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Stereotypes: Inadvisable

Hotel chain greeted with unwelcome sex discrimination case

After it terminated a female front desk clerk, a hotel chain was greeted by a sex discrimination lawsuit contending that it had violated Title VII of the Civil Rights Act of 1964. The case, *Lewis v. Heartland Inns of America*, eventually fell before the U.S. Court of Appeals for the Eighth Circuit.

Working the "A" shift

The plaintiff began working for Heartland Inns in July 2005, initially as the front desk clerk at one of their hotels from 11:00 p.m. until 7:00 a.m. Because of good performance and customer feedback, she was eventually promoted to a day shift by her manager, who received permission to do so from Heartland's Director of Operations (DO).

Shortly thereafter, the DO saw the clerk working and told the manager that she wasn't sure the plaintiff was a good fit for the front desk. According to the DO, Heartland staff should be "pretty," whereas the clerk had "an Ellen DeGeneres kind of look" and lacked the "Midwestern girl look." The DO ordered the manager to move the clerk back to the overnight shift and, when the manager refused, the DO demanded the manager's resignation.

The Director of Operations consistently indicated that female front desk clerks must be "pretty" and criticized the plaintiff's lack of the "Midwestern girl look."

In January 2007, Heartland announced that the front desk position would require a second interview and bought video equipment to allow the DO to see an applicant before extending an offer. Later that month, the DO met with the clerk, whose manager had informed her of what had been said about her appearance.

The clerk protested that other staff members hadn't been required to have second interviews and told the DO that she believed a second interview was being required only because of her looks. Three days later, the clerk was fired.

Filing a lawsuit

The clerk filed a sex discrimination lawsuit, and the district court granted Heartland's motion for summary judgment. The clerk appealed.

The appeals court noted that, while the district court had properly recognized evidence of discrimination, the district court had mistakenly determined that the clerk had to produce evidence that she was treated differently from similarly situated males. Citing the Sixth Circuit's decision in *Smith v. City of Salem, Ohio*, the court explained that "an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."

Thus, the court concluded that a reasonable jury could find that the DO's "pretty" and "Midwestern girl look" requirements related to the clerk's sex, because the terms — by their nature — apply only to women.

Deciding to terminate

Next, the appeals court turned to whether the DO's remarks had played a role in the termination decision. The court found that the DO was a primary decision-maker with authority to hire and fire employees.

Although several people also took part in the decision to terminate the clerk, they relied on the DO's description of her January 2007 conversation with the plaintiff. The

DO consistently indicated that female front desk clerks must be "pretty," and she criticized the plaintiff's lack of the "Midwestern girl look" in the same conversation in which she ordered the clerk's manager to move the plaintiff back to the overnight shift.

In addition, the DO authorized the manager to hire the clerk over the phone but demanded a "confirm/endorse" interview once she saw the plaintiff's "tomboyish" appearance. Thus, the court concluded the DO's stereotypes had played a key role in the clerk's termination and reversed the grant of summary judgment.

Exercising restraint

Appearance *can* play a role in some employment decisions, such as permissible dress codes. But employers should ensure that management is trained to exercise restraint and avoid sexual stereotyping. ♦

The Fair Labor Standards Act

Overtime case turns on employee's sales activities

The "exempt vs. nonexempt" quandary has played out in many court cases over the years. In *Reiseck v. Universal Communications of Miami, Inc.*, the U.S. Court of Appeals for the Second Circuit examined whether an advertising salesperson was an administrative employee for the purposes of the Fair Labor Standards Act (FLSA) and, thus, exempt from its overtime provisions.

FLSA basics

In September 2002, the plaintiff began work as a Regional Director of Sales at Universal Communications of Miami's New York City office. In February 2004, Universal terminated her. Two months later, she filed a lawsuit alleging that Universal had failed to pay her overtime, in violation of the FLSA. The district court granted Universal's motion for summary judgment, and the plaintiff appealed.

Pursuant to the FLSA, employers must pay an employee at a rate of "not less than one and one-half times the regular rate at which he [or she] is employed" for any hours worked in excess of 40 hours in a given week. This general rule doesn't apply, however, to several types of employees, including "administrative" staff.

