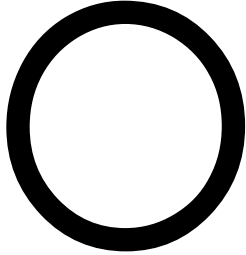


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# Managing Law Firm Employees: Concerns from Hiring Through Firing

by Denise Hoggard, Esquire

 One overlooked aspect of operating a law firm is the potential liability inherent with being an employer. The oversight can be costly. Establishment and maintenance of the employment relationship require guidance from start through the cessation.

## **Beginning the Employment Relationship.**

Employment sounds in contract and the terms of the contract are often loosely articulated, if not ignored by the employer. In order to select the best possible employee, a clear understanding of what the job entails is important. Many employments have ended unhappily because the employer envisioned it had selected an employee to perform duties and with skills that the employee either never understood, or had the capacity to perform. Call it the square peg in the round hole syndrome, if you will. Before hiring for a position, make sure you know what you want from the position and then look for applicants with those skills.

In seeking employees, there is no requirement that the position be advertised, unless such requirement exists by

contract. Should the employer elect to advertise, or otherwise be required to do so, make sure it is race, gender, age, and disability status neutral. Generally, if the advertisement focuses on a description of the job duties and qualifications which are directly related to the skills needed for the position.

The terms of the employment agreement should also include a clear understanding between the parties about how compensation will be computed. Minimum wage per hour in Arkansas is \$6.25 per hour where an employer employs at least four employees. For employees non-exempt from the overtime provisions of the Fair Labor Standards Act, all hours worked (suffered or permitted) must be compensated at the rate of one and one half times the regular rate of pay.<sup>i</sup> For non-exempt employees, the parties may agree that a salary will be paid. Keep in mind that the salary does not have to be intended to cover only 40 hours per week, but if the salary is intended to cover more than 40 hours per workweek, hours worked in excess of 40 hours per week are required to be compensated with an additional half-time pay per hour worked.<sup>ii</sup> Significantly for law firms, paralegals and legal assistants generally do not qualify for the professional exemption.<sup>iii</sup> Further, they may also not qualify to be exempt under the administrative exemption. Each position would require evaluation in light of the primary duties of the job.

Employers are required to have workers compensation insurance coverage if they employ three or more employees. They are required to provide unemployment benefits when employing as few as one employee.

Employers obtain personal and confidential information from employees and prospective employees because of the nature of the relationship. Because of this fact, employers

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have to protect against right of privacy claims which may arise from a failure to keep these purely personal pieces of information private. For example, an employee who provides information for acquiring health insurance coverage through the law firm's group health insurance, may have a cause of action should that information be disclosed to third parties, other than the carrier.

## Negligent Hiring, Supervising and Retention Claims.

Arkansas imposes on the employer a duty to exercise due care in hiring. Based in common law, there is a duty placed upon employers to hire only those whose presence would not present a danger to fellow employees. Accordingly, an employer may be liable for the employee's negligence if the employer knew or should have known of the employee's incompetence. Negligent hiring is based upon the principle that an employer may be liable for exposing the public to the actions of a violent employee. Courts have found the employer's have breached their duty in cases where a reasonable background check would have revealed the violent propensities of the applicant.<sup>iv</sup> In addition, where the employer fails to conduct a background investigation but the investigation would not have resulted in any evidence that the employee has violent propensities, then the neglect hiring claim will be not successful.<sup>v</sup>

The elements of a cause of action for negligent hiring are found in *Sparks Regional Medical Center v. Smith*, 63 Ark.App. 131, 976 S.W.2d 396 (1998), which held that employers are subject to direct liability for the negligent hiring, retention, or supervision of their employees when third parties are injured by the tortious acts of unfit, incompetent, or unsuitable employees. To prove the claim, it must be proved that the employer knew, or in the exercise of ordinary care should have known, that its employee's conduct would subject third parties to an unreasonable risk of harm.<sup>vi</sup>

To find a cause of action under negligent supervision of an employee, one must find that the natural and probable consequence of negligent supervision would subject third parties to an unreasonable risk of harm. *Saine v. Comcast*. In *Saine* a Comcast employee raped and then attempted to kill Ms. Saine. "First, he hit her in the head with a blowtorch canister, and then he bound her hands behind her back, tied her feet together, and dropped her into a bathtub filled with water. Once she was in the water, he slit her throat with a knife he had retrieved from the kitchen, and then he plugged a lamp into an electrical socket and tossed it into the tub to electrocute her. She was still alive, so he held her head under water for more than a minute in an attempt to drown her. When all other attempts to kill her had failed, he forced her, bound, into a closet, and set fire to her carpet with his blowtorch. Miraculously, Ms. Saine lived, and Franks was convicted of rape, kidnapping, arson, and attempted murder."<sup>vii</sup> She then sued for negligent hiring (which was dismissed), negligent supervision and negligent retention. The Court held that "it is not necessary that the particular harm

to Ms. Saine be foreseeable, but only that Comcast be on notice that it was reasonably foreseeable that an appreciable risk of harm to third parties could be caused by negligent supervision or retention of Franks."<sup>viii</sup>

## Anti-Discrimination Provisions.

Most practitioners are familiar with the rule that all employment in Arkansas is "at will" and can be terminated at any time for any reason or no reason at all. However, there are caveats which threaten to subsume the rule. Employment for a