the employee will be able to find comparable employment elsewhere and, if so, when. Other courts have dealt with this dilemma by exercising continuing jurisdiction over the case and periodically awarding damages equal to the difference between the employee's actual earnings and what he would have earned during the same period in the job he was wrongfully denied. Nonetheless, a number of courts have granted front pay awards, both in Title VII and ADEA cases, and these awards have generally been confirmed by the federal courts of appeal including

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- Idaho (Idaho Code § 44-201 (1996));
- Illinois (Ill. Ann. Stat. ch. 745 § 46/10 (Smith-Hurd 996));
- Indiana (Ind. Code Ann. § 22-5-3-1 (West 1996));
- Kansas (Kan. Stat. Ann. § 44-119a (1996));
- Louisiana (La. Rev. Stat. Ann. § 23:291 (West 1996));
- Maine (ME. REV. STAT. ANN. tit. 26, § 598 (West 1996));
- Michigan (Mich. Comp. Laws Ann. 423.452 (West 1996));
- New Mexico (N.M. Stat. Ann. § 50-12-1 (Michie 1996));
- Ohio (Ohio Rev. Code Ann. § 4113.71 (Baldwin 1996));
- Oklahoma (Okla. Stat. Ann. tit. 40, § 61 (West 1996));
- Oregon (Or. Rev. Stat. § 30.178 (1996));
- South Carolina (1996 S.C. Acts 281, approved May 6, 1996 by the Governor);
- South Dakota (S.D. Codified Laws § 60-4-12 (1996));
- Tennessee (Tenn Code Ann. § 50-1-105 (1996));
- Texas (Tex. Lab. Code Ann. § 52.031 (West 1996));
- Utah (Utah Code § 43-42-1 (1996));
- Wisconsin (Wis. Stat. Ann. § 891.33 (West 1996));
- Wyoming (Wyo. Stat. Ann. § 27-1-113 (1996).

Although the particular degree of protection provided to employers is distinct; a result of the specific language of that state's statute and resulting case law, the Alaska statute provides language typical to many of the other states which have statutes, and is therefore instructive.

Immunity for Good Faith Disclosure of Job Performance Information

An employer who discloses information about the job performance of an employee or former employee to a prospective employer of the employee or former employee at the request of the prospective employer or the employee or former employee is presumed to be acting in good faith and, unless lack of good faith is shown by a preponderance of the evidence, may not be held liable for the disclosure or its consequences... (Alaska Stat. §09.65.160).

In addition, companies may further protect themselves from liability by assuring that the employee's evaluations are documented in that employee's personnel file in order to prove that the company acted in good faith in revealing the information (and some states require the employer to docket such information, e.g., Michigan). Businesses may further seek to protect themselves by asking employees who leave to sign forms promising not to sue over job references, and several courts have recently ruled in favor of companies in analogous situations.

This trend toward state protection should benefit companies and good employees alike. Still, knowledge of the state of the relevant law on protection from disclosure of employee information remains a vital part of effective corporate practice. ■

the U.S. Court of Appeals for the Second Circuit which covers New York, Connecticut and Vermont. Most recently, in Padilla v Metro-North Commuter Railroad, 1996 U.S. App LEXIS 20317, Docket No. 95-6056 (CA 2, 8/13/96), a case arising under the ADEA, the Second Circuit upheld a decision of the U.S. District Court for the Southern District of New York requiring the defendant to pay the plaintiff, who was wrongfully demoted, front pay of $20,000 per year for 25 years, $20,000 representing the difference between his pre-demotion and post-demotion salary and 25 years the number of years required for him to attain 67 years of age and become eligible to receive a full pension. According to the EEOC, this is the longest if not the largest front pay award ever confirmed by a federal appeals court. ■

Labor Law Update

By Pablo Quiñones

The United States Court of Appeals for the Second Circuit upheld a National Labor Relations Board order requiring a hotel purchaser to adhere to the previous owner's collective bargaining agreement in *NLRB v. Staten Island Hotel Limited Partnership*, Nos. 96-4045(L), 96-4063, 1996 U.S. App. LEXIS 31035 (2d Cir. December 3, 1996). The NLRB order principally required the hotel purchaser to hire the hotel's previous employees, abide by the previous owner's collective bargaining agreement, and to pay those previous employees past and current wages and benefits at the rate set by the previous agreement, until the parties negotiate in good faith, and either reach an agreement or an impasse. Usually, a purchaser may establish its own initial terms and conditions of employment until it negotiates its own collective bargaining agreement with the preexisting union or the talks reach an impasse. Here, however, the hotel purchaser's failure to comply with a NLRB subpoena seeking the number of former employees whose job applications were rejected allowed an adverse inference that the employer had refused to hire a significant number of former employees. This adverse interest coupled with substantial evidence of antiunion animus supported the finding that the hotel purchaser unlawfully discriminated against former employees on the basis of their union membership.

