

PANC
2017 SPRING CONFERENCE
Wrightsville Beach, N.C.
April 5, 2017

“CAN I ASK ABOUT THAT?”
INTERVIEWS AND PRE-EMPLOYMENT
INQUIRIES

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Federal Anti-Discrimination Statutes

- ▶ Numerous laws prohibit discrimination and thus restrict the types of information that can be considered during the hiring process, including:
 - ▶ Title VII of the Civil Rights Act of 1964
 - ▶ Prohibits discrimination on the basis of race and color, sex, pregnancy, national origin, or religion.
 - ▶ Americans with Disabilities Act (ADA)
 - ▶ Age Discrimination in Employment Act (ADEA)
 - ▶ Genetic Information Non-Discrimination Act (GINA)
 - ▶ Anti-retaliation provisions in the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA)
 - ▶ Immigration Reform and Control Act of 1986 (IRCA)

Proving Discrimination – the Circumstantial Case

- ▶ The job applicant first establishes a *prima facie* case of discrimination by showing: (i) he was qualified for the position, (ii) he was rejected, and (iii) the position remained open or a person outside the protected class was hired.
- ▶ Once the applicant presents a *prima facie* case, the burden shifts to the school district to show a legitimate, non-discriminatory reason for the decision.
- ▶ The burden then shifts back to the applicant to show that the district's explanation is false or unworthy of credence.

Risky Hiring Practices

- ▶ Making comments that directly refer to a protected status (e.g., "Do you think you could work for a supervisor who is 30 years younger than you?")
- ▶ Making inappropriate small talk that inadvertently asks about a protected class (e.g., "That's an unusual last name. Where is it from?")
- ▶ Making inappropriate notes on hiring documentation (e.g., underlining the name of a church identified on a resume; using "codes" to indicate race/sex/age/etc.)
- ▶ Not following hiring procedures and deadlines
- ▶ Failing to develop standardized interview questions

Risky Hiring Practices

- ▶ Failing to maintain proper records of a hiring decision
- ▶ Failing to apply the hiring criteria consistently to all applicants
- ▶ Engaging in informal investigations on the Internet or social media or through back channels
- ▶ Inquiring during an interview about off-limits subjects, such as religion, child-care needs, marital status, sexual orientation, or political beliefs.
- ▶ Failing to train decision-makers on employment law.
- ▶ Making promises, assurances, or predictions that you can't keep (e.g., "I can assure you, the job is yours. All we need to do is finish the paperwork.")

Can I Ask That? Consider these Inquiries:

- ▶ **Name**—"What's your maiden name?" "Do you prefer to be addressed as Mrs., Miss, or Ms.?" "What's the origin of your last name?"
- ▶ **Age**—"Why did you decide to return to work after retirement?" "How much longer do you plan on working? We're looking for a long-term commitment."
 - ▶ Risky small talk with a current employee: "How are your grandkids?" "How is Tom enjoying retirement?"
- ▶ **National origin/citizenship**—"You have a lovely accent. Where are you from?" "Are you an American?" "How long have you lived here in the U.S.?" "Where did you grow up?" "Where were your parents born?"
 - ▶ Risky small talk: commenting on jewelry or clothing that appears to have cultural significance.

Can I Ask That? Consider these Inquiries:

- ▶ **Sex, marital status, sexual orientation** -"Where does your husband [wife] work?" "What is your spouse's name?" "You stayed home with your kids for two years while your wife worked?"
- ▶ **Family status, children** -"Do you plan on having children?" "What are the names and ages of your children?" "How will you handle child care if you have to work late?" "Where do your children go to school?" "Who do you live with?"

Can I Ask That? Consider These Inquiries:

- ▶ **Genetics**- "I know your mother had breast cancer, God bless her. How are you doing with your health?"
- ▶ **Religion**- "I see that you attended ___ University. That's a Catholic school, isn't it?" Asking the candidate questions to confirm that he or she is not an atheist. Referencing an upcoming Christian holiday weekend to see how the candidate responds. Inquiring whether the applicant's children attend a private religious school.
- ▶ **Disability**- "That campus is a high-stress place, I have to tell you. Have you ever been treated for stress or any mental health problem?" "How often did you use sick leave at your prior job?" "Did you ever file a workers' compensation claim?" "Are you taking any medications?" FMLA inquiries.

Disability-Related Inquiries



"You can't start a job interview with "How are you?"
It's a veiled inquiry into my general health."

Disability Related Inquires

- ▶ **Prohibited Medical Examinations and Inquiries:** "A covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A).
- ▶ **Permissible Inquiries:** "A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B).

