

Employment Notes

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RELIGIOUS ACCOMMODATION: BEARDS, BUTTONS AND BOW-TIES

A waiter reports to work with a beard in violation of a policy prohibiting facial hair. An employee insists that she be allowed to wear a button with the phrase “Stop Abortion” and a color photograph of a fetus despite the fact that it upsets other employees in her office. An employee on a 9am-5pm weekday schedule leaves before 3pm every Friday. A cashier refuses to wear the bow-tie that is part of her uniform. Are these actions protected by law?

Federal and state law prohibits discrimination against employees based on their religious beliefs and requires that employers make reasonable accommodations for the religious observances of employees. Title VII of the Civil Rights Act of 1964 mandates that employers with fifteen or more employees must accommodate an employee’s religious observance as long as it does not impose an “undue hardship” on the employer’s business.

Title VII only requires employers to reasonably accommodate *sincerely held* religious beliefs, practices and observances of which they are aware. If the religious belief is not bona fide or sincerely held, the employer is not required to provide an accommodation. An employer faced with the difficult determination of whether or not a particular employee’s request for accommodation is based on a bona fide religious belief is entitled to insist that the employee substantiate his claim that the religious belief on which his request for accommodation is based is sincerely held and is not merely a personal preference. For example, in the case of the Muslim banquet waiter who reported for work at The Waldorf-Astoria with a beard in violation of a policy prohibiting facial hair, the court granted summary judgment to The Waldorf-Astoria finding that the waiter’s claim that his beard was part of his religion was insincere. The court cited the fact that the waiter had not previously told anyone at The Waldorf-Astoria about his religion, that the beard was only two to five days old and that he shaved it off shortly after the incident.

Once an employer has proposed an effective and reasonable accommodation it need not consider an alternative suggestion from the employee, even if such alternative suggestion does not impose an undue hardship on the employer. A United States District Court held that a Catholic office worker, who took a religious vow to wear a particular anti-abortion button at all times, which button was extremely objectionable to fellow employees, was entitled to a reasonable accommodation under Title VII based on the fact that wearing the button pursuant to her vow was a protected religious practice. The employer’s offer to allow the employee to continue to wear the button if she covered the objectionable portions while at work was found by the court to be a sufficient reasonable accommodation. The employee rejected this option, suggested various other accommodations and was subsequently terminated for continuing to wear the uncovered button at work. The court concluded that the employer had reasonably accommodated the employee by offering her the opportunity to wear the button at work, if covered, and dismissed the employee’s claim.

Certain states have more thoroughly defined protections for employees’ religious observances. In New York, for example, with the exception of emergencies or where an employee’s physical presence is indispensable to the orderly transaction of business, state law specifically requires that employers with four or more employees allow employees to take off time from work to

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observe their sabbath and any other holy day. This includes allowing observant employees a reasonable time prior and subsequent to their sabbath or holy day for travel between their place of employment and their home. However, employers are not required to compensate employees for any such time taken off. In New York, the employer may require the employee to make up the time taken off at a mutually convenient time, may count such time off against vacation time or may consider such time as leave without pay.

On the other hand, New York courts have also held that New York law does not create a duty to accommodate general religious practices. A parking garage cashier's claim that the bow-tie of the uniform required by her employer would violate her religious beliefs as a Jehovah's Witness did not require her employer to provide an accommodation. The employer had instituted the uniform in an effort to convey a professional and recognizable image to the public and the court found that, absent a discriminatory motive, the requirement to wear a bow-tie did not violate New York law because it was a general religious practice.

As in most areas of employer-employee relations, proper record-keeping is essential. All requested and proposed accommodations should be well documented, particularly in circumstances where an employer or employee declines the other's offer of, or suggestion for, a reasonable accommodation. While not required to implement, or even respond to an employee's suggested accommodation, if an employee

has suggested an accommodation that the employer does not intend to implement, such employer would be well advised to prepare a memo to the file demonstrating that such suggestion was considered, why it was rejected and if an alternate accommodation was offered.

Over the last few years there has been an increase in religious discrimination lawsuits and in recent months there has been a heightened sensitivity to the religious needs of employees. On May 23, 2002, the Workplace Religious Freedom Act of 2002 was introduced into the Senate. Among other changes to the status quo, the Act would define Title VII's "undue hardship" to mean "an accommodation requiring significant difficulty or expense," thereby increasing an employer's responsibility to provide an accommodation. Changes to Title VII will undoubtedly result in an even greater increase in litigation as courts gradually flesh out the new legislation. Even now, handling the religious needs of employees is a potential minefield of legal requirements. There is no standard formula for compliance, but rather each case is unique and employers must act based on the applicable law and particular facts involved.