An employee falls under the administrative exemption if he or she is paid on a salary or fee basis at a rate of not less than $455 per week and the employee's "primary duty consists of . . . the performance of office or nonmanual work directly related to management policies or general business operations of his [or her] employer," and requires "the exercise of discretion and independent judgment."

There was no dispute that the regional sales director's employment satisfied the salary test prong. At issue was whether her primary duty consisted of work directly related to management policies or business operations.

Seeming contradictions

In its interpretive regulations, the Department of Labor describes "work directly related to management policies or general business operations" in two ways:

1. "…those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work," and

Case in contrast: Insurance adjusters exercise discretion

Not every decision related to the Fair Labor Standards Act (FLSA) turns out like *Reiseck v. Universal Communications of Miami, Inc.* (See main article.) In *Robinson-Smith v. Government Employees Insurance Co.*, the U.S. Court of Appeals for the District of Columbia Circuit found that auto damage adjusters working for insurer GEICO met the requirements of the administrative exemption (again, see main article for details) and, therefore, weren't entitled to overtime under FLSA.

At issue in this case was whether the plaintiffs' primary duty required "the exercise of discretion and independent judgment." The court found that the adjusters' work consisted of the assessment, negotiation and settlement of automobile damage claims. This included engaging in total-loss negotiations with customers 20 to 60 times annually. In addition, the adjusters worked without immediate supervision the majority of the time and made decisions that were reviewed only after the estimate was written and the claim paid.

Although some adjusters routinely called their supervisors in situations involving nonminor adjustments or concessions, there was no GEICO policy or procedure requiring them to do so. Finally, the adjusters were empowered to negotiate and settle claims up to $10,000 to $15,000, which were financially binding upon GEICO.

Thus, the appeals court found that the adjusters exercised discretion free from immediate direction or supervision and with respect to matters of significance, making them exempt administrative employees under the FLSA.

2. "…advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control."

The appeals court was forced to reconcile these seemingly contradictory definitions in this case. It began by noting that, though the Secretary of Labor's legislative regulations (those promulgated pursuant to an express grant of authority by Congress) have the power to control courts' reading of the law, the Secretary's interpretive regulations have the power to only *persuade* courts.

The court explained that, because the sales director's primary duty was the sale of advertising space, she may reasonably be considered a *sales* employee, rather than an administrative one. But the court noted that, because the sales director had sold advertising space, she seemingly must have "promoted sales."

An influential decision

The court then turned to the Third Circuit's decision in *Martin v. Cooper Electric Supply, Co.* There, the Third Circuit reasoned that sales promotion "consists of marketing activity aimed at promoting (i.e., increasing, developing, facilitating, and/or maintaining) customer sales generally."

Thus, the Third Circuit concluded that an employee making specific sales to individual customers is a salesperson for FLSA purposes, while an employee encouraging an increase in sales generally among all customers is an administrative employee for FLSA purposes.

Adopting the Third Circuit's logic, the court in *Reiseck* concluded that the plaintiff was a salesperson. Although she did "develop new clients" with the goal of increasing sales generally, this was not her primary duty. Instead, her primary duty, in the court's view, was to sell specific advertising space to clients.

The court concluded that, because the sales director's primary duty was the sale of advertising space, she should be considered a "salesperson" for FLSA purposes and, therefore, she didn't fall under the administrative exemption to the FLSA's overtime pay provisions.

Additionally, the court noted that recent amendments to the interpretive regulations, though they didn't apply retroactively to this case, supported its conclusion.

Substantial liability

As this case demonstrates, the question of whether an employee is exempt from FLSA's overtime provisions is fact-intensive. Misclassifying employees as exempt — and, as a result, not paying them overtime — can lead to substantial liability for employers, including liquidated damages equal to 100% of the unpaid overtime. Therefore, employers should consult with legal counsel whenever the "exempt or nonexempt?" question arises. ♦

Is a disability an excuse for bad workplace behavior?

