



Employment

Law Briefing

Insights on Legal Issues in the Workplace



INSIDE ...

When religious beliefs conflict with diversity programs

Don't commit defamation when giving job references

Employer liability for domestic violence in the workplace

When religious beliefs conflict with diversity programs

Did a company discriminate on religious grounds against a fundamentalist Christian employee when it forced him to remove from his work station Bible verses that violated its diversity policies? The Ninth Circuit resolved this delicate issue in *Peterson v. Hewlett-Packard*.

The company posts diversity posters

Hewlett-Packard's antiharassment policy barred as unacceptable "any comments or conduct relating to a person's race, gender, religion, disability, age, sexual orientation or ethnic background that fail to respect" individual dignity and feelings. The company began displaying diversity posters in its Boise, Idaho, office as part of its workplace-diversity campaign.

In response to workplace posters that promoted tolerance of gay employees, a 21-year employee who had consistently received satisfactory job evaluations posted two Biblical scriptures on his work cubicle's overhead bin that were visible to co-workers and customers. One passage from Isaiah 3:9 read: "The shew of their countenance doth witness against them; and they declare their sin as Sodom, they hide it not.



Woe unto their soul! For they have rewarded evil unto themselves." Another from Leviticus 20:13 read: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them."

The company removes the employee's signs

The employee described himself as a "devout Christian" who believed that homosexual activities violate Biblical commandments and that he had a duty "to expose evil when confronted with sin." Soon after he posted his signs, his supervisor removed them for being offensive to some employees and for violating the antiharassment policy.

In the next few days, the employee met several times with managers and told them he hoped his gay and lesbian co-workers would read the passages, repent and be saved. He argued that the diversity campaign was an initiative to "target" heterosexual and fundamentalist Christian employees in general and him in particular. Management rejected his proposal that he would remove the offending scriptural passages if the company would remove the gay posters.

The employee sticks to his guns

The company gave the employee time off with pay to reconsider his position. When he returned to work, he again posted the passages and refused to remove them. The company discharged him for insubordination.

The employee alleged that his discharge constituted discrimination on religious grounds in violation of Title VII. Title VII defines "religion" to include all aspects of religious observance, practice and belief, unless an employer demonstrates that it can't reasonably accommodate an employee's religious observance or practice without undue hardship in conducting its business. The trial court threw the case out without a trial.

On appeal, the employee argued that the company had violated Title VII's proscription of religious discrimination by: 1) engaging in disparate treatment of him, and 2) failing to accommodate his beliefs.

The Ninth Circuit considers the first claim

To establish a prima-facie case of disparate treatment, the Ninth Circuit found the employee had to show:

1. He was a member of a protected class,
2. He was qualified for his position,
3. He experienced an adverse employment action, and
4. Similarly situated persons outside his protected class were treated more favorably or that other circumstances surrounding the adverse employment action gave rise to an inference of discrimination.

The Ninth Circuit held that the employee had failed to meet the fourth requirement. He characterized the workplace-diversity campaign as a "crusade to convert fundamentalist Christians to its values" — including the promotion of "the homosexual lifestyle." But the court found that the campaign's stated goal was to increase diversity tolerance. Even if the campaign specially combated homophobia, that emphasis wasn't unlawful. In fact, the company's efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the civil-rights statutes' general goals and objectives.

The employee alleges an inquisition

The employee maintained that the company's campaign and the entire disciplinary process initiated in response to his postings constituted an "inquisition serving no other purpose than to ferret out the extremity of his views on homosexuality." He asserted that managers harassed him to change his religious beliefs. But the court found evidence showing that the managers had acted in precisely the opposite manner. In numerous meetings, the managers acknowledged his beliefs' sincerity and insisted that he needn't change them.

For example, the managers didn't object to his expressing his antigay views in a letter to the editor published in the *Idaho*

Statesman. The letter stated that the company was "on the rampage to change moral values in Idaho under the guise of diversity" and that the diversity campaign was a "platform to promote the homosexual agenda." Nor did the managers bar him from parking his car with a "Sodomy is Not a Family Value" bumper sticker in the company lot. Instead, all that the managers asked him to do was to remove his postings and not violate the harassment policy — a policy uniformly applied to all employees. The court found that no contrary inference could be drawn from anything in the record.

The Ninth Circuit considers the second claim

To establish a prima-facie case on his failure-to-accommodate claim, the employee had to show that:

1. He had a bona fide religious belief, the practice of which conflicted with an employment duty,
2. He informed his employer of the belief and conflict, and
3. The employer discharged, threatened or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement.

The Ninth Circuit found he had established a prima-facie case. That shifted the burden to the company to show that it 1) initiated good-faith efforts to reasonably accommodate his religious practices, or 2) couldn't reasonably accommodate him without undue hardship.