DO UNTO OTHERS

Hiring Practices Affect Trade Secret Protection

"Do unto others." This is a maxim that, in one form or another, has been uttered from parent to child, friend to friend, and from colleague to colleague for

centuries. It has been essential in teaching children how to interact with their peers and in creating a sense of morality and fairness upon which strong character is based. As a result, it is no wonder why this age-old maxim is slowly being incorporated into the jurisprudence of employer hiring practices and affecting the ability of employers to enforce contractual terms that were on their surface negotiated and agreed upon by the parties in good faith. Although the case law in this area is not fully developed, it appears as though non-competition and non-solicitation covenants that have become boilerplate in employment contracts are being met with skepticism when the employer seeking to enjoin its former employee from violating those covenants has done that which it seeks to prevent. In other words, developing case law suggests that an employer must "do unto others." An employer may be precluded from enforcing non-competition or non-solicitation provisions when that employer has engaged in the practice of hiring employees who were, at the time of hiring, bound by similar covenants.

In *Morgan Stanley DW, Inc. v. Frisby*, 163 F. Supp. 2d 1371 (N.D. Ga. 2001), the Northern District of Georgia was presented with a situation in which Morgan Stanley hired the defendant as a stock broker in one of its Atlanta offices. As was customary, the defendant signed an employment agreement that contained a non-solicitation covenant, which provided that he would not, for one year after his termination or resignation from Morgan Stanley, "solicit those clients within a 100-mile radius of their north Atlanta office whom

[he] serviced or learned about while employed by Morgan Stanley.” However, soon after leaving Morgan Stanley’s employ in August of 2001, the defendant “began a swift and methodical effort to solicit, by overnight mailings, the customers with whom [he] did business while at Morgan Stanley.” As a result, over thirty of the defendant’s customers terminated their relationship with Morgan Stanley and transferred their accounts to the defendant’s new employer.

When Morgan Stanley attempted to enjoin its former employee from soliciting Morgan Stanley’s clients in violation of the employment contract, it was stonewalled. Irrespective of the non-competition and non-solicitation covenants that had been in place, the court refused to enjoin the competitive conduct, in part, because of Morgan Stanley’s own hiring practices. The court held that Morgan Stanley was “estopped by its unclean hands from seeking equitable relief from this Court.” In so holding, the court determined that “equity does not permit Morgan Stanley to enforce restrictive covenants against [the defendant] when it actively recruits brokers from competitors and encourages them to retain and use copies of client records to solicit the transfer of client accounts from those competitors without regard for any agreements between the brokers and the competitor.”

Similarly, in *Salomon Smith Barney Inc. v. Vockel*, 137 F. Supp. 2d 599 (E.D. Pa. 2000), the Eastern District of Pennsylvania utilized the doctrine of unclean hands to prevent an employer from enjoining a former em-

ployee for violating certain covenants that restricted the employee’s ability to compete after the employment relationship had ended. In that case, the defendant was a bond trader with Salomon Smith Barney (“SSB”). He received an offer of employment from a competitor who requested that he bring his SSB account statements with him. The defendant resigned from SSB and began his new employment, but not before he made good on his new employer’s request and took with him a majority of his SSB account statements. The new employer used these account statements to prepare solicitation packages and encourage these clients to transfer their accounts.

As was the case in *Morgan Stanley*, SSB sought an injunction preventing the solicitation of its clients and restricting defendant’s ability to disclose SSB’s confidential and proprietary information. Once again, the court foreclosed SSB’s efforts to restrict competition based upon the hiring practices that SSB had previously utilized. The court was mindful of the fact that before becoming an employee of SSB, the defendant worked for another competitor. When SSB made its offer of employment to the defendant, it too requested the account statements that he had generated while employed by his prior employer. The defendant complied with SSB’s request, which precipitated SSB’s mailing of solicitation packages to old clients encouraging them to follow their former broker and transfer their accounts.

In denying SSB’s request for an injunction, the court determined that “as a court sitting in

equity, we will not aid a wrongdoer.” Integral to the court’s decision was that “Smith Barney seeks the help of a court of equity to prevent the same conduct . . . which it had previously abetted and from which it has handsomely profited.” Simply stated, SSB was not allowed to utilize the Court as a mechanism for prohibiting the very conduct that it had been guilty of engaging in.

Courts are often presented with situations in which a staffing firm seeks the court’s intervention because a former employee has violated a non-compete agreement by joining a competitor or non-solicit or trade secret covenants by soliciting clients, employees or job candidates or by disclosing or utilizing that staffing firm’s trade secrets or confidential information at his or her place of subsequent employment. Often the former employer attempts to protect its interests by seeking a preliminary injunction to prevent the former employee from competing, or soliciting customers or employees or making any further use of the employer’s trade secrets or confidential information. However, like the situations in *Morgan Stanley* and *Salomon Smith Barney*, the employers in these situations are often advocating positions to which they, at one time, wholeheartedly objected. It is not uncommon for an employer to zealously advance the position that a former employee’s use of its customer lists violates their non-solicit agreement, even though, a few months earlier, that same employer was defending its own new employee’s use of another company’s customer lists on the ground that such information did

not constitute a trade secret.

