



YOU MEAN, THERE'S MORE?:

DISCRIMINATION ISSUES THAT FLY UNDER THE RADAR

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Consistently Inconsistent
(Discrimination)

Bob missed an important assignment. You would like to fire him. HR and your own experience tells you that every employee who failed to timely complete an important assignment is fired at first offense.

However, you gave Bob 50 important assignments. You assigned your other employees 5. Bob was given 5 days to complete his 50 assignments. Everyone else was given 5 weeks.

Analysis

- ▶ Consistency is key to avoiding discrimination complaints, but it is not just consistency in the disciplinary actions.
- ▶ It is also consistency in the particulars leading up to the offense that led to the disciplinary action.
 - ▶ Assignments
 - ▶ Training
 - ▶ Deadlines
 - ▶ Priorities
 - ▶ Micromanagement
 - ▶ Connection to the team and access to resources

Principles

- ▶ Policy is important, but practice is more important
- ▶ Be consistent in all things
- ▶ Bring isolated employees back to the team



The Short Cut – Part I

(Religion)

John is a Police Captain, and he's hiring patrol officers. Currently, John has 30 patrol officers working under his command.

Bob comes in for an interview. During the interview, John tells Bob that patrol officers work rotating shifts that require them once a month to work weekends. Then, he asks Bob if he can work weekends. Bob says he has a sincerely held religious belief that prohibits him from working on Sundays.

John no longer considers Bob a viable candidate for the position because he thinks that the other patrol officers will not like pulling extra weekend shifts to cover for Bob.

Analysis

- ▶ SCOTUS has been clear about a couple of things regarding religion:
 - ▶ Don't consider someone's religion, or lack thereof, when hiring
 - ▶ An employer can deny a reasonable accommodation for a sincerely held religious belief only if the accommodation creates an undue hardship. SCOTUS says that grouchy employees are not part of an employer's undue hardship analysis

Principles

- ▶ Don't ask questions likely to reveal a sincerely held religious belief, because you may have to defend asking it
 - ▶ Instead, explain the job
- ▶ Every time an applicant or employee requests a reasonable accommodation because of a sincerely held religious belief, it is a potential precedent setting lawsuit in the making. So, you will not make those calls. Your attorneys will.



The Short Cut – Part II

(Disability)

John is the manager of the City's groundskeepers, and he is hiring. HR gave him a job description and job posting which listed the requirements of the job. One of those requirements states that groundskeepers must be able to lift 40 lbs.

Bob comes in for an interview. He has a back impairment that keeps him from lifting more than 20 lbs. John shows Bob the job description and asks him if he can perform all the tasks listed. Bob says, no.

John no longer considers Bob a viable candidate for the position.

Analysis

- ▶ By asking Bob during the interview if he can lift 40 lbs. John made the ability to lift 40 lbs. a qualification standard for the job.
- ▶ This is a big bet on behalf of the City. And one that is completely unnecessary. Post Offer/Pre Employment allows employers to ask medical questions, provided all candidates in the same job category are asked the same questions.

Analysis

- ▶ During the interview process, a hiring manager can add the phrase...”with or without an accommodation,” but it won’t keep them from heading off in the wrong direction.
- ▶ Accommodations are about the “whats” of a job, not the “hows.”
 - ▶ As in, what do I get paid to do? Do I get paid to lift weight?

Essential Job Functions

- The position exists to perform the function
- There are a limited number of other employees available to perform the function, or among whom the function can be distributed
- A function is highly specialized, and the person in the position is hired for special expertise or ability to perform it.

Bob is a physical therapy assistant at an in-patient facility. He has arthritic knees and is restricted by his physician from lifting more than 10 lbs. or walking more than short distances. The job description says a physical therapy assistant must lift patients in excess of 50 lbs. Based on the job description, Bob and his physician requests a Hoyer Lift to transfer patients.