Conditional Employment Offers

42 U.S.C. § 12112(d)(3)

A covered entity may require a medical examination or make medical inquiries after an offer of employment has been made, and may condition an offer of employment on the results of such examination or inquiries, if:

- ▶ All entering employees in the same job category are subjected to such an examination regardless of disability;
- ▶ Any exclusionary criteria are job-related and consistent with business necessity; and
- ▶ The medical information is treated as a confidential medical record.

Sample Impermissible Disability Questions NOT to Ask an Applicant

1. Have you ever been treated for any of the following conditions or diseases?
2. Please list any conditions for which you have been treated in the past.
3. Have you ever been hospitalized? If so, for what condition?
4. Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
5. How many days were you absent from work last year because of an illness?
6. Do you have any physical defects or disabilities?
7. Are you taking any prescription medication?
8. Have you been treated for drug or alcohol abuse?
9. Have you ever filed a workers' compensation claim?
10. Why are you limping?

Sample Permissible Questions to Ask an Applicant regarding a Disability

1. Are you able to perform the tasks in the job description, either with or without an accommodation?
2. How would you perform the tasks in the job description?
3. The job interview should focus on the ability of an applicant to perform the job, not on the applicant's disability.
4. If an applicant has a known disability that would appear to interfere with the performance of a job-related function, the applicant may be asked to describe or demonstrate how the function would be performed, even if other applicants do not have to do so.
5. The interviewer may provide information on regular work hours or leave policies and any special attendance needs for the job and may ask if the applicant can meet those requirements.
6. The interviewer may ask information about previous work attendance, but the question should not refer to illness or disability. (E.g., How many days were you absent in each of the last 3 years?)
7. If the applicant volunteers medical information, the interviewer should emphasize that the employer does not discriminate on the basis of disability and that an applicant's health status or disability is not considered if the applicant can perform the essential functions of the job with or without reasonable accommodation.

Hiring Process

1. Review application form.
2. Have job description which identifies essential functions of the job, as well as other functions.
3. Limit questions to applicant's ability to perform the job.
4. Do not request irrelevant information, health-related information, or information regarding a protected status.
5. Application process must not be discriminatory.
6. Reasonable accommodations must be made for applicants with disabilities or applicants with religious beliefs.
7. Medical examinations and medical inquiries are prohibited prior to a conditional job offer.
8. After a conditional job offer is made, medical examinations and medical inquiries are permissible if required of all entering employees in the same job category.
9. Exclusionary decisions based on medical factors must be job-related and consistent with business necessity.

Religious and Reasonable Accommodation

TITLE VII OF THE CIVIL RIGHTS ACT

- ▶ Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination based on race, color, religion, sex, and national origin.
- ▶ Title VII prohibits discriminatory treatment of employees on the basis of their religious beliefs and requires employers to make reasonable accommodations for employees' religious practices.
 - ▶ As an employer, school districts must make reasonable accommodations under the Free Exercise Clause of the First Amendment to adjust the work environment to accommodate employees' religious beliefs.
 - ▶ Religious practices that may need accommodation include attending worship services, praying, wearing certain types of clothing (or refusing to wear certain types of clothing), and adhering to certain grooming practices.

Religious and Reasonable Accommodation

"REASONABLE" ACCOMMODATIONS AND "UNDUE" HARDSHIP

- ▶ When an employee's religious belief, practice, or observance conflicts with a work requirement, the employer must make reasonable accommodations for that employee, unless doing so would pose an undue hardship.
 - ▶ Undue hardship may be shown when a religious accommodation requires more than a *de minimis* cost or burden.
 - ▶ Costs to be considered include not only direct monetary costs but also the burden of the conduct on the workplace.
 - ▶ Courts have found the following to constitute an "undue hardship":
 - ▶ When the accommodation requires the employer to hire additional employees;
 - ▶ When the accommodation would lessen the efficiency of other departments or employees;
 - ▶ When the accommodation infringes on other employees' job rights or benefits;
 - ▶ When the accommodation causes co-workers to carry the accommodated employee's share of burdensome work.

Religious and Reasonable Accommodation

CASE-BY-CASE ASSESSMENT

- ▶ A case-by-case assessment should be made each time a religious accommodation is requested.
 - ▶ There may be differing accommodation requests based on the same religious belief, depending on how an individual observes or practices his or her religion.
 - ▶ An accommodation may create an undue hardship in one department but not in another because of the nature of the employee's work, safety concerns, security considerations, scheduling dilemmas, or other factors.