It may not be long before more courts begin to use the *Morgan Stanley and Salomon Smith Barney* rationale to deny preliminary injunctions when an employer is attempting to argue for the enforceability of something it previously contended was unenforceable. Similarly, when considering the arguments of a defendant new employer in these types of cases, courts look at their own form of employment agreement. If these agreements contain non-competition and non-solicitation clauses, the courts will often view an argument against enforceability with considerable skepticism. Staffing firms should review their hiring practices and their philosophy with respect to the non-competition and non-solicitation covenants of new employers' former employees. If a staffing firm is inclined to seek enforcement of these covenants when employees leave, it should not hire individuals from competitors who have similar contracts and encourage violations. Conversely, if a staffing firm seeks to routinely hire from competitors without regard to non-compete and non-solicit agreements, it should re-evaluate the use of such provisions in their employment agreements.

If an employer has been guilty of disregarding the non-competition or non-solicitation covenants that were in place when it initially hired its employees, that employer could find it extremely difficult to obtain a court's aid when it has been the victim of similar hiring practices.

RECORD-KEEPING: THE SECRET WEAPON AGAINST EMPLOYEE CLAIMS

Failure to keep proper employee records as expressly required by the Fair Labor Standards Act ("FLSA") is often the proverbial "nail in the employer's coffin" in suits brought by employees for an employer's violation of federal wage and hour laws. The FLSA contains minimum wage and overtime pay record-keeping requirements. Pursuant to the FLSA, certain records pertaining to employee wages, hours worked, and other conditions and practices of employment must be kept and maintained by the employer. Unfortunately, employers are often not concerned or do not wish to be burdened with the task of maintaining and updating employee records. One reason repeatedly cited for such employer reluctance is that the FLSA does not impose significant civil penalties upon employers solely for their failure to maintain employee records. While it is true that failure to comply with the record-keeping requirements alone may leave the employer's pocketbook virtually unscathed, employers may face far more extensive problems that stem from failing to comply with the FLSA's record-keeping requirements.

A Record-Keeping Defense

An employee bringing a claim against his or her employer for unpaid wages, including unpaid overtime compensation, bears the burden of proving by a preponderance of the evidence

that work was performed on behalf of the employer for which the employee was not properly compensated. Whether employee claims are for minimum wage or overtime violations, the well organized employer can often defend these claims simply by producing properly maintained records that illustrate the employer's compliance with federal and state wage and hour laws. By producing these records, the employer can often demonstrate that the allegedly aggrieved employee did not overcome his or her required burden of proof and is therefore not entitled to any additional compensation under the FLSA. However, when an employer's records are inaccurate, inadequate or, in some instances, nonexistent, the remedy courts will provide for the employee can be a harsh one for the employer.

A Record-Keeping Failure

An employer's failure to keep accurate records is not only in itself a violation of the FLSA but may also produce a reasonable inference that other violations of the FLSA are taking place. In instances where an employer fails to maintain records as required by the FLSA, courts will not penalize the employee by denying recovery due to the employer's inability to prove the extent of the alleged uncompensated labor. To the contrary, courts can, and often do, rely on the employee's evidence of how many regular and overtime hours were worked and how much was paid. This evidence is often proffered in the form of employee testimony. If the employee satisfies the court that uncompensated hours were

worked, the burden then shifts to the employer to come forth with evidence to negate the reasonableness of the inference drawn from the employee's testimony. Sadly, often the only rebuttal to employee evidence is the employer's poorly kept or non-existent records. The result is that the employer is left at the mercy of the employee's testimony.

As a result of the likelihood that a court will resolve testimonial differences in favor of the employee and the employer's obligation to maintain records, it is obviously in the employer's best interest to keep accurate records pertaining to its employees. Organized and updated employee records can potentially serve as a strong defense against current employees or former employees looking for a monetary windfall. The penalty of hefty liquidated damages and attorneys' fees that are routinely awarded in wage and hour cases, in addition to an employee's backpay, is far more injurious to the hard-working employer than the minimal penalty for failing to comply with FLSA's record-keeping requirements.

Some Record-Keeping Requirements

The types of records required to be kept by employers depends upon the classification of the employee for whom such records are maintained. Generally, there are two broad classifications of employees: those that are exempt from the overtime provisions of the FLSA and those that are not exempt. An example of records that employers must maintain for non-exempt employees include:

1. the employee's regular hourly

rate of pay;

2. the basis upon which wages are paid;

3. total hours worked each workday and each workweek;

4. total daily or weekly straight-time earnings or wages;

5. total weekly overtime pay; and

6. total additions to, or deductions from, wages paid each pay period.

