

ACEA Annual Conference:

Employment Issues in Hiring, Discipline, and Firing

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Employment Issues: *The Legal Framework*

- Key Points:
 - Harassment/discrimination on the basis of a protected class;
 - First Amendment concerns;
 - Retaliation for exercising a protected right;
 - Proper implementation of background checks

Harassment and Discrimination: *Protected Classes*

- May not harass or discriminate against an employee because of the employee's:
 - Age (ADEA)
 - Gender, including pregnancy (Title VII; EPA; 14th Amendment)
 - Race/Color (Title VII; 14th Amendment; 42 U.S.C. § 1981)

Harassment and Discrimination: *Protected Classes*

- May not harass or discriminate against an employee because of the employee's:
 - Religion (Title VII; 14th Amendment)
 - Disability (ADA)
 - Genetic Conditions (GINA)
 - National Origin (Title VII)

Harassment and Discrimination: *Protected Classes*

- In addition, public employers may not discriminate or harass employees who exercise their First Amendment rights of speech or association.

Protected Classes:

Age

- The Age Discrimination in Employment Act (“ADEA”) protects all employees over the age of 40.

Protected Classes: *Disability*

- The Americans with Disabilities Act protects employees with both an actual or a perceived disability.

Protected Classes: *Disability*

- A disability is a:
 - Physical or Mental Impairment
 - That substantially limits
 - One or more major life activities.
- May be perceived or actual
- Corrective measures (except contacts) are irrelevant in determination.

Protected Classes:

Disability

- Must provide reasonable accommodations unless the employer can demonstrate undue hardship.
- Burden is on employee to request.

Protected Classes:

First Amendment Rights

- May not discriminate against or harass employees because they exercise their rights to speech or association.
- These claims are brought pursuant to 42 U.S.C. § 1983.
- COUNTY OFFICIALS AND EMPLOYEES MAY HAVE INDIVIDUAL LIABILITY FOR THESE CLAIMS.

Protected Classes:

First Amendment Rights

- Association: Political association claims are the most common; however, any and all forms of association are protected (except criminal behavior).
- There is an exception allowing discrimination on the basis of political association for certain confidential positions.

Protected Classes:

First Amendment Rights

- Employees who engage in speech **as a citizen on a matter of public concern** generally cannot be discriminated against or harassed because of this speech.
- Employees' interest in speech must outweigh government's interests.
- Speech includes any expressive activity.

Harassment and Discrimination: *What Behavior is Prohibited?*

- Discrimination
 - Treating people differently on the basis of a protected characteristic
- Harassment
 - Words, conduct, or action (usually repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.

Prohibited Behavior: *Discrimination*

- “Adverse Employment Action:”
 - Refusal to hire
 - Failure to Promote
 - Termination
 - Suspension
 - Demotion
 - Other material changes in terms and conditions of employment

Prohibited Behavior:

Harassment

- Quid Pro Quo
 - Submission to such conduct is made either an expressed or implied term or condition of an individual's employment; or,
 - Submission to or rejection of such conduct by any individual is used as the basis for employment decision affecting an individual.
- Hostile Work Environment
 - Interferes with the individual's work performance or creates a hostile, intimidating, or offensive work environment.

Prohibited Behavior:

Harassment

- Harassment can take a variety of forms: verbal, visual, written or physical.
- May include “jokes,” pictures, cartoons, statements, etc.

Prohibited Behavior:

Retaliation

- May not retaliate against an employee who reports alleged harassment or discrimination.
- Retaliatory behavior is broader than an adverse employment action and includes ***any*** behavior that would tend to discourage employees from reporting harassment or discrimination.

Prohibited Behavior:

Retaliation

- Retaliation claims may also be stated under the Family and Medical Leave Act (“FMLA”); the Fair Labor Standards Act (“FLSA”); and the Alabama Workers’ Compensation Act.
- You cannot retaliate against somebody who exercises their right under these statutes.

Prohibited Behavior:

Improper Hiring Procedures

- Fair Credit Reporting Act
- Health Screening
- Drug and Alcohol Screening

Improper Hiring Procedures: *Fair Credit Reporting Act*

- If you receive “consumer reports” as part of your background checks, you must:
 - Notify the employee in writing in a separate, stand-alone notice that you consider consumer reports in the employment process;
 - Obtain a proper release;
 - and, if needed, provide an adverse action notice to the employee.

Improper Hiring Procedures: *Pre-Employment Health Screenings*

- Under the Genetic Nondiscrimination Act, you cannot request, require, or purchase genetic information except:
 - Inadvertent requests;
 - The request is made as part of a health or genetic services program offered by the employer, in which case the information must be voluntarily given and kept strictly confidential
 - To gain information about an employee's FMLA request

Improper Hiring Procedures: *Pre-Employment Health Screenings*

- Genetic information is defined as information about
 - (1) an individual's genetic tests;
 - (2) the genetic tests of family members of an individual; or
 - (3) the manifestation of a disease or disorder in family members of an individual.

Improper Hiring Procedures: *Pre-Employment Drug Testing*

**SAFETY
SENSITIVE**

Employment Issues: *Implementation*

- It all begins with your policies!
 - Find the right balance between bureaucracy and oversight for YOUR county.
- TRAINING MATTERS.

Implementation:

General Principles

- Be consistent!
- Timing!
- Be honest and specific (but not brutal or rude) about your reasons for the disciplinary actions.
- Make sure all practical issues are covered, i.e., COBRA benefits, payment of leave time, etc.

Implementation:

Hiring

- Before the Interview:
 - Do you have a current job description?
 - Have you advertised the job appropriately?
 - Have you determined how the successful candidate will be selected?

Implementation:

Hiring

- Avoid the forbidden questions!
- Standard Evaluation Form
- Use of subjective criteria are acceptable *as long as* they are clearly articulated.
 - Energy
 - Enthusiasm
 - Cooperative
 - Motivated
 - Personable/"Fit In."

Implementation:

Discipline and Termination

- Discipline and Termination generally are necessitated either because of poor work performance or misconduct.
- Acute v. Ongoing Issues
 - Evaluations!!!
- Consistency is the key.

**EXPLANATIONS
AND
DOCUMENTATION**