Must assist patients transfer

Must assist patients with manual exercise

Must teach and assist patients in using devices

Must be available to assist patients as they balance

Must be able to assemble and disassemble therapy equipment

Principles

- ▶ Don't let hiring managers take shortcuts
- ▶ The ADA prods employers toward the interactive process
 - ▶ When in doubt, go through the interactive process – no bad thing will happen – you are promised a productive employee
- ▶ Any steps employers take to circumvent the interactive process puts them at legal risk, unnecessarily
- ▶ Focus on the whats. It will make the interactive process much easier



Playing Well with Others (Neurodivergent Employees)

Sue works as a Financial Analyst in the City's Planning Department. She has Autism. Others, both inside the Planning Department and outside of it, have complained that Sue's communication is often more direct than they are used to, and she tends to get nervous in face-to-face meetings and has shut down if the other person is defensive or emotional.

Analysis

- ▶ Lot's going on here
- ▶ Accommodation:
 - ▶ Allows employee to meet the essential functions of the job
 - ▶ If interacting with people internal and external to the organization is essential to the position, then the employee must be able to perform those tasks with or without an accommodation

Analysis

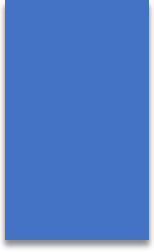
- ▶ Performance and Conduct
 - ▶ Performance: employer sets performance standards.
Employer is promised a productive employee
 - ▶ Conduct: For the most part conduct standards are absolutes
- ▶ If complaints are made about the employee's behavior, management must go through each incident to see if it violates conduct standards

Analysis

- ▶ But don't forget discrimination
 - ▶ An employee that is ostracized by their co-workers because of their disability is likely to file a discrimination claim
 - ▶ Maybe training for staff would be appropriate
 - ▶ We all must bend to others in the room
 - ▶ This is not an accommodation. It's just a way to head off a discrimination complaint

Principles

- ▶ Neurodivergent employees must meet both conduct and performance standards
- ▶ If the job is customer facing, then it's customer facing
- ▶ If behavior doesn't violate conduct standards, then staff training and a little understanding is a good way to avoid a discrimination claim



Numbers? What Numbers?

(How to Use Numbers Legally)

Issue

- ▶ It may seem as though we are no longer required to pay attention to workforce numbers. But we are. It's just we need to use numbers correctly – not illegally.

I run a company. We employ electricians. And we recruit exclusively in Bexar County, Texas.

45% of all electricians in Bexar County are Hispanic

5% of our electricians are Hispanic

5% of all applicants (electrician) have Hispanic surnames

Analysis

- ▶ Legally, a straight line is not always the shortest distance between two points
- ▶ The law expects employers to remove barriers to employment (open things up)
- ▶ Restricting protected groups is often illegal
- ▶ Employers have a business interest in opening up employment
 - ▶ Law of large applicant pools

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5% of electrician hires are Hispanic

Principles

- ▶ Goal should be to remove barriers
- ▶ Use numbers as flags to identify possible barriers
- ▶ Don't restrict
- ▶ Failing to remove barriers is restricting



It Only Hurts When I Laugh
(Retaliation)

You work as the Parks Director. Jane and Bob are two of your employees. One day, you fire Jane. Bob doesn't like this, and so he goes home that weekend and records a video of himself rapping (to a killer beat) about how you fired Jane because she is a woman, and then he posts it to his Insta account. It is quite catchy. It goes viral. 2 million views in two days. Sunday evening your teenage daughter shows it to you on her phone as she dances along. She can't help it. Bob is dope.

Analysis

- ▶ Legally, taking disciplinary action against Bob may or may not be okay. It depends on the specific facts.
- ▶ Plaintiff attorneys love retaliation cases – easy to prove
- ▶ If someone makes a discrimination complaint against a manager, they will be grouchy – that's okay
- ▶ But, when a manager starts believing they're the victim, then retaliation not only becomes acceptable; it becomes reasonable

Principles

- ▶ Watch for managers who believe they are the victim
- ▶ It's not their perspective that's important; it's the employers
 - ▶ Employers want to keep their promises
 - ▶ And employers will look at the fractured relationship and watch how the manager builds enough trust with the employee to keep them productive

Summary

- ▶ Open Up – Don't Restrict
- ▶ Consistency is the key (Discrimination)
- ▶ When in doubt, go through the interactive process (the law insists)
- ▶ Let HR lead (the interactive process)
- ▶ Good faith goes a long way (in everything)
- ▶ Keep the right perspective (retaliation)

Attempts: Brief Observations on Civil Rights, EEO, and the Difficulties of Difference

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