It is important to understand what records are necessary to comply with the FLSA and the various options that exist for employers to satisfy the prescriptions of the FLSA.

Conclusion

While the process of keeping and maintaining employee records may be an involved and arduous one, employers are best served by complying with the FLSA record-keeping guidelines. Courts have made it clear that employees will have a much more difficult time establishing their claims for unpaid wages in the face of records which are organized, trustworthy and accurate. Furthermore, properly kept records are an easy and credible means of refuting exorbitant or false wage claims or unauthorized overtime claims. Poorly kept and inaccurate records, independent of any other claims, may not yield sizeable employer penalties, but coupled with a greedy employee's wage and hour claim, may prove to be a costly mistake.

DAMNED IF YOU DO AND DAMNED IF YOU DON'T

Over the years case law has taught employers that by taking appropriate remedial action against

supervisors accused of sexual harassment they can eliminate some, if not all, of their accountability for the actions of the accused harasser. With this edict in mind, employers are often overly-aggressive in their treatment of supervisors who are accused of harassment. Many employers are so concerned about a potential lawsuit that they may choose to discipline an accused harasser even if the harassment allegations remain unsubstantiated after an investigation. After all, with the elimination of the accused harasser - even if he did nothing wrong - the employer generally has a better chance of defending against any claim of harassment. Now, because of a recent ruling in New Jersey, *Grasser v. United Healthcare*, New Jersey employers who take this aggressive, safety-net style in disciplining alleged harassers may be subject to a lawsuit of a different ilk.

In *Grasser*, the alleged harasser brought suit against his former employer for wrongful discharge. The court sided with the alleged harasser holding that the New Jersey Law Against Discrimination requires companies to make *fair and thorough* investigations into allegations of sexual harassment. Now, for the first time in New Jersey, a court has held that employers who terminate alleged harassers without such an investigation may be held accountable under a claim of "wrongful discharge."

As a result of this new cause of action, New Jersey employers must balance the interest of formulating an appropriate response to the complaints of the harassee with that of performing a thorough and fair investigation before taking any action against the

harasser. This is not an easy task. Inevitably, whichever way the employer sides after an investigation, the other party may be left with an avenue of redress against the employer.

As is often the occasion, investigations into complaints of sexual harassment are frequently reduced to the uncorroborated statements of the harassee and the alleged harasser. In these situations, employers are going to be forced to make a decision as to what punishment, if any, is appropriate. Terminate the harasser and risk a wrongful discharge suit. Do not terminate the harasser and risk a sexual harassment suit. *Damned if you do and damned if you don't.*

Since *Grasser* involved the termination of the alleged harasser and a "wrongful discharge" claim, the question of liability for adverse actions that fall short of a termination (i.e., a suspension) has yet to be addressed. Though it will take some time for the courts to better define employers' responsibilities to an accused harasser, New Jersey employers must consider this new cause of action whenever they are investigating complaints of sexual harassment. Consequently, employers should be ever diligent in performing and documenting their harassment investigations and the basis for their determinations. Of course, this documentation should demonstrate that the employer performed a thorough and fair investigation and formulated an appropriate and reasonable response with respect to both the harassee and the harasser.

UNION ALERT

Employers beware! According to a recent poll, a majority of non-union workers favor the unionization of their workforce for the first time since 1984. Over the years, the number of employees who say that they favor the unionization of their workplace has steadily increased. Now the "ayes" are in the majority. Increasing support for unions will undoubtedly result in increased union activity at what are currently non-unionized workplaces.

Employees cite the troubled economy, fear over job security, ever increasing corporate mistrust and the dilution of pension plans as a result of the abysmal performance of the stock market as reasons why they now favor unionization. In addition to these "common" concerns shared by most employees, every company has issues specific to its workforce. These specific issues, often ignored by employers, can be the impetus for employees to seek outside intervention. Employers should be proactive and teach supervisors and managers how to listen and respond to employee concerns before employees turn to a union for support. In other words, the best defense is a good offense.

Training managers is vital because once a union organizing drive has been initiated, untrained managers often make seemingly harmless statements for which employers can later be held accountable. Consequently, an employer can prevail in a hard-fought union election only to be ordered by the National Labor Relations Board to repeat the election or, worse, recognize the union with-

out having the opportunity to campaign during a second election. In order to avoid such a result, employers and their managers must adhere to the well-defined rules that govern the conduct and statements of employees and their agents during and prior to a union campaign. To ensure a lawful campaign, employers should educate management as to what statements and actions are likely to violate the law. As a result, if and when a union does begin an organizing campaign, management will be prepared to run an aggressive campaign of its own, lawfully touting the benefits of remaining unorganized.

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