

Case Studies: Avoiding HR Pitfalls (and a Brief WV Legislative Update)

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*No statements made in this seminar or in the written materials/powerpoint should be construed as legal advice pertaining to specific factual situations.

Drug Testing –

- After two sessions of unsuccessful work, private sector drug testing bill has passed both houses
- HB2857 creates the West Virginia Safer Workplaces Act
 - Mirror of last year's bill
 - Permits drug and alcohol testing in accordance with written policy in compliance with the Act
- Significant liability protection for employers

- Second Chance Employment Act:
- Third time is the charm – in the form of SB76
- Creates the Second Chance Employment Act
 - Individuals guilty of certain crimes can petition for those convictions to be reclassified
 - “Reduced misdemeanor”
 - Protections for employers
 - Immunity for negligent hiring claims

- WV Medical Cannabis Act:
- SB386 – Medical marijuana
- Truly effective July 1, 2019
- For employers, many blanks that need filled
 - Delayed implementation with rule making
 - Another legislative session before implemented
- Drug testing, recreational use in other states, etc.
- Employers may not discriminate against “certified persons”
 - But may still discipline for being under influence
 - Not required to permit use on premises

Investigation of Employee Complaints

2015

- 89,385 total charges filed with EEOC
- 26,396 – sex discrimination
- 31,027 – race discrimination
- 39,757 – retaliation for complaining about discrimination or harassment

2016

- 91,503 total charges filed with EEOC
- 26,934 – sex discrimination
- 32,309 – race discrimination
- 42,018 – retaliation



Title VII of the Civil Rights Act of 1964

Makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to:

- compensation, terms, conditions, or privileges of employment (including promotions, demotions, transfers, recruitment, discipline, layoff, termination)
- because of such individual's race, color, religion, sex, or national origin, disability, age, military and veteran status

The Pennsylvania Human Relations Act prohibits discrimination and harassment on the basis of:

- Race
- Color
- Religion
- Ancestry
- Age (40 and above)
- Disability (and association with a disabled individual)
- National origin
- Possession of a GED

Individual Liability



Maryland Civil Rights Act

The Maryland Civil Rights Act prohibits discrimination and harassment on the basis of:

- Race
- Color
- Religion
- Age
- National Origin
- Marital Status
- Sexual Orientation
- Genetic Information
- Disability unrelated in nature and extent so as to reasonably preclude the performance of employment



West Virginia Human Rights Act

The West Virginia Human Rights Act prohibits discrimination and harassment on the basis of:

- Race
- Color
- Religion
- Ancestry
- National Origin
- Sex
- Blindness
- Age (Age 40 or above)
- Disability

Individual Liability



What is Harassment?

- Off-color remarks, jokes
- Offensive or derogatory comments
- Verbal, visual or physical conduct
- Based on an individual's protected status constitutes unlawful harassment,
- If the conduct creates an intimidating, hostile, or offensive working environment or interferes with the individual's work performance.

Hostile Work Environment

1. Employee suffered intentional discrimination because of his or her sex, race, disability or age;
2. The discrimination was pervasive or regular;
3. The discrimination detrimentally affected the plaintiff;
4. The discrimination would detrimentally affect a reasonable person in the same protected class in that position; and
5. The existence of *respondeat superior* liability.

GENDER/ SEXUAL DISCRIMINATION



Case 1



Masoud Sharif v. United Airlines, 841 F.3d 199
(4th Circ. 2016)

Procedural History: District Court granted summary judgment for Defendant United Airlines because the employee could not prove that the explanation offered by the employer (taking fraudulent FMLA and lying about it) was a pretext for retaliation for taking FMLA leave.

Sharif v. United Airlines

- The U.S. Court of Appeals affirmed, holding that the employee had not produced sufficient evidence of the employer's reason for the termination was pretext. Discharge for fraudulently taking FMLA and then being untruthful in the investigation was upheld.

Why the Employer Prevailed:

- All prior FMLA requests were approved;
- The alert about the timing of the FMLA day in the middle of vacation was factual and objective;
- A thorough investigation of the sequence of events was conducted;
- The employee was given the opportunity to explain the situation

Ranade v. BT America, Inc. (Unpublished Opinion
– 4th Cir. 2014)

Procedural History: District Court granted summary judgment to the employer on the employee's that she was discharged in retaliation for exercising her FMLA rights and that the employer had interfered with her FMLA rights. Employee did not show that reason for discharge was pretextual.

