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VIRGINIA
EMPLOYMENT LAW LETTER

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Bernard J. DiMuro, Jonathan R. Mook, Editors
DiMuroGinsberg PC

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CONFIDENTIAL INFORMATION

Protecting your trade secrets from former employees

by Jayna Genti

While employers are generally aware of the need to guard against employees taking sensitive business information and giving it to a competitor, they often forget about preventing former employees from gaining access to electronically stored information. As companies increasingly rely on servers and e-mail for daily business operations, employers must remember to take precautions to prevent the unauthorized storage or communication of proprietary information. Preventive measures could have helped a Virginia employer that recently filed a lawsuit against a former employee.

The lawsuit

Christopher J. McGrath worked as Atlantic Marine Construction's (AMC) vice president of construction. After his termination in August 2015, AMC claimed that he gained unauthorized access to its computers and servers and misappropriated its trade secrets.

The company routinely stores trade secrets and confidential and proprietary information on its servers, including proposal sheets, formulas for assessing overhead costs, historic design and cost data, current and past bids, customer contracts, historic job cost data, and employee information. AMC's confidential information also includes customized databases compiled for clients, vendors, subcontractors, suppliers, and other entities with which it does business.

After McGrath was terminated, AMC discovered that a copy of Google Chrome's remote desktop application was installed on a computer at its Virginia Beach headquarters. According to Google, the application "allows users to remotely access another computer through [the] Chrome browser or a Chromebook. Computers can be made available on a short-term basis for scenarios such as ad hoc remote support or on a more long-term basis for remote access to . . . applications and files."

AMC filed a lawsuit against McGrath in Norfolk federal court for violations of federal and state computer crime laws. AMC claims McGrath used the remote desktop program to access its computer system on more than a dozen occasions in order to view, copy, and download its trade secrets.

The legal landscape

AMC asserts that McGrath's actions violated a number of statutes designed to prevent the unauthorized access of information stored on a computer, including:

- The Virginia Computer Crimes Act, which prohibits computer fraud, computer trespass, computer

invasion of privacy, theft of computer services, and personal trespass by computer;

- The Computer Fraud and Abuse Act (CFAA), which protects against unauthorized computer invasions similar to the acts prohibited by Virginia law;
- The Stored Communications Act (SCA), which is part of the Electronic Communications Privacy Act (ECPA) and prohibits unauthorized persons from intentionally accessing a facility through which an electronic communication service (e.g., e-mail) is provided and obtaining, altering, or preventing authorized access to a wire or electronic communication while it is in electronic storage; and
- The Wiretap Act, which is also part of the ECPA and prohibits unauthorized access of electronic communications while they are in transit.

While the SCA focuses on the privacy of stored electronic communications, the Wiretap Act focuses on the unauthorized interception of electronic communications. For example, diverting an employer's incoming or outgoing e-mails without authorization would fall within the scope of the Wiretap Act because it involves capturing information before it is stored electronically. However, an employee accessing his former employer's e-mail system without authorization would fall under the purview of the SCA. The Virginia Computer Crimes Act and the CFAA prohibit similar unauthorized conduct. *Atlantic Marine Construction Co. v. McGrath,* No. 2:15-cv-508 (E.D. Va.).

Preventing unauthorized access

The above laws will assist you in pursuing legal action against a former employee who gains unlawful access to your computers and steals your trade secrets, but in many respects, a lawsuit is akin to shutting the barn door after the horses have escaped. By the time AMC learned of McGrath's unauthorized access of itsecomputers and servers, substantial harm had already occurred.

Fortunately, there are a number of steps you can take to make sure the barn door stays closed and prevent former employees from gaining unauthorized access to your computer system and stealing valuable trade secrets. At the very least, you should:

- Maintain a list of which employees have access to your information systems.
- Revoke employees' passwords immediately upon their departure.
- Disable former employees' access rights to limit the adverse consequences of missing any access codes.
- Designate a manager to make sure that former employees' access rights have been disabled. Provide the manager a checklist.