The court ruled that the company did in fact meet this burden, because the only accommodations he was willing to accept would have imposed undue hardship on the company. The court noted that company managers convened four

On appeal, the employee argued that the company had violated Title VII's proscription of religious discrimination by: 1) engaging in disparate treatment of him, and 2) failing to accommodate his beliefs.

meetings to explain its reasons for its diversity campaign and allowed him to fully explain his reasons for his postings — all while trying to resolve the conflict so as to respect all workers' dignity. But the employee repeatedly maintained that he would accept only one of two accommodations: 1) both the gay posters and antigay messages remain, or 2) both sides remove their postings.

As for the first proposed accommodation, the Ninth Circuit held that an employer needn't accommodate an employee's religious beliefs if doing so would result in discrimination against co-workers or deprive them of contractual or other statutory rights. And an employer needn't accommodate an employee's desire to impose his religious beliefs on his co-workers. In the court's view, the only alternative acceptable to the employee — taking down the diversity posters — was also unacceptable. Taking down the posters would have imposed an undue hardship on the company by infringing on its right to promote diversity and encourage tolerance and good will among its workers.

The lesson for employers

In summary, the Ninth Circuit found that the employee had offered no evidence — circumstantial or otherwise — that would support a reasonable inference that his discharge resulted from disparate treatment owing to religion.

The court found that he was discharged for insubordination for repeatedly disregarding instructions to remove the postings from his cubicle — not because of his religious beliefs.



As we can see, this case demonstrates the conflicts that can arise between competing statutes and the difficulties a

company can face in resolving these conflicts. The employee clearly had a sincere religious belief that the posters promoting tolerance of gay employees were evil and that his religious duty required him to expose that evil.

On the other hand, the company was engaged in a legitimate project to promote diversity tolerance in its workplace. If the employee had objected to posters promoting tolerance of minority employees in the workplace, the employer would unquestionably be within its rights to force removal of any material that denounced racial tolerance in the workplace, even if objections were based on sincere religious beliefs. Here, the employer's attempt to strike a balance between its objectives and an employee's religious rights resulted in a successful outcome. Obviously, employers must exercise extreme care when faced with such conflicts. 🏢

Don't commit defamation when giving job references

Two recent court opinions demonstrate how defamation law applies in the workplace.

Employers can learn from them how to avoid employee suits for defamation. Here's how the courts ruled.

Case 1: What constitutes defamation?

In *Gray v. AT&T Corp.*, a customer-account representative sued AT&T for allegedly defaming her when giving reasons for her discharge. The doctor's forms she submitted certifying she was

prevented from working for more than a month because of an injury proved to be fraudulent. So the company discharged her for "falsifying corporate documents" and told several corporate managers and officials of the discharge reasons.

The ex-employee filed for unemployment benefits, and the company sent her discharge information to the outside firm that processed unemployment claims, stating she was discharged for falsifying records. She sued the employer for defamation, alleging that it defamed her by publishing statements that she had committed disability fraud. The trial court dismissed her suit without a trial and she appealed.

The Eighth Circuit first found that under Missouri law — the state in which the case arose — to establish a prima-facie case for defamation, a claimant must establish six elements:

1) publication of, 2) a defamatory statement that, 3) identifies the claimant, 4) is false, 5) is published with the requisite degree of fault, and 6) damages the claimant's reputation.

Publication occurs when a person communicates the statement to a third person. But communications between officers of the same corporation in the due and regular course of corporate business — or between different offices of the same corporation — don't constitute publications to third persons. Thus, intracorporate communications made in the regular course of business don't constitute publication. The employee claimed that publication occurred both when the company notified corporate officials of the discharge reasons and when it conveyed that information to the outside company handling its unemployment claims.

The court found that the company's communication to its managers and officials didn't constitute publication because it was an intracorporate communication made in the regular course of business. As for the communication to the outside company, the court noted that defamation law recognized a general exemption to the publication rule for corporate communications to necessary third parties authorized to act on a corporation's behalf. The court held that under Missouri law, this exemption would apply to the communication to the outside company because it had a "need to know" this information to perform its function for the company. The court thus concluded that the trial court properly dismissed the case because the alleged defamatory statement wasn't published.

Although the company was successful here, it might have avoided the lawsuit entirely if it had chosen its words more discreetly. Instead of using the word "fraud," the company could have stated that it discharged the employee for noncompliance with its policies on documenting absences. When companies use words implying immoral behavior — such as "theft," "fraud" or "misrepresentation" — they open themselves to defamation lawsuits.

Case 2: Did the self-publication doctrine apply?

In *Cweklinsky v. Mobil Chemical Co.*, the Connecticut Supreme Court was also faced with an issue of publication in a defamation case. But here the question was whether the state recognized the self-publication doctrine. That means that the alleged defamatory statement was communicated only to the employee. Under this doctrine, some states find that publication occurs when a statement is made to an employee regarding discharge reasons because the employee is compelled to repeat the explanation to prospective employers when asked. The court concluded that Connecticut doesn't recognize the self-publication doctrine.

As in *Gray*, the alleged defamatory statement arose when the company interpreted the employee to have provided false documentation to excuse an absence and fired the employee for taking paid medical leave without a medical basis. During the trial, the employee testified that he had published the defamatory statements to prospective employers because he felt "compelled" to do so when they asked why he had been let go.