Ranade v. BT America, Inc.

- The U.S. Court of Appeals affirmed, finding that the almost six month gap between the FMLA leave and the discharge undermined the claim of a connection between the events. The existence of the pre-leave performance improvement plan and efforts to help her performance further supported the employer's reason for discharge.

Why the Employer Prevailed:

- Timing - 6 months between leave and discharge (note: court referenced a case in which two months and two weeks undermined inference of causation);
- Documented improvement plan and efforts to assist employment performance;
- Side note: Court also noted that the employer was not required to disrupt its operations to accommodate the employee

Case 3



Durstein v. Cabell County Board of Education, WVPEGB Docket 2017-1955-CabEd

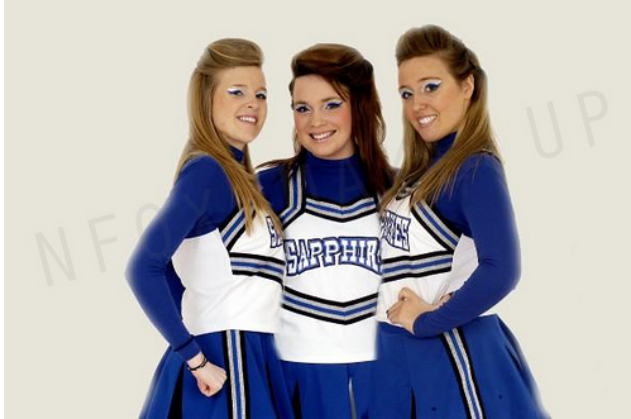
Procedural History: Board of Education voted to terminate the employment of high school social studies teacher

The Grievance Board upheld the termination on the basis of insubordination, finding a rational nexus between the conduct and the teacher's duties. Insubordination was established by proof of violation of employee code of conduct. The First Amendment claim was rejected as the school's interest in the orderly operations of its affairs outweighed the employee's rights to free speech.

Why the Employer Prevailed:

- Posts were subject to notoriety;
- The comparators offered by teacher were not sufficiently similar;
- Posts adversely affected minority students and staff;
- Teacher signed Acceptable Use Policy acknowledgement
- Teacher signed acknowledgment of Employee Code of Conduct

Case 4



Kanawha County Board of Education v. Kimble,
W. Va. Supreme Court of Appeals, unreported decision
5/30/14

Procedural History: Board of Education discharged Cook/Cheerleading Coach from both positions. Employee filed a grievance and grievance board upheld the decision as to the Cheerleading Coach position but ruled that the employee be reinstated with back pay as a Cook, finding there was no nexus between the employee's conduct and that position and that the employee's conduct was not immoral.

: Kanawha County Board of Education v. Kimble

The Supreme Court of Appeals agreed with the Board of Education's position and ruled that the termination from both positions was justified. The court held that the employee had been insubordinate by taking the students on a trip after been expressly told not to do so. The photographs of the employee in close proximity to her topless students and adding the caption referring to the girls as "Ho's" was sufficient evidence of immorality. Her actions were rationally related to both positions.

Why the Employer Prevailed:

In this case, it was not really a matter of what the employer did right, but rather what the employee did wrong: disobeyed a direct order; was caught being too friendly with the students; AND, stupid enough to post photographic evidence of her disregard of a direct order and her poor judgment on social media.

Employer did, however, follow proper process and procedure for terminating the employment and persevered by pursuing the appeal.

Case 5



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Liverman v. City of Petersburg, 844 F.3d 400
(2016)

Procedural History: District court grants summary judgment to one of the two employees on claim that the social media policy violated the employee's First Amendment rights but that the Chief was entitled to qualified immunity. As to the second employee, the court held that his rights had not been violated. The court further ruled that neither of the employees had been retaliated against in subsequent investigations.

Liverman v. City of Petersburg

On appeal – The Fourth Circuit ruled that the social media policy was unconstitutionally overbroad as to both employees. The posts were a matter of public concern (not personal interest) and the interests of present and future employees in the subject matter outweighed any interest of the department.

Moreover, no disruption was shown to have resulted from the posts. No qualified immunity based on the breadth of the policy. The dismissal of the retaliation claims was upheld.