Additionally, wipe employees' hard drives upon their separation from employment. Doing so will prevent former employees from using malicious applications that were downloaded prior to their departure. If you suspect that a former employee has engaged in the unauthorized use of your electronic systems, turn off his computer and disable any e-mail accounts he used.

Those measures may not prevent the unauthorized access of your computer system, but as the old saying goes, "An ounce of prevention is worth a pound of cure."

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Message from the editor

by Jonathan R. Mook

This month's lead article, "Protecting your trade secrets from former employees," was written by Jayna Genti, who recently joined DiMuroGinsberg PC as an associate attorney. Before joining the firm, Jayna worked as a law clerk for U.S. District Court Magistrate Judges Michael S. Nachminoff and T. Rawles Jones, Jr., in the Eastern District of Virginia. She also worked as a law clerk for U.S. District Judge David Briones in the Western District of Texas. Jayna is a graduate of New York University and the University of Texas School of Law. We welcome her to the firm and as a regular contributor to *Virginia Employment Law Letter.* ✤

SEX DISCRIMINATION

It's OK to have different physical standards for men and women

by Rachael E. Luzietti

In a nutshell, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, religion, race, national origin, or color. Generally, employment policies, practices, or requirements that are applied to employees differently based on one of those characteristics are deemed to violate Title VII. Title VII violations can have dire consequences for employers. However, the U.S. 4th Circuit Court of Appeals (whose decisions apply to all Virginia employers) recently ruled that a physical fitness test that had different standards for men and women did not violate Title VII.

Background

Jay Bauer was an assistant professor at the University of Wisconsin-Milwaukee for several years. He has

an undergraduate degree in speech language pathology and a doctorate in human communication sciences. In 2008, he applied to the FBI's special agent training program for the second time. The program is an intensive 22-week endeavor that covers academics, practical skills, firearm training, and physical fitness. Bauer excelled in many aspects of the program and was well liked by his peers, who voted him class leader.

The physical fitness element proved difficult for Bauer. The program requires candidates to perform one minute of sit-ups, a 300-meter sprint, push-ups to exhaustion, and a 1.5-mile run. To pass the physical exam, a candidate must achieve a minimum score, which requires meeting minimum standards in each performance category and being average or above average in one or more categories. The standards, which are set by the FBI, differ for men and women. Specifically, men are required to perform at least 30 push-ups, while women must perform only 14.

Despite several attempts, Bauer was not able to perform the 30 push-ups required to pass the physical exam. On his final attempt, he fell short by one push-up. Although he apparently was otherwise qualified, the FBI declined to hire him as a special agent and ultimately offered him an intelligence analyst position. Bauer accepted the job offer and sued the FBI. He claimed the physical fitness test discriminated based on gender and illegally used different standards for men and women in violation of Title VII.

Bauer originally filed his lawsuit in Chicago federal court, but it was transferred to the federal district court in Alexandria. The district court ruled that the FBI's physical fitness exam was discriminatory in violation of Title VII and entered judgment in favor of Bauer. The FBI appealed the decision to the 4th Circuit.

4th Circuit's decision

The appeals court disagreed with the district court's finding that different physical standards for men and women necessarily violate Title VII. The 4th Circuit explained that because of physiological differences, men and women demonstrate their level of physical fitness differently. The court reasoned that a test that requires men and women to meet the same physical fitness standards and allows them to demonstrate their fitness differently does not violate Title VII.

The 4th Circuit held that "an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences [and] impose an equal burden of compliance on both men and women, requiring the same level of physical fitness." The 4th Circuit sent the case back to the district court for further proceedings. *Bauer v. Lynch,* No. 14-2323 (4th Cir., Jan. 11, 2016).