First, the court noted that in general, no action for defamation exists if an employer publishes defamatory statements only to the employee and the employee later communicates these statements to a third person. But the court found that several other states had carved out an exception to that rule when a defamed former employee communicates the firing reason to prospective employers when the person is asked why he or she left his or her former employment. These courts reasoned that it was fair to hold an employer liable for compelled


self-publication because it was reasonably foreseeable that an employee, in seeking new employment, would inevitably be asked why he or she left his or her former employment.

Self-publication means that the alleged defamatory statement was communicated only to the employee.

The Connecticut court refused to join these other states because acceptance of the self-publication doctrine would have a chilling effect on workplace communication. This

would have an adverse effect on employees who might not receive constructive criticism that would benefit them in the future as well as to prospective employers who might not receive information on applicants from former employers for fear of liability.

What is a wise policy?

Fearing liability, many employers already refuse to divulge any information other than former employees' names, ranks and dates of employ to prospective employers seeking references on applicants. This may be a wise policy in light of today's litigious culture. An attorney can help you develop policies relating to communications on former employees. 

Employer liability for domestic violence in the workplace

One hazard of running a business that many employers may never have thought of is domestic violence that spills over into the workplace. Yet domestic violence is a growing workplace problem and an increasing source of potential employer liability.

Let's take a look at a case in point and how employers can protect themselves.

The case arises

The question in *Gantt v. Security USA* was whether an employer could be held liable for a supervisor's intentional infliction of emotional distress on a subordinate. Here's what happened: A security guard at an IRS building in Maryland obtained a court order barring a former boyfriend from going near her, including while she was at work. The offender had seriously injured her and threatened to kill her, his children, his wife and himself. When she notified her employer of the court order, management instructed all supervisors to assign the guard only to secure inside posts.



The guard's weekend supervisor, who was on friendly terms with the offender, had been reminded to assign the guard to an inside post. Nevertheless, the supervisor ordered the guard — despite her objections — to work at an unsecured post outside the building. The supervisor then transferred a call from the offender to the guard at her workstation. The guard hung up

on him and asked the supervisor to move her inside. The supervisor refused to permit the move. Later that day, the offender entered the premises with a shotgun and kidnapped the guard at gunpoint. He held her for six hours, raping, terrorizing and threatening to kill her before he was captured.

Two other guards witnessed the kidnapping, but the supervisor refused to call the police, saying “No, we don’t need to call the police because he doesn’t want to hurt her, he just wants to talk to her.” The supervisor claimed she eventually called the police, but not until five or ten minutes after the abduction, even though the supervisor later conceded that she knew that five or ten minutes can mean the difference between life and death when someone is held at gunpoint.

The offender was sentenced to 20 years for kidnapping, rape and violation of the restraining order. When the guard returned to work, she told her manager and investigators that she believed the supervisor was responsible for the assault. The employer failed to act on her complaints. Instead, it permitted the supervisor to retain the rank of sergeant and to continue to supervise the guard.

The trial court decides

The guard sued the employer for intentional infliction of emotional distress. The trial court found that, in Maryland — as in many other jurisdictions — to make a claim of intentional infliction of emotional distress, a claimant must show that:

1. The conduct was intentional or reckless,
2. The conduct was extreme and outrageous,
3. The wrongful conduct was causally connected to the emotional distress, and
4. The distress was severe.

To meet the first element, a claimant must show that the defendant either desired to inflict severe emotional distress, knew that this distress was certain or substantially certain to result from the conduct, or acted recklessly in deliberate disregard of a high degree of probability that emotional distress would follow.

Because the guard’s emotional distress arose out of and in the course of her employment, she also had to prove that her employer deliberately intended to injure her or else Maryland’s Workers’ Compensation Act would preempt her claim.



This act provides an employee’s exclusive remedy for on-the-job injuries unless an injury results from an employer’s deliberate intent. The employer argued that the intent-to-injure exception to workers’-comp exclusivity didn’t apply to the guard’s claim.

The trial court, finding that these criteria weren’t met, threw the case out without a trial.

The Fourth Circuit splits its decision

On appeal, the Fourth Circuit reinstated for trial the guard’s emotional-distress claim growing out of the supervisor’s intentionally assigning her to an unsecured post. The court found that a jury could infer from the guard’s evidence that the supervisor — despite knowing of the offender’s threats and abuse — deliberately determined to inflict on her any emotional distress she might suffer from talking to the offender.

But the Fourth Circuit affirmed dismissal of the claim that grew out of the abduction and rape. The court found that the guard had failed to sufficiently prove that the supervisor intentionally assigned her to the unsecured post with the intent and for the purpose of giving the offender access to her so that he could assault, batter and kidnap her.

What employers can learn

This case demonstrates a source of potential liability for employers. To minimize their risk, employers must exercise care when they know that any employees are domestic-violence victims and that it may extend to the workplace. Prepare for these situations by developing policies and communicating them to both workers and managers. 🏠