Why the Employer Lost:

A sweepingly overbroad social media policy that prohibited the dissemination of any information “that would tend to discredit or reflect unfavorably upon the [employer],” prohibited “negative comments” about internal operations or conduct of supervisors or peers and noted that violations would result in disciplinary action.

Case 6



Boyer-Liberto v. Fountainbleau Corp., 786 F.3d 264 (2014)

Procedural History: Plaintiff sues for racial discrimination/hostile work environment and retaliation. Summary Judgment was granted to employer because the two comments made by a fellow employee were too isolated to support either claim.

On Appeal: The Fourth Circuit affirmed. The two “racially derogatory and highly offensive” comments which were close in time and related to a single incident were found not to have been “so severe or pervasive” as to create a hostile work environment. Employee’s retaliation claim failed because she had not engaged in protected activity.

Why the Employer Prevailed:

The speaker was not her supervisor;

The terms and conditions of the employee's employment were not affected;

There were only two comments in two days.

Case 7



Crockett v. Mission Hospital, Inc., 717 F.3d 348
(4th Cir. 2013)

Procedural History: Employee sues for hostile work environment. District Court grants summary judgment to employer because the employee did not show that “she suffered a tangible employment action” and the employer was able “to defeat liability because it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.”

On Appeal: Summary Judgment affirmed. While employee could show unwelcome conduct based on her sex and that the conduct was severe enough to create a hostile work environment, she had not suffered a tangible employment action. Also, her harasser was not a decision-maker. Employer was entitled to the affirmative defense that it had acted reasonably upon receipt of the report of harassment and that the employee had not taken advantage of the opportunities offered to avoid harm.

Why the Employer Prevailed:

- It had “established, disseminated and enforced an anti-harassment policy and complaint procedure and took reasonable steps to prevent harassment.”
- It investigated the claim despite the employee’s refusal to provide more than very limited information.
- It counseled the employee how to file a complaint and met with her;
- It had a clearly documented unrelated reason for termination (Employee actually voluntarily dismissed her claim related to discharge because of this);
- The Employee had not reported the harassment before she was suspended (the alleged adverse action) and would not cooperate with the harassment investigation.

Case 8



McNelis v. Pennsylvania Power & Light Co., 867 F.3d 411 (3d Circ. 2017)

Procedural History: Employee sues claiming violation of the ADA. District Court grants summary judgment to the employer, holding that employee was discharged because he could not meet a legally mandated job requirement.

On Appeal - Judgment for Employer Affirmed.

The employee was not a “qualified individual with a disability” because he could not perform the essential functions of the job with or without reasonable accommodations. The employer was mandated to follow the Nuclear Regulatory Commission’s requirement that its employees hold a security clearance. The employee’s disability precluded this.

Why the Employer Prevailed:

(Other than compliance with federal law....)

It promptly responded to the reported concerns about the plaintiff's fitness for duty and placed his unrestricted access "on hold.";

It retained a well-qualified expert to perform a fitness for duty examination.

Case 9



Young v. United Parcel Service, 135 S. Ct. 1338
(2015)

Procedural History: Employee alleged violation of ADA and Pregnancy Discrimination Act. District Judge granted summary judgment to employer finding that other employees being granted light duty accommodations were too different to qualify as “similarly situated comparators”

Fourth Circuit – Affirmed District Court decision.

Young v. United Parcel Service

On Appeal to U.S. Supreme Court:

Reversed and remanded decision for consideration of the following: whether Employee belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “similar in their ability or inability to work.”

Take aways:

Think carefully about whether you should extend light duty work to some but not others.

You will need to justify refusal to offer it to some with a “legitimate, nondiscriminatory reason.”

Expense and inconvenience will not be enough.

Note: UPS changed its policy concerning pregnant workers before the case was argued before the US Supreme Court. The case settled before the lower court could apply the standard set by the Supreme Court.

Case 10



MEN VS. WOMEN

Bauer v. Lynch, 812 F.3d 340 (4th Cir. 2016)

Procedural Background: Male FBI trainee sued for sex discrimination after failing out of academy (by one push-up). Trainee and FBI filed cross motions for summary judgment. District Court grants Trainee's motion, finding that the use of gender-normed physical fitness standards violated Title VII. The FBI's BFOQ defense and its disparate impact defenses were rejected.