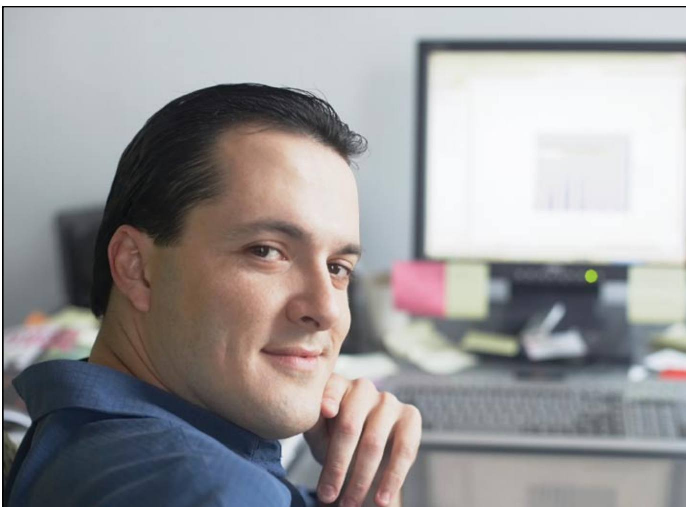
An employee who puts a poster of Charles Manson in his cubicle and uses a company computer to surf Web sites about serial killers and assault weapons may seem a sure and justifiable target for termination. But when you add in a bipolar disorder and the Americans with Disabilities Act (ADA), the matter becomes more complicated. Such was the case in *Calandriello v. Tennessee Processing Center, LLC*, which was heard by the U.S. District Court for the Middle District of Tennessee.

A lapse in judgment

The plaintiff was hired by Tennessee Processing Center's (TPC's) parent company in August 1997 as a Data Center Acceptance Testing Technician. After a series of transfers, he began work at TPC's Nashville office in September 2005.

In September 2007, a co-worker complained to the General Manager that the technician had a poster of Charles Manson in his cubicle and was on the Internet viewing assault weapons. The GM instructed the tech to remove the poster and the employee complied. Nonetheless, on Sept. 27, TPC issued the tech a written warning, which he signed and acknowledged.

On Oct. 1, the tech told his director supervisor that he had a bipolar mental disorder that he believed had caused a lapse in judgment that resulted in his displaying the Manson poster. The tech also opined that his conduct hadn't directly threatened any employee, involved destruction of company property or resulted in any financial loss to the company. Thus, he believed he should be exempt from any disciplinary action because he was entitled to a reasonable accommodation under the ADA. The direct supervisor told the tech that HR would be informed of the situation, which it was.



During this same period, TCP's investigation into the tech's Internet usage revealed that, from Aug. 12 until Sept. 17, his computer included:

- 10,515 hits classified as shopping,
- 284 hits classified as military,
- 35 hits classified as adult material,
- 21 hits classified as weapons,
- 13 hits classified as games, and
- 1 hit each in the militancy/extremist and racism/hate categories.

After consultation among corporate security, HR and legal counsel, TPC decided that, because of the items found on the tech's computer, as well as his display of the Charles Manson poster in his work area, the company should terminate his employment immediately because of "loss of confidence."

Initial allegations

The tech subsequently filed a lawsuit alleging that TPC had failed to provide him with an accommodation and discriminated against him in violation of the Tennessee Disability Act (TDA), which mirrors the ADA. TPC filed a motion for summary judgment.

First, the tech alleged that TPC had failed to grant him the reasonable accommodation of removing the final warning from his personnel file. The court rejected this claim, explaining that employers may impose discipline for workplace violations on an individual with a disability and that a reasonable accommodation doesn't include forgoing or rescinding such discipline. The court noted that the EEOC Enforcement Guidance states, "[S]ince reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability."

Next, the court turned to the tech's disparate impact claim and found that he could establish a prima facie case of disability discrimination. Thus, the burden shifted to TPC to show a legitimate business reason to terminate him.

TPC maintained that the tech was fired because the company was concerned about the possibility of workplace violence after he'd posted the Charles Manson poster in his cubicle and downloaded pictures and articles about assault weapons and serial killers on his computer. The court concluded that taking action because of fear of potential violence was a legitimate nondiscriminatory reason for an adverse employment action.

Shifted burden

The burden then shifted back to the tech to show that these reasons were pretext. He claimed that pretext could be found because members of management had allegedly made derogatory comments about his mental state, co-workers had also posted "humorous" posters, and he'd been given permission to search the Internet.