Also, the Second Circuit found that the NLRB order was remedial, and not punitive in nature for two reasons. First, the NLRB order required payment of the former rate only until the good faith negotiation of another collective bargaining agreement or to impasse. Second, although the purchaser could have unilaterally set wages if it had hired all of the hotel's former employees, the employees could have accepted, declined, or negotiated for different wages. The court added that the "choice between imposing a predecessor's contract terms and fashioning reasonable hypothetical contracts terms" presents less-than-perfect alternatives. The choice between these alternatives under elementary conceptions of justice and public policy, however, requires an employer to bear the burden of the uncertainty created by its unfair labor practices. ■

Case Study: A Growing Danger: Suits By Alleged Sexual Harassers

By Hope Comisky

(This article is based on a paper which appeared in The Labor Lawyer, volume 12, issue 1, published in October 1996.)

The well-publicized cases resulting from alleged sexual harassment are those brought by the person allegedly harassed. However, there are a growing number of cases brought by the alleged harassers who were disciplined as a result of an investigation of a sexual harassment claim. For example, a teacher who was fired for alleged sexual harassment sued his former employer in the Philadelphia County Court of Common Pleas for defamation and failure to perform a reasonable investigation. Although the investigation claim was dismissed by the trial judge, the jury rendered a verdict in the amount of $256,000 in compensatory damages and $10 million in punitive damages in favor of the plaintiff on two of his defamation claims.

A recent case involving Consolidation Coal Company presents a classic case study in the two-edged sword of a sexual harassment charge. First, an employee of Consolidation Coal claimed that her supervisor conditioned certain job assignments and approval of her excused absences on an agreement to have sex. He also threatened her with

termination unless she agreed to sleep with him. The company terminated the supervisor for "sexual harassment and unacceptable relations with employees who worked directly for him." Nevertheless, the employee filed suit alleging that the supervisor's actions constituted sexual harassment, assault and battery and inflicted emotional distress. Although a jury found against her, the court found in her favor on the sexual harassment charge.

The employer later received inquiries from prospective employers about the former supervisor. In response, the prospective employers were told that the former supervisor was terminated for "some record-keeping irregularities," e.g., absent time reports. The former supervisor sued for intentional interference with prospective contractual relationships. The company defended the lawsuit and had to undergo discovery before it prevailed at the summary judgment stage. Even then, however, the court felt obliged to rule that the statement made by the former employee was not false. The supervisor's relationship with the employee compromised his and the company's objectivity concerning the appropriate reasons to grant excused absences. Since record-keeping irregularities were involved in the decision to fire him, the response was truthful and there was no unjustified interference.

Although Consolidated Coal took severe remedial action in discharging the alleged harasser, it was left to defend not one, but two lawsuits. Winning the case brought by the alleged harasser vindicated the company, but cost it much in time and productivity, to say nothing of attorneys' fees.

Reported Causes of Action Utilized in Suits by Accused Harassers

The suits by the alleged harassers are brought under a myriad of theories, including interference with contract, as alleged against Consolidated Coal. Discussed below are the causes of action most utilized in these cases.

Violation of the Anti-Discrimination Laws

Ironically, a key theory employed by alleged harassers in their court complaints is violation of the anti-discrimination laws. For example, in one case where the alleged harasser claimed age discrimination was the real reason for the discharge, the employer explained that the termination was for a host of reasons, unrelated to age: repeated failure to accept constructive criticism; signing someone else's name to a memorandum without authorization; and based upon the sexual harassment claims of his secretary. The plaintiff responded by stating that age was the real motivating factor because: 1) the sexual harassment charges were not documented in his performance review; 2) he was never disciplined for any such conduct; and 3) the company failed to investigate a previous sexual harassment charge made against him when he was under age 40. The employer prevailed based on the court's findings that the employer legitimately discussed the later problem outside the normal performance reviews and took the remedial action it deemed appropriate. The earlier charge of harassment was different because it was made by an employee who had been terminated.