Religious and Reasonable Accommodation

STEPS FOR DEALING WITH A SPECIFIC RELIGIOUS ACCOMMODATION REQUEST

1. An employee requiring accommodation has an obligation to initiate a request for accommodation.
 - ▶ Ideally, the request should be in writing and identify what measures of accommodation are required.
2. The request should be discussed with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.
 - ▶ Once an employee has requested religious accommodations, Title VII requires an "interactive process," initiated by the employer and with cooperation between the employer and employee.
3. It should be determined whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the school.
 - ▶ If eliminating the conflict would not impose an undue hardship, an accommodation is not "reasonable" if it merely lessens rather than eliminates the conflict between religion and work.
 - ▶ Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer is not obliged to provide the accommodation preferred by the employee.

Religion and Reasonable Accommodation



Samantha Elauf

Religion and Reasonable Accommodation

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028 (2015)

- ▶ In June 2015, the U.S. Supreme Court ruled that an employer's decision not to hire a candidate out of a desire to avoid having to accommodate a religious belief violates Title VII if the employee actually requires an accommodation and the employer's desire to avoid the accommodation is a factor in the decision not to hire.
- ▶ Facts:
 - ▶ Plaintiff, a Muslim woman, wore a headscarf during her job interview with A&F.
 - ▶ No discussion about religion or religious accommodation at interview.
 - ▶ Plaintiff not hired because hiring authority believed that the headscarf conflicted with the store's "Look Policy" that prohibits employees from wearing "caps."

Religion and Reasonable Accommodation

- ▶ In Abercrombie, the employer argued that it should not be held liable because it did not have *actual knowledge* of the woman's religion or need for an accommodation.
- ▶ The Court held that proof of actual knowledge was not necessary to establish liability and that it was sufficient that the employer was motivated by a desire to avoid having to accommodate the woman's religious beliefs.
- ▶ The Court's rejection of an "actual knowledge" standard demonstrates that there is little room for guesswork or casual decision-making in the hiring process.

After Abercrombie

- ▶ What could the store managers in Abercrombie have done differently?
 - ▶ The prudent practice is for the hiring authority to focus on the job posting and to make sure the candidate understands the requirements of the position: can the candidate perform (i) the duties of the job, (ii) in the prescribed work environment, (iii) during the hours specified, and (iv) while complying with any mandatory grooming standards?
- ▶ If an applicant asks about a religious accommodation before or during an interview, the "interactive process" will be somewhat similar to the interactive process from the disability context.

After Abercrombie

- ▶ If the applicant asserts an objection during a job interview, the hiring authority should explain the general process for addressing such matters:
 - i. state that the human resources department coordinates the interactive process; and
 - ii. explain that the candidate will be asked to identify which aspects of the job will require an accommodation and to identify specific proposed accommodations (the candidate may provide during the interview or to human resources after the interview).
- ▶ Human Resources will evaluate the request in light of the undue hardship standard (assuming the applicant is "otherwise qualified" for the position).

Use of Criminal History

- ▶ A 2012 Guidance from the EEOC is concerned that the use of criminal history records has had a disparate impact on African-American and Hispanic employees who are arrested and convicted at rates that are disproportionate to their representation in the general population.
- ▶ Candidate exclusions based on criminal history must be based on job-related criteria and consistent with business necessity.
- ▶ Whether a prior criminal offense is relevant will depend on how old the offense is, the nature of the offense, and the relationship of the offense to the job at issue.

Use of Criminal History



- ▶ In general, inquiries about criminal history should *not* occur during a job interview. These inquiries should be performed by human resources in accordance with specific procedures established by the district, and the information obtained must be treated confidentially and not shared with the hiring authority.
- ▶ The EEOC strongly discourages inquiries about arrests because an arrest does not establish guilt. However, the EEOC states that an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question.

Use of Criminal History



- ▶ EEOC encourages the use of "targeted screens" and an "individualized assessment." With an individualized assessment, the candidate is given an opportunity to explain why he should not be excluded.
- ▶ When there is a tight nexus between a particular offense and a particular job, the EEOC states that Title VII does necessarily require an individualized assessment.
- ▶ Based on its 2012 Guidance, EEOC has initiated litigation:
In June, 2013, the EEOC filed two (2) separate lawsuits, against BMW Manufacturing Co., LLC, and against Dolgencorp, d/b/a Dollar Tree, for use of criminal background checks. Both suits were brought under Title VII and asserted claims of disparate impact against African Americans. The case against Dolgencorp remains pending.