Bottom line

Although physical fitness tests are not applicable to many jobs today, the 4th Circuit's decision recognizes an important and fundamental issue that confronts employers in all industries—men and women are different and have different needs, capabilities, and strengths. There are many situations in which employers may have to apply different standards or provide different accommodations to employees based on physical differences or characteristics. For example, you may need to provide accommodations for an employee's disability (e.g., a ramp or special office equipment) or accommodations related to a female employee's pregnancy or the birth of a child (e.g., private space in your facility for nursing mothers, or light duty if the employee has certain lifting limitations due to the pregnancy).

You must walk a fine line between accommodating employees' characteristics and holding them to the same performance standards. When you are faced with such a delicate situation, it is wise to consult experienced counsel who can assist you in charting an appropriate path to legal compliance.

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FAIR CREDIT REPORTING ACT

Know the rules before conducting background checks

by Bill Ruhling

The pressure to hire the right candidate for the job is always present. It is becoming increasingly common to use background checks during the recruiting process. Although background checks can be beneficial, using them in the wrong manner can be extremely costly since their use is often the subject of state and federal regulation.

The Fair Credit Reporting Act (FCRA) governs preemployment background checks that involve consumer information (e.g., a credit or criminal history report) compiled by a consumer reporting agency (CRA). The FCRA governs who may obtain a background check and restricts how the information in a background check may be used. Generally, preemployment background checks are permissible, but you must certify to a CRA that the applicant (1) has been informed in writing that a consumer report may be obtained and (2) has authorized the procurement of a consumer report in writing. In addition, the applicant must receive the notice in a separate document.

Using information in a background check

You are permitted to use information obtained from a consumer report for hiring decisions and other personnel actions as long as the use of the information complies

WORKPLACE TRENDS

Survey finds most employers keeping but modernizing performance ratings. Most North American employers plan to continue using performance ratings in spite of widespread dissatisfaction with their programs, according to a survey by global professional services company Towers Watson. Instead of scrapping their performance management systems, many employers report efforts to modernize their processes. Changes include replacing annual performance review cycles with more frequent employee and manager interactions, applying a more future-oriented definition of performance and potential, and implementing new technology.

Progress on work-life balance? Research from finance and accounting staffing firm Robert Half Management Resources finds that more workers and CFOs are enjoying more work-life balance. One survey released in December 2015 found that 77% of workers characterized their work-life balance as good or very good, and 45% reported they have greater balance than three years ago. A separate survey found that 82% of CFOs rated their work-life balance as good or very good. Twenty-two percent of workers and 17% of CFOs reported that their work-life balance was fair or poor. Fourteen percent of the workers said they have less balance now compared to three years ago.

Research pinpoints "hot jobs" for 2016. Researchers from CareerBuilder and Economic Modeling Specialists Intl. have compiled a list of in-demand jobs for 2016 for workers with or without college degrees. Among occupations that require a college education and have large gaps between job openings and hires, registered nurses, software developers (applications), marketing managers, sales managers, and medical and health services managers took the top five slots. Among jobs that don't typically require a college degree but have gaps between job openings and hires, heavy and tractor-trailer truck drivers, food-service managers, computer user support specialists, insurance sales agents, and medical records and health information technicians took the top five places.

Surveys show disconnect on benefits between retirees and employers. Surveys of retirees and employers show a gap between what retirees recalled they were told about their retirement medical benefits before they retired and what employers believe they communicated. The comparisons of surveys from global professional services company Towers Watson, released in December, found that 43% of retirees surveyed said their employers took no steps to help them understand and manage the cost of retiree medical benefits before they retired, but just 9% of employers acknowledged they offered no help. ✤

with applicable laws (e.g., laws prohibiting discrimination). Before taking an adverse action (e.g., rejecting an applicant, reassigning or terminating an employee, or denying an employee a promotion) based on information obtained from a consumer report, you must provide the individual a copy of the report and a written explanation of her FCRA rights.