Bauer v. Lynch

On Appeal: Fourth Circuit reverses the ruling below. The court considered prior decisions that rejected similar challenges and reversed the district court's decision, finding that "the physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness." An employer has not discriminated when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences.

Take away:

Give careful consideration when creating differing standards for any job requirements.

Note that the FBI spent substantial time and devoted expertise to developing a test that normalized standards that would address their differences.

Case 11



Villa v. Cavamezze Grill, LLC, 858 F.3d 896 (4th Cir. 2017)

Procedural History: Employee claims Title VII retaliation. District Court grants summary judgment to employer. Termination for making a false report that another employee had been sexual harassed is not illegal retaliation, even if the result of the employer's investigation was wrong.

Villa v. Cavamezze Grill, LLC

On Appeal – the District Court’s decision was affirmed. That the employer intended to retaliate is required to prove a Title VII retaliation claim. An employer has not retaliated if it discharges an employee due to an error and did not realize that the employee had engaged in protected conduct. “Whether the termination decision ‘was, wise, fair, or even correct’ is immaterial.”

Why the Employer Prevailed:

The report of harassment was investigated by conducting numerous witness interviews. Note: “an obviously inadequate investigation” could show the required retaliatory motive.

The employee’s report was in “opposition” to a discriminatory practice, which requires proof of motive: it is not required for adverse action for “participation” (making a claim, testifying, assisting or participating in a claim.)

Mayo v. St. Mary's Medical Center, Inc.,

Unreported – W. Va. Supreme Court of Appeals, 4/7/17

Procedural History: Employee sues for interference and retaliation under the FMLA, as well as gender and disability discrimination. Trial court grants summary judgment to employer, finding that the employee had not complied with the notice provisions for FMLA leave and that this termination was unrelated to FMLA or missing work while in the hospital.

Decision on Appeal: Affirmed. Proof of a FMLA interference claim requires a finding of prejudice as a result of the violation. The employee was discharged because of violations of employee standards. The lack of proof of motive caused the retaliation claims to fail.

Why the Employer Prevailed:

Documentation, documentation, documentation: good policy manual; good documentation of infractions and resulting disciplinary action.

Thorough investigation of complaint (also well-documented).

Employee was given the opportunity to respond to written allegations of disciplinary charges after being medically-released to return to work.

POLICY AGAINST HARASSMENT



- **Prohibition**

HARASSMENT OF ANY SORT – VERBAL, PHYSICAL, OR VISUAL – WILL NOT BE TOLERATED.

- **Accessible Complaint Procedure**

- Confidentiality
- Consistent with the need to investigate
- Appropriate corrective action
- No retaliation

Complaint Procedures

1. Reduce all complaints to writing.
2. Employees must confirm and sign a written summary outlining their complaint with any relevant information necessary for an investigation.
3. Notify employees of the decision or status of the investigation within a reasonable period of time from the date the incident was reported.
4. There will be no discrimination or retaliation against any individual who files a good-faith harassment complaint.
5. There will be no discrimination or retaliation against any other individual who participates in the investigation of a harassment complaint.



Complaint Procedures

7. If there is a finding to support cause of discrimination or harassment, appropriate corrective and/or discipline action will be swiftly pursued.
8. Disciplinary action, including discharge, will be taken against individuals who make false or frivolous accusations, such as those made maliciously or recklessly.

All supervisors have the duty of ensuring that no individual or employee is subjected to harassment, and of maintaining a workplace free of such harassment.



Supervisory Responsibilities

- Refrain from inappropriate behavior. This includes **any** form of unlawful harassment, discrimination and retaliation. Key is inappropriateness, not illegality.
- Report **all** complaints of harassment, discrimination, retaliation and inappropriate behavior – even if employee requests nothing be done and asks for absolute confidentiality.
- Respond proactively to inappropriate behavior, even in the absence of a complaint. Silence equals tacit support. Consult with Human Resources.

Supervisory Responsibilities

- Remedy unlawful discrimination, harassment, retaliation and other inappropriate behavior (even if not unlawful).
- Cooperate fully in any confidential investigation.
- Refrain from unlawful retaliation. Involves all terms and conditions of employment

Questions?

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