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General Counsel Employment Law Report

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A Clearer Definition of "Protected Concerted Activity"

First, a quick reminder. The National Labor Relations Act applies to all employers, not just those with unionized workers. So, even if your workplace is union-free, please keep reading. This information will be helpful to you!

Now, some law school geekery. Hooray! Jacobellis v. Ohio was mandatory reading in the first year of law school. It's a well-known U.S. Supreme Court case in which the justices use fancy words like "prurient" and establish a test for what is and what is not "obscene." But, the BEST language from the case comes from Justice Stewart's concurring decision. He writes the following as his "definition" of "hard core pornography": *I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. **But I know it when I see it**…* That is the kind of stuff you read in law school and never forget. Supreme Court opinion gold.

Ok, why am I writing about a 1964 case? Because when I read about a January 2019 National Labor Relations Board decision, it made me think of Justice Stewart's "I know it when I see it" quote. Over the past many years, it has become less and less clear what, exactly, "protected concerted activity" is. It felt a bit like the NLRB would take a "we'll know it when we see it" sort of approach. It's unlawful for an employer to take adverse action against an employee who engages in protected concerted activity. But, it's hard to avoid something if it's unclear what you're supposed to avoid. The NLRB's opinion in Alstate Maintenance LLC clearly explains how the current Board defines protected concerted activity. Here are excerpts that employers should find quite helpful:

- "Section 7 of the Act gives employees the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."
- Therefore, for employees to be protected by Section 7, "two elements must be satisfied: the activity they engage in must be "concerted," and the concerted activity must be engaged in "for the purpose of . . . mutual aid or protection."
- "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."
- "An individual employee who raises a workplace concern with a supervisor or manager is engaged in concerted activity if there is evidence of "group activities"—e.g., prior or contemporaneous discussion of the concern between or among members of the workforce—warranting a finding that the employee was indeed bringing to management's attention a "truly group complaint," as opposed to a purely personal grievance. "[A]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'
- To be considered "for the purposes of mutual aid or protection," the activity must have occurred in an effort "to improve terms and conditions of employment."

If you have any questions as to whether an employee's actions may be protected by Section 7, please reach out!

You Still Can't Use Your Dress Code As An Excuse To Discriminate

Remember that time when the U.S. Supreme Court held that Abercrombie & Fitch discriminated against a Muslim woman because her head scarf clashed with its "look" policy? No? Well, let me refresh your memory. Abercrombie refused to hire a Muslim woman who wore a hijab because the head scarf violated its no hats dress code, and the Supreme Court was having none of it.

Now that we're all caught up, there are a couple of important parts of the decision worth highlighting:

- An applicant or employee does not have to make a specific request for a religious accommodation to obtain relief under Title VII, which prohibits religious discrimination in hiring.
- If an employer acts with the motive of avoiding the need to accommodate a religious practice, it is a violation of Title VII even if the employer only has a suspicion that accommodation may be needed.

At the time, attorneys urged clients to update their dress codes and handbook policies to specifically state that exceptions may be made for religious accommodation; and to be prepared to make accommodation to their dress code.

But, it turns out someone forgot to tell UPS, who just settled a $4.9 million dollar religious discrimination suit with the EEOC. According to the news release announcing the settlement, UPS prohibited male employees in a supervisory or customer contact position, including delivery drivers, from wearing beards or growing hair below collar length. According to the EEOC, since at least January 2005, UPS would not hire or promote applicants whose religious practices of wearing beards or long hair conflicted with its appearance policy and wouldn't provide reasonable accommodation for them at its facilities throughout the United States. Whoops.

When it comes to making exceptions to the dress code as a religious accommodation, the rule is pretty simple: if it doesn't cause a health or safety concern or in some other way cause an undue hardship for the company, it should be granted.

Policies: Employer Friend or Foe?

Are policies an employer's friend or foe?

If you answered "it depends," you:

1. Might be a lawyer; and
2. Are **right**!

I have the privilege of talking to a lot of different employers. Not surprisingly, our conversations are often about the appropriate next steps an employer should take. We talk about the facts – the employee's actions or requests that necessitate the employer's response. We also talk about the other facts – the employer's policies and past practices. And, here's where the question of policy friend or foe is answered. Let's use two recent client conversations as examples.

Example 1 – Progressive Discipline Policy

A client called and indicated that an employee had very poor attendance and was calling out last minute with all sorts of issues – car trouble one day, day care coverage another, illness another. The employee missed shifts almost as often as he reported for them. The employer wanted to terminate. When I asked if the employer had a progressive discipline policy, the answer was "yes, but don't use it." Just like that, we have a policy foe.

As you know, most employees are employees at-will which means that employment can be ended by either the employer or the employee at any time for any reason or no reason at all. Therefore, progressive discipline policies are not required. But, when a progressive discipline policy is written and placed into a handbook alongside all sorts of very important policies (FMLA, violence in the workplace, nondiscrimination, code of conduct, etc.), the message to employees is that the progressive discipline policy is important and will be followed. If the employer doesn't follow the progressive discipline policy, the employee may take his case to the EEOC or state agency and say, essentially: "my employer has this policy and it didn't follow it…it's proof they treated me differently."

Example 2 – Personal Leave Policy

A client called to ask about documentation that could be requested to support an employee's request for leave as an accommodation (the employee was not eligible for FMLA). I asked about the employer's sick time policy. I asked about the employer's leave policies. To this, the answer was "we approve personal leave for many reasons, including illness, and don't require any documentation to support the leave." Just like that, an unexpected policy foe. Given the language of the policy and the employer's past practice with regard to the policy, they were now in a position of having to approve a leave without requesting or requiring documentation and without having the opportunity to assess the reasonableness of the requested accommodation.