When a CRA provides you with a consumer report, it also should give you a summary of employees' rights under the FCRA, which contains the required explanation. Giving the summary to an applicant or employee with the consumer report will satisfy the FCRA's requirements. Additionally, within three business days of taking an adverse action, you must notify the applicant or employee of the reason for the action. The notice must include:

(1) The CRA's name, address, and phone number;

(2) A statement that the CRA did not make the adverse decision and cannot provide the specific reasons for the decision; and

(3) A notice of the individual's right to dispute the accuracy or completeness of the information in the report and her right to receive an additional copy of the report if requested within 60 days.

Having a compliance plan is the best protection

The FCRA imposes penalties if consumer information in a background check is used improperly. Violations carry significant penalties, including actual damages or a fine of up to $1,000 for each willful violation. Moreover, the FCRA includes a fee-shifting provision that allows individuals to recover the costs of filing a lawsuit, including attorneys' fees. Also, willful violations can result in punitive damages.

Your responsibilities do not end after you make an employment decision based on a consumer report. Both the Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC) impose obligations regarding the maintenance and destruction of consumer reports to protect consumers from identity theft. Any consumer reports you obtain must be kept for at least one year after they are produced or a personnel decision is made. Once you have satisfied the retention rules, the FTC's destruction rule requires you to burn, pulverize, or shred paper documents. Also, you must dispose of electronic information in a manner that prevents access or reconstruction.

Bottom line

Background checks are becoming an increasingly useful hiring tool, and knowing how and when to use information obtained from a consumer report is critically important. Having a formal policy on the use of background checks can help ensure you do not run afoul of the FCRA. Have qualified legal counsel review your policy to ensure your company can hire the most qualified individuals without incurring liability.

Information on the discrimination concerns related to the use of criminal background checks can be found in the following articles:

"EEOC consolidates, updates guidance on Title VII, arrest and conviction records" (July 2012), "Employers call for clarification on EEOC criminal-history guidance" (April 2013), and "4th Circuit slams EEOC for challenging background checks" (April 2015).

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DISABILITY DISCRIMINATION

DOJ insists on website accessibility compliance but delays regulations (again)

Most private businesses that provide goods and services to the public are required under Title III of the Americans with Disabilities Act (ADA) to provide individuals with disabilities "full and equal enjoyment" of the business's goods and services. To comply with Title III requirements, these entities (known as "public accommodations" under U.S. Department of Justice (DOJ) regulations) must afford individuals with disabilities an equal opportunity to participate and benefit from the goods, services, privileges, or advantages afforded to other individuals.

This may require a public accommodation to make reasonable modifications in its practices and procedures, provide auxiliary aids, and remove barriers in existing facilities. And despite the fact that the "World Wide Web" hadn't been invented when the ADA was signed into law, the DOJ says a public accommodation is required to make its website and Internet services accessible to people with disabilities. But while the DOJ insists on compliance in website accessibility, it hasn't provided any guidance to public accommodations in the form of regulations (although the regulations have been in the works for several years).

Recently, the DOJ announced yet another delay in the regulations—this time until 2018. And while the regulations may be delayed, the claims of ADA violations from plaintiffs' lawyers and others, including the DOJ, are gaining momentum. Given the lack of guidance from the DOJ and the uncertainty in the legal landscape, many public accommodations faced with inaccessibility claims are opting to settle these claims rather than risk expensive litigation.

What to do without regs

The DOJ has made clear its position that public accommodations must provide accessible websites, with or without regulatory guidance. In a "Statement of Interest" filed in a lawsuit brought against Netflix in 2012, the DOJ said it "has long affirmed the application of Title III of the ADA to websites of public accommodations." In the same filing, the department pointed to its work developing regulations "specifically addressing the accessibility of goods and services offered via the Web by entities covered by the ADA," but it also noted, "The fact that the regulatory process is not yet complete in no way indicates that Web services are not already covered by Title III." So public accommodations are required to comply with Title III, but they don't have guidance from the DOJ on the technical standards they need to meet to ensure compliance.