In another case where an alleged harasser complained that the real reason for the discharge was age, he was hired just five years earlier. In addition, he admitted making a series of crude remarks directed at a female colleague. He did not prevail.

A most curious case is one brought for reverse discrimination. There, the plaintiff claimed that a female subordinate engaged in the same type of sexual banter as did he, but was not disciplined as severely. His claim was rejected for these reasons: (1) the decision-makers were men; (2) men are an historically-favored group, and there was no evidence that this was the unusual employer who, instead, disfavored male workers; and (3) the female line employee was not similarly situated to the plaintiff-supervisor.

Cases have also been brought for alleged race discrimination and religious discrimination.

Tort Theories

Tort theories abound in cases brought by alleged sexual harassers. Those theories include the following.

Intentional infliction of emotional distress This theory requires extreme and outrageous conduct. A classic example is a doctor telling parents that their child has a fatal illness when, in fact, the doctor knew that the child would fully recover. This theory has not been productive for the alleged harassers.

Wrongful discharge In most jurisdictions, an at-will employee can be terminated for any reason or no reason. If the termination invokes a violation of a recognized public policy, however, courts will

permit a cause of action for wrongful discharge to proceed. For example, if an employee is terminated because the employee is performing compulsory jury duty, the termination likely will not stand. Actions by alleged harassers have not been successful under this theory.

Violation of the duty of reasonable investigation Harassers have alleged that the employer violated a duty of reasonable investigation when the employer investigated the sexual harassment charge. To date, these cases have not been successful where the alleged harasser was an employee-at-will.

Intentional interference with contractual relations Alleged harassers claim that those making the harassment complaints, and those performing the investigation which resulted in discipline against the alleged harasser, improperly and intentionally interfered with the alleged harasser's employment, and are liable for that conduct. With respect to the employer or its agents, courts have dismissed those claims, stating that the employer and its agents have a qualified privilege to investigate such complaints and take remedial action, as appropriate. If there is no evidence that the privilege was abused, there can be no issue of liability. However, with respect to the employee, no privilege exists, and those cases may have to be tried to verdict.

Defamation

The analysis regarding defamation claims brought by alleged harassers is similar to that described above. The employer and its agents have a qualified privilege to republish statements which may be defamatory in connection with an investigation and a determination of what remedial steps to take. As long as the statements are made to those with a "need to know", there is no liability. The complaining employee, again, is left to prove her case to a jury, convincing the jury that the complaints were grounded in truth.

Breach of Contract

For those employees with an employee agreement, or who are third party beneficiaries of a collective bargaining agreement as members of a union, there are additional theories.

Alleged harassers have claimed that termination of their employment breaches a specific clause of the applicable employment agreement, i.e., a contract which prohibits discharge absent "misconduct." They have also relied on oral promises of employment in a specific job in an attempt to invalidate a demotion or termination from a specific job. They have not been successful.

Members of unions have fared better when arbitrating their claims that termination for alleged harassment was without "just cause." Arbitrators have also reinstated alleged harassers when the employer did not meet the letter of the collective bargaining agreement by, for example, failing to provide notice of the charges in writing. Such decisions have resulted in a tension between arbitrator's rulings and what the courts will allow. Several courts have reversed arbitrators' decisions in favor of alleged harassers, finding that such decisions violate public policy and send a message that sexual harassment complaints will not be seriously considered.

Public employees add a violation of procedural due process to their arsenal.

How to Limit Exposure to Suits by Alleged Harassers

- conduct a thorough, even-handed investigation. Utilize an independent investigator, and conduct personal (not telephone) interviews.
- put the results and recommendations of the investigation in writing. Explain the remedial steps, if any, to the complaining party and the alleged harasser.
- share the information only with those who have a "need to know". Review any applicable contract or collective bargaining agreement before a decision to discipline is made. Make sure the disciplinary actions are consistent for the same type of conduct.
- especially in the case of a discharge, designate one person to respond to all inquiries about the former employee. It is safest to limit reference information to a confirmation of dates of employment and positions held. ■

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