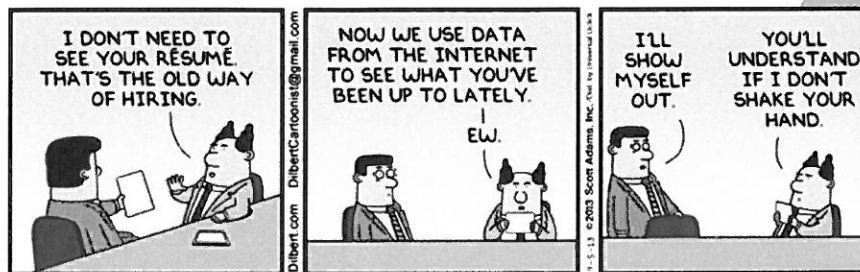
Use of Criminal History

- ▶ In EEOC v. BMW Manufacturing Co., LLC, the EEOC alleged that BMW disproportionately screened out African Americans from jobs, and that its criminal background policy was not job related and consistent with business necessity.
- ▶ BMW's policy had no time limit with regard to convictions and it was a blanket exclusion without any individualized assessment of the nature and gravity of crimes, the ages of the convictions, or the nature of the applicants' respective positions.

Use of Criminal History

- ▶ The court in EEOC v. BMW entered a Consent Decree on September 8, 2015, which enjoined BMW from using their criminal background check guidelines. Additionally, it provided that:
 - ▶ BMW is prohibited from declining to hire any job applicant because of criminal arrests or charges of any type if the arrests or charges did not result in a conviction. BMW may, however, postpone an offer to an individual with a pending charge based on the conduct alleged in the underlying charge, pending final resolution of the charge.
 - ▶ Prior to declining to hire or otherwise disqualifying a job applicant based on criminal history, BMW must provide written notice to the applicant that, among other things, invites the applicant to provide the employer with additional information regarding the conviction, the accuracy of the criminal history information, the circumstances of the offense, or other relevant information regarding the applicant's suitability for employment.
 - ▶ BMW must provide two (2) hours of training to all hiring authorities regarding policies, practices, and procedures concerning the use of criminal history as a selection criterion.
 - ▶ BMW must pay \$1,600,000 in monetary relief, payable to the fifty-six (56) claimants in the litigation, and allow them the opportunity to reapply to work at the facility as positions become available, and, if eligible under the general job qualifications and new criminal background check guidelines, reinstate all eligible applicants without loss of seniority, with the years 2008 through 2015 being credited to each applicant towards wages, seniority, benefits, and all other privileges of employment.

The Internet and the Hiring Process



A New Source of Liability?

Gaskell v. University of Kentucky, 2010 F.Supp.2d 4867630 (E.D. Ky., Nov. 23, 2010)

- ▶ An astronomer was the frontrunner to be selected as the director of a new observatory. The hiring committee viewed his personal web site and found material that led them to believe he was a creationist who mixed science and religion. The university offered the position to an allegedly less qualified candidate.
- ▶ The astronomer sued for religious discrimination
- ▶ The university moved for summary judgment and lost –the evidence suggested the Internet posts actually influenced the hiring committee.
- ▶ Case later settled for \$125,000.

A New Source of Liability?

Nieman v. Grange Mutual Casualty Co., 2012 WL 1467562 (C.D. Ill., April 27, 2012)

- ▶ The job applicant sued for age discrimination and retaliation, claiming that the hiring manager learned about his age (date of graduation) from his "LinkedIn" profile and learned about a prior lawsuit that was available on the Internet. The court denied the employer's motion to dismiss, holding that the case needed to proceed to the evidentiary stage.

Social Media: Minimizing Risk



Social Media: Minimizing Risk

- ▶ Any social media searches should be conducted by Human Resources, not the hiring authority or the interview committee. The person who conducts the search should focus on job-related inquiries. If the search reveals personal, protected information, this information should not be shared with the hiring authority.
- ▶ Develop a policy to address how and when Internet-obtained material may be used to evaluate candidates. Disclose the policy to candidates.
- ▶ Determine at what stage a search might be conducted. Establish standards/guidelines to ensure uniform searches.

Social Media: Minimizing Risk



"According to your LinkedIn profile you're a focused, disciplined achiever. According to your Facebook photos you love Jack Daniels and are pretty comfortable with your body."

Social Media: Minimizing Risk

- ▶ Stick to publicly available sites. Document results.
 - ▶ *There is a difference between a public Facebook profile and "friending" a candidate to discover information.*
- ▶ Other informal, "back channel" investigations should be avoided. If the district intends to rely on adverse information to exclude a candidate from consideration, that information needs to be in the official file.
 - ▶ *In the event of an EEOC charge or lawsuit, the district will need to be able to point to all relevant evidence that justified not hiring the applicant.*

Social Media: Minimizing Risk



Signs of the social networking times.

The End