There are, however, some indications of what the DOJ expects public accommodations to do to make websites accessible. Earlier this year, the agency settled a lawsuit it filed against a nonprofit provider of free online courses. Under the terms of the agreement, the online provider agreed to modify its website, platform, and mobile applications to conform to the Web Content Accessibility Guidelines (WCAG) 2.0 AA. WCAG 2.0 are voluntary guidelines issued by the World Wide Web Consortium (W3C) and were described by the DOJ in the agreement as "industry guidelines for making Web content accessible to users with disabilities."

The DOJ has made clear its position that public accommodations must provide accessible websites.

Specifically, the settlement agreement requires compliance "at minimum" with the WCAG 2.0 AA. In the agreement, the DOJ stated that other guidelines published by the W3C could be relied on by the online provider in achieving usability by people with disabilities. These guidelines include the User Agent Accessibility Guidelines (UAAG) 1.0 and the Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (WCAG2ICT).

According to the W3C's website (www.w3.org/WAI/intro/wcag), the WCAG are organized around four principles for access and use of Web content:

- Perceivable—content must be presentable to users in ways they can perceive;
- Operable—users must be able to operate the interface;

AGENCY ACTION

DOL issues new guidance on homecare workers. The U.S. Department of Labor (DOL) has issued new guidance on whether, when, and in what amount employers may credit toward wages the value of lodging provided to live-in homecare workers. The guidance explains the requirements for taking a lodging credit under the Fair Labor Standards Act (FLSA) and the proper method of accounting for that credit in calculating wages. The guidance also includes frequently asked questions about paying live-in homecare workers. The documents are available at www.dol.gov/whd/homecare/credit_wages.htm.

EEOC releases publications on rights of applicants, employees with HIV. The Equal Employment Opportunity Commission (EEOC) in December 2015 issued two publications addressing workplace rights for individuals with HIV infection under the Americans with Disabilities Act (ADA), including the right to be free from employment discrimination and harassment and the right to reasonable accommodations in the workplace. "Living with HIV Infection: Your Legal Rights in the Workplace under the ADA" explains how applicants and employees are protected from discrimination and harassment. "Helping Patients with HIV Infection Who Need Accommodations at Work" explains to doctors that patients with HIV infection may be able to get reasonable accommodations that help them stay employed.

OSHA renews alliance to protect road workers. The Occupational Safety and Health Administration (OSHA) announced on December 17 that it had renewed its alliance with the National Institute for Occupational Safety and Health and Roadway Work Zone Safety and Health Partners to protect workers in roadway construction work zones from injuries, illnesses, and fatalities. The renewed alliance will continue for five years. The alliance promotes safety in the industry, especially among non- and limited-English-speaking workers.

Webpage developed to prevent workplace violence in healthcare settings. OSHA has unveiled a webpage developed to provide employers and workers with strategies and tools for preventing workplace violence in healthcare settings. The page is part of OSHA's Worker Safety in Hospitals website (www.osha.gov/dsg/hospitals/), and it complements the updated Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, published in 2015. The new page includes real-life examples from healthcare organizations that have incorporated successful workplace violence prevention programs and models of how a workplace violence prevention program can complement and enhance an organization's strategies for compliance and a culture of safety. ✤

- Understandable—users must be able to understand the information as well as the operation of the user interface; and
- Robust—users must be able to access the content as technologies advance.

Bottom line

Although there's no guarantee the DOJ's regulations will have technical standards identical to the WCAG, public accommodations may want to reduce their exposure to Title III claims by taking steps to comply with Title III requirements for website accessibility. Public accommodations should evaluate the current status of their websites and Internet services (a third-party expert may be needed) and determine whether to use in-house resources or hire a consultant to develop or modify their websites to conform to WCAG 2.0 AA. There may be interim steps public accommodations can take to make their websites more accessible without completely rebuilding them. Consultation with legal counsel may help public accommodations decide what steps to take to effectively reduce potential liability. ✤

DISCRIMINATION

Employer policies, training key to avoiding anti-Muslim bias claims

As fears of terrorism at home and abroad—and related political rhetoric—dominate headlines, emotions run high. Those sentiments often find their way into the workplace, subjecting certain employees to unlawful discrimination based on religion and national origin. The deadly terrorist attacks in Paris in November and San Bernardino, California, in December are just the latest instances to provoke fear and anger capable of inciting discrimination, harassment, and retaliation at work.

Statistics from the Equal Employment Opportunity Commission (EEOC) show a spike in claims of discrimination in the workplace based on religion and national origin since the September 11, 2001, terrorist attacks. That rise in claims has put the agency on guard, prompting it to take action to prevent discrimination and punish employers that allow it to occur. Therefore, the message is clear: Employers need to take their responsibility to act against unlawful discrimination very seriously.

EEOC action

Employers face liability when they allow unlawful discrimination or fail to address it when it occurs. Religion and national origin are among the characteristics protected under Title VII, which applies to employers with 15 or more employees as well as most unions and employment agencies. The EEOC has reported that in the first months after the September 11, 2001, terrorist attacks, it saw a 250 percent increase in the number of religion-based discrimination charges involving Muslims. An EEOC document states that between September 11, 2001, and March 11, 2012, it received 1,040 charges from individuals who

are or were perceived to be Muslim, Sikh, Arab, Middle Eastern, or South Asian.

The EEOC document says the number of charges directly related to the 2001 attacks has decreased over the years, but "the Commission continues to see an increase in charges involving religious discrimination against Muslims and alleging national origin discrimination against Muslims or those with a Middle Eastern background."

CASE TRACKER

Courts nix noncompete and dismiss retaliation claim

by Sara Sakagami

Issues involving noncompete agreements and retaliation claims continue to arise. This month's "Case Tracker" provides useful insight into those issues by reviewing court decisions addressing Virginia's law on noncompetes and the standard for establishing retaliation claims.

Noncompete unenforceable

Thomas Fame, an allergist and immunologist, has practiced medicine in the Roanoke Valley area for almost 25 years. In 2010, he began working as a staff physician for Allergy & Immunology, PLC (A&I). He signed a "nonmember employment agreement" that contained a noncompete prohibiting him from working for any business that competed with A&I in the Roanoke Valley area. A&I fired Fame on May 1, 2015.

Fame filed suit in Roanoke Circuit Court and asked the court to declare his noncompete overly broad and unenforceable. The court agreed to strike down the noncompete. The enforcement of restrictive covenants is generally not favored. For a noncompete to be enforceable, it must satisfy three elements:

(1) It must be reasonable and no broader than necessary to protect the employer's legitimate business interests.

(2) It cannot be unduly harsh or oppressive from the employee's perspective.

(3) It cannot violate public policy.

The court found that Fame's noncompete was unduly harsh to Fame and broader than necessary to protect A&I's business interests. The court explained that Fame's profession is highly specialized and that prohibiting him from working as an immunologist in the Roanoke Valley area would require him to choose between finding a new career and relocating to an entirely new area to continue his practice. The court ruled that both options would impose an undue and unnecessary burden on him. *Fame v. Allergy & Immunology, PLC*, CL15-1099 (City of Roanoke, Dec. 14, 2015).

Bottom line. Noncompete provisions can provide important protections. But be sure to frame the restrictions narrowly so that they will not interfere with your employees' ability to make a living. Otherwise, you risk losing the protections altogether.

Court dismisses retaliation claim

Joan Dobias-Davis began working for Amazon in 2010. In April 2012, Amazon promoted her to senior HR manager and transferred her to its new distribution center in Chesterfield County. Dobias-Davis claimed the distribution center had a "youth culture."

