CLIENT ALERT

LABOR & EMPLOYMENT

EMPLOYMENT LAW ISSUES CONTINUE TO EVOLVE WITH HAIRSTYLE, SEX GOSSIP, AND EMOTIONAL OUTBURST DISABILITY PROTECTIONS

by Sara H. Jodka

Employment law is constantly evolving and changing to keep up with the evolving workforce and work-related issues. For example, in the last year, we have seen a changing landscape focused on gender bias and discrimination with the Me Too and Times Up movements. While we will continue to see claims, charges, and lawsuits related to those issues, there are a number of other evolving employment issues that should be on employers' radars. Here are just a few.

Hairstyle Protections

On February 18, 2019, the New York City Commission on Human Rights issued "NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair" that provided, in part, that employers could face "anti-Black bias" liability if they have appearance or grooming policies that ban certain hairstyles like cornrows, Bantu knots, locs, braids, Afros or fades, which are associated with black employees. Specifically, the Commission noted: "[a]nti-Black bias also includes discrimination based on characteristics and cultural practices associated with being Black, including prohibitions on natural hair or hairstyles most closely associated with Black people."

Interestingly, in *EEOC v. Catastrophe Management Solutions*, the 11th U.S. Circuit Court of Appeals ruled that a company, who refused to hire a female applicant because she refused to cut her dreadlocks, would not face liability because it enforced its "race-neutral grooming policy", which was not discriminatory finding that dreadlocks are not a cultural practice.

Given the inconsistency on these issues, employers should carefully review their appearance and grooming policies and review each applicant/employee issue on the subject on a case-by-case basis to determine if religious, race or cultural exceptions need to be accommodated.

Sex Gossip Bias Protections

In *Parker v. Reema Consulting Services, Inc. ,Case No. 18-1206 (4th Cir. Feb. 8, 2019)* a female warehouse manager was subjected to false rumors that she "slept her way to the top" and sued after she was terminated after complaining. The court found that the sex-based nature of the rumor that led to her firing was rooted in longstanding "negative stereotypes" about women in the workplace that have yet to be done away with. The court found that such a stereotype was sufficient for the female employee to sustain a viable sex discrimination claim against her employer under Title VII of the Civil Rights Act.

The case stands for the position that accusing employees of sleeping their way to the top, of being a slut, and similar accusations is a gender-based stereotype and sexual harassment. This is reinforced by decisions out of the Third and Seventh Circuit Courts, which have previously held that women could base sex discrimination claims on rumors of sleeping with their superiors. *See Spain v. Gallegos*, 26 F.3d 439 (3r Cir. June 16, 1994) (holding that an employee adequately pleaded Title VII claims that she was wrongly denied advancement because of false rumors of an affair with her boss); and *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996) (saying that "unfounded accusations that a woman worker is a 'whore,' a siren, carrying on with her coworkers, … 'sleeping her way to the top,' … are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they could constitute a form of sexual harassment.").

Extended ADA Protections

Conduct warranting protection under the Americans with Disabilities Act (ADA) and comparable state laws also continues to expand. For conduct associated with mental conditions, this can be explained, in part, because of more education and information regarding such conditions, which also seems to be reducing some of the bias associated with mental infirmities, the extension of previously-identified conditions and the addition of new ones via the publication of the DSM-V, among others.

Recently, in *Mullen v. New Balance Athletics*, Case No. 1:17-cv-194, NT (D. Maine, Feb. 27, 2019), the court held that a jury should decide whether an employer had a duty to accommodate the emotional side effects of the employee's disability, which the employee claimed caused her to engage in abrupt and heated exchanges with superiors in the workplace as a result of a recent hysterectomy. The employee claimed the employer knew she had a recent hysterectomy and the resultant emotional side effects of that procedures, and that she explained that she told the HR managers that in the event of an emotional outburst, she just needed to be allowed to wash her face and go back to work. The employee was not allowed to do that and, instead, felt compelled to resign. Typically, emotional outbursts in the workplace have been easily dismissed by employers as clear cut cases of insubordination, so this case highlights the importance of the interactive process, even in the event of conduct that may otherwise just appear to be insubordination, especially when coupled with the employer's knowledge that the employee has a medical issue that can cause such emotional responses.

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FOR MORE INFORMATION CONTACT:

Sara H. Jodka, CIPP-US is a Member in Dickinson Wright's Columbus office. She can be reached at 614.744.2943 or sjodka@dickinsonwright.com.