Here, the court noted that the fact that some employees had posted "humorous" posters in their cubicles provided nothing from which the court or a jury could make a reasonable comparison with a poster of Charles Manson. The court also explained that the tech's claim that other employees talked about guns and hunting said nothing about whether those same employees visited the number and types of Web sites that he'd visited. Nor did it say anything about whether management forwent punishment if, and when, it discovered that an employee was flaunting the rule against using company computers for personal reasons.

In addition, the court found the tech's statement that some unnamed supervisor at some unspecified time had given him permission to surf the Web was insufficient to show pretext. The court reasoned that this didn't indicate that the supervisor knew of the sites the tech was visiting or suggest that management had knowledge of that alleged permission.

Is taking action because of fear of potential violence a legitimate nondiscriminatory reason for an adverse employment action?

Finally, the court stated that, even if members of management knew of the tech's bipolar disorder, he failed to present any evidence that managers harbored bias. Therefore, the court granted TPC's motion to dismiss.

Behavioral focus

This case demonstrates the importance, when taking disciplinary action, of focusing on an employee's workplace behavior rather than possible medical explanations for that behavior. If the behavior is clearly unacceptable, as in this case, an employer generally won't be required to tolerate the behavior — even if it derives from a disability. ♦

Applicant's failed drug test leads to questionable inquiries

The Americans with Disabilities Act (ADA) includes a ban on pre-employment medical inquiries. In *Harrison v. Benchmark Electronics Huntsville, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit looked at whether an employer violated that ban following a job applicant's failed drug test.

Failed drug test

In November 2005, Aerotek, a company that placed temporary workers at Benchmark Electronics Hunstville Inc. (BEHI), assigned the plaintiff to work as a "debug tech."

In May 2006, at the supervisor's request, the tech submitted an employment application. In July, as part of the

application process, the tech took a drug test that eventually came back positive for barbiturates. In response, the tech informed his supervisor that he had a prescription.

The supervisor then called BEHI's Medical Review Officer (MRO) and passed the phone to the tech, who answered a series of questions about the medication, including:

- How long he'd been disabled,
- What medication he took, and
- How long he'd taken the medication.

The questions prompted the plaintiff to reveal that he'd had epilepsy since he was age two and took barbiturates to control it. He also disclosed the dosage. The supervisor didn't ask any questions but remained in the room during the conversation.

Later in July, the MRO cleared the tech and informed the supervisor that he could hire him. But the supervisor told HR not to prepare an offer and instructed Aerotek that the tech was *not* to return to BEHI.

ADA Regs

On May 3, 2007, the tech sued BEHI. Among his claims was that BEHI had made an improper pre-employment medical inquiry. The district court granted BEHI's motion for summary judgment, and the tech appealed.

The ADA regulations adopted by the EEOC provide that an employer may make certain pre-employment inquiries into an applicant's ability to perform job-related functions with or without reasonable accommodations. But it's illegal for an employer to make targeted disability-related inquiries "likely to elicit information about a disability."

The ADA, however, includes an exemption whereby "a test to determine the illegal use of drugs shall not be considered a medical examination." Employers may also ask follow-up questions in response to a positive drug test regarding which medications have been taken.

"Likely to elicit"

The appeals court stressed that employers should know that many questions about lawful drug use are likely to elicit information about a disability and are, therefore, impermissible at the pre-offer stage.

Applying these standards to the tech's claim, the appeals court explained that, though BEHI was permitted to ask follow-up questions to ensure that the positive drug test was attributable to a lawful prescription, a jury could find that its specific questions exceeded the likely-to-elicit standard. A jury could also find that the supervisor's presence in the room violated the ADA because it was likely an intentional attempt to elicit information about a disability in violation of the ADA. Therefore, the appeals court reversed the granting of summary judgment.

> *Many questions about lawful drug use are likely to elicit information about a disability and are, therefore, impermissible at the pre-offer stage.*

A fine line

There's a fine line between permissible and prohibited. In this case, had the employer simply requested to see the tech's prescription instead of asking follow-up questions, it wouldn't have violated the ADA. Any employer that engages in anything more than superficial interviewing must be thoroughly familiar with ADA guidelines on pre-employment inquiries. ♦

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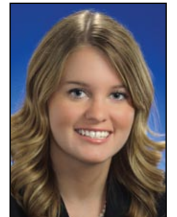

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