More Often, Policies are Friends!

Those are two real examples of situations where the existence of a policy created more risk/less flexibility for the employer. But, **more often than not, policies are very much an employer's friend.**

Avoid foe situations by:

- Ensuring your policies are well-written;
- Ensuring all HR and management personnel understand the policy and consistently adhere to it;
- Routinely reviewing your policies to ensure they accurately reflect your practices. If a policy in the handbook isn't followed, remove it. If you consistently follow a process that isn't documented, add it. If a policy isn't working well, consider how to best update it; and
- Consider how policies interact and whether those interactions create conflict.

We can help.

When the Rumor Mill Leads to a Discrimination Claim

More than a handful of times, I have received questions based on a variation on the following scenario: Young employee (usually female) is spending lots of time with older (usually married, usually male) supervisor, rumors of an intimate relationship percolate, complaints of preferential treatment along with the rumor make their way to HR, and the employer is at a loss as to how to proceed.

I am always quick to point out in these scenarios that absent proof that the two are engaged in a relationship that violates the employer's policy, what the employer has proof of is unhappy employees and a rumor, and both can lead to liability if the situation is not addressed appropriately.

A recent case out of the 4th Circuit, demonstrates the risk:

The Plaintiff is a female who quickly rose through the employer's ranks. She learned that some male employees were spreading a rumor that she had slept with a manager to get ahead. She learned that the highest ranking manager at the facility where she was working, was involved in spreading the rumor. According to the court, she faced "open resentment and disrespect" from many co-workers, including employees she supervised. The Plaintiff was eventually fired, and, not surprisingly, sued, alleging sex discrimination and a hostile work environment, and retaliation among other claims.

The 4th Circuit noted the deeply rooted perception that women, not men, use sex to achieve success, and concluded that conduct based on that perception was gender-based. It also noted that two other circuits, the 3rd and the 7th, have declared that women can base a sex discrimination case on rumors of an affair with the boss.

Rumors in the workplace, particularly those that are based on gender stereotypes can create a number of problems for employers. First, they are a good indicator that there is both a morale issue, and a supervisor who does not have a good understanding of the risk he or she is creating. If employees are concerned about favoritism or some other conflict of interest, that is a real issue that should be addressed. However, the rumors themselves can also be a real problem, particularly when they rise to the level of bullying or discrimination; and should be addressed to avoid further exposure.

We Don't Just Frame the Challenges – We Provide the Solutions

HR-RELATED RISK HAS NEVER BEEN GREATER: This is an understatement that is reinforced with each of these General Counsel Employment Law Reports. The regulations that govern today's workplace are extensive and expanding and reach employers of all sizes and in all industry sectors. Compliance obligations are burdensome and the corresponding liability and exposure for business owners and supervisors is extraordinary. In fact, in some circumstances, business owners, supervisors and managers have personal and vicarious liability which could include: back pay; front pay; emotional distress; attorney's fees; civil fines and criminal sanctions. Employment lawsuits have risen 400% in the last 20 years. The cost to settle an employment lawsuit has tripled during the last five years alone, to an average of more than $300,000. The average compensatory award in federal employment cases now exceeds $500,000. This trend will continue in the next decade.

THINGS JUST GOT A LOT MORE COMPLICATED: Our crystal ball tells us that local governments, state and municipal, will become the incubators of employment laws and workplace regulations over the next several years. Cities and states throughout the country will take more control over the regulations that govern the workplace, including paid leave time and the overtime eligibility rules, just to name two.

In general terms, we know that the need to more effectively manage HR-related risk and employment law compliance remains constant.

HELP IS ON THE WAY: Employment Law Compliance and HR-Related Risk Management is our endgame, and we are always looking for ways to more effectively help our clients achieve that goal. We know our clients, and we know you are short on time and we know other priorities consume resources. That is precisely what led us to develop the On-Call Service and a wide range of proactive HR-Related Risk Management Services.

THE RANGE OF THOSE SERVICES INCLUDES: Compliance toolkits addressing the hottest topics in today's workplace; our comprehensive and very popular Employee Handbook Preparation/Updating Service; Diagnostic Compliance Audit of Personnel Practices Service; our Corporate Business Continuity & Crisis Management Plan Preparation Service; and Affirmative Action Compliance Assistance Services. We have also developed more targeted services to allow our clients to focus on the areas that concern them most while minimizing the impact on their time and budget, for example, our Sexual Harassment Prevention Toolkit, our Reasonable Accommodation Compliance Toolkit and our Pregnancy Non-Discrimination and Accommodation Compliance Toolkit. Most importantly, all of our advice and counsel will be protected by the Attorney/Client privilege, giving our clients the comfort of knowing they have identified and addressed compliance risks before those issues have become an expensive distraction in their workplace.

THE SOLUTION: We get it – we have recognized that addressing this level of risk costs employers significant time and money and we offer a unique solution to workplace compliance liability that is highly effective and not otherwise available. Here is a link to our comprehensive Menu of Employment Law Compliance and HR-Related Risk Management Services. We stand ready to help should the need arise. Please contact Mike Foley at mike@foleylawpractice.com should you have any interest in one of these services and Mike will share the fixed fee for that service. Our clients constantly tell us our fixed fees are well below what our competitors charge.

General Counsel's Office Hours

Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.