In April 2013, Allyson Hoffman became Dobias-Davis' supervisor. Dobias-Davis claimed Hoffman began a campaign to have her terminated. Hoffman presented her with a performance improvement plan without warning. Dobias-Davis claimed the plan contained false statements about her job performance. When Dobias-Davis asked Hoffman whether any employees performed above expectations, she responded by naming a young male employee. One month later, Dobias-Davis was placed on a 30-day performance improvement plan instead of the normal 90-day plan. She was terminated 30 days later.

Dobias-Davis filed a lawsuit against Amazon and Hoffman in Richmond federal court alleging age discrimination and retaliation. Amazon asked the court to dismiss her retaliation claim because she did not engage in protected activity for which the company could have retaliated.

The court agreed with Amazon. The court explained that to establish a retaliation claim, Dobias-Davis had to engage in an activity that is protected by law (e.g., filing a discrimination charge or voicing her concerns in order to bring discriminatory activity to Amazon's attention). She never raised concerns that she was being discriminated against because of her age or gender. Hoffman made a vague reference to age when she used a young male employee as an example of a worker with high performance. However, Dobias-Davis accused Hoffman of retaliation, not age discrimination, and a vague reference to a characteristic does not constitute protected activity. *Dobias-Davis v. Amazon.com, LLC*, 2016 WL 153085 (E.D. Va., Jan. 11, 2016). ✤

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- 3-15 Drugs and Alcohol in the Workplace: Key Policies and Legal Issues You Must Consider
- 3-16 FMLA Self Audits/DOL Systemic Investigations—Avoid Problems with Self Audits
- 3-16 Salary Surveys: Strategies for Researching and Analyzing Pay Information ✤

The EEOC document says alleged harassment has included taunts such as "Saddam Hussein," "camel eater," and "terrorist."

Many examples of workplace incidents show up in complaints and lawsuits. In one case filed in federal court in Louisiana, a Muslim employee of a concrete company claimed a member of management called him into his office and forced him to watch a video of a beheading, after which the manager yelled, "These are the Muslims." That incident—in addition to the employer's ineffective actions to prevent and stop harassment—led a court to allow the employee's claim to go to a jury.

The EEOC has posted information outlining employers' responsibilities related to Muslim, Arab, South Asian, and Sikh workers. The question-and-answer document is found at www.eeoc.gov/eeoc/publications/backlash-employer.cfm. The document explains that Title VII prohibits discrimination based on religion, ethnicity, country of origin, race, and color and that "such discrimination is prohibited in any aspect of employment, including recruitment, hiring, promotion, benefits, training, job duties, and termination." Workplace harassment also is prohibited under Title VII.

In addition, the document for employers spells out that Title VII prohibits retaliation against individuals who engage in protected activity, which includes filing a charge, testifying, assisting, or participating in any manner in an investigation, or opposing a discriminatory practice. In addition, the agency has developed fact sheets on immigrant employee rights (www.eeoc.gov/eeoc/publications/immigrants-facts.cfm) and discrimination based on religion, ethnicity, or country of origin (www.eeoc.gov/laws/types/fs-relig_ethnic.cfm).

What to do

You have a responsibility to prevent and address discrimination and harassment, so it's crucial to have sound antidiscrimination policies and reporting procedures that are well-known to employees. Employees and management in particular also need training on proper workplace behavior.

Employees who suspect they are targets of discrimination or harassment should know how to report the problem and ask for help. In addition to a clear reporting policy, your procedures should include a prompt investigation of the complaint as well as an effective response. Once a report has been made, you need to act quickly to investigate the allegations and take steps to prevent more trouble.

Consistency also is vital to avoiding and solving problems. Workplace rules and documentation of employment actions need to be applied consistently since any inconsistency in practices or documentation may give the appearance of discrimination even if no discrimination is intended. ✤

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