

TIPTOEING AROUND LANDMINES DIVERSITY-RELATED EMPLOYMENT LAW

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Hypothetical 1: Recruiting

- ❑ A partner returns from his on-campus interviews with a stack of resumes and notes. He tells his Legal Recruiting contact that “I want to issue six callbacks – four to white men, one to a woman, and one to a Latino man.” Legal Recruiting files the resumes and notes for each of those candidates. On the resumes of the woman and the Latino man, the partner has underlined information indicating the candidates’ race and/or gender.

Recruiting

- ❑ Is there an obligation to identify the applicants by race and/or gender?
- ❑ For what purpose will the information be used?
- ❑ Issues concerning self-identification
- ❑ EEOC requirements

Hypothetical 2: Reporting/Surveys

- ❑ A summer associate expressly checks a box declining to self-identify as a particular race or ethnicity when completing her summer program paperwork. During fall recruiting, Legal Recruiting had identified her as South Asian, based on her physical appearance and name. When completing their NALP form and providing statistics about the diversity composition of their summer class, Legal Recruiting states the summer associate is Asian-American.

Reporting/Surveys

- EEOC Guidance
 - **ENCOURAGES** use of self-identification over visual identification
 - **BUT** permits use of other records or visual identification where an employee *declines* to self-identify
 - **PROHIBITS** reclassification of an employee who has self-identified (See 70 Fed. Reg. 71296)

Hypothetical 3: Mentoring

- A law firm institutes a women-focused mentoring program. Women associates are now assigned to be members of mentoring groups. Men are not invited or included.

Mentoring

- Affinity Groups
- *Moranski v. General Motors*, 433 F.3d 537 (7th Cir. 2005)
- Title VII-Disparate Treatment
- Employee Benefit

Hypothetical 4: Assigning

- A partner emails the assigning administrator on Thursday morning stating that one of his matters is heating up and he needs an associate who is available immediately. He describes why the matter presents an excellent professional development opportunity and copies his senior associate who is an observant Jew.

The assigning administrator forwards the partner's email to a junior associate who is a Black woman. The junior associate calls the assigning administrator to say she doesn't like working with that senior associate because he expects her to be available to work all day Sunday, which means she is unable to attend her church. She would rather work on Saturdays.

Assigning

- Title VII requires religious accommodation of any “sincerely held belief”
- Upon request, must engage in interactive process to accommodate unless result in “undue hardship” or incur more than “de minimis burden” (See 29 CFR 1605)
- Religious discrimination claims small, but fastest growing share of EEOC charges

Hypothetical 5: Reviews

- ❑ A senior partner completes an associate's evaluation and states that the associate is average and meeting expected standards. In confidence, the senior partner tells the administrator in charge of collecting the associate's evaluations that she doesn't want to work with the associate again because
 - (a) "he was incompetent" or
 - (b) "he can't speak English."

Reviews

- ❑ Adverse Employment Action
- ❑ Unconscious Bias
- ❑ Title VII
- ❑ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)

Hypothetical 6: Layoffs/Attrition

- A law firm decides to counsel out underperformers and/or engage in layoffs because of financial concerns. Each department head proposes a list of targeted associates.
 - (a) The firm asks its Chief Diversity Officer to look at the gender, racial, and sexual orientation composition of the targeted associates, and he notes that a disproportionate number of Black and LGBT associates are on the list. The department heads are told to replace some diverse associates.
 - (b) The department heads are allowed to act individually in order to bring headcount down 10%. Six months later, the firm notes that women and Latino lawyers experienced a 20% higher rate of attrition than other groups during that period.

Layoffs/Attrition

- Title VII prohibits discriminatory selection procedures, as well as discrimination in layoffs
- Disparate Treatment vs. Disparate Impact
 - *Griggs v. Duke Power Co.*(1971)
 - *Ricci v. DeStefano* (2009)
- Uniform Guidelines on Employee Selection Procedures (See 29 CFR 1607)
 - Adverse Impact Analysis/Regression Analyses
 - 4/5ths Rule

Hypothetical 7: Managing/LGBT

- An LGBT associate confides to the diversity manager of her firm that she is extremely unhappy on one of her matters. She expresses particular discomfort about working with a senior associate who she says has made dismissive comments about her relationship with a woman. The associate tells the diversity manager she does not want to escalate the issue.

Managing/LGBT

- Title VII prohibits sexual harassment/sex discrimination, including “sex stereotyping”
 - *Price Waterhouse v. Hopkins* (1989)
 - *Prowel v. Wise Business Forms* (3rd Cir. 2009)
 - Strict Liability for Supervisory Conduct
 - Employment Non-Discrimination Act
- State/Local Law
 - 21 States + DC
- Institutional/Firm Policy
- Human Rights Campaign

Resources/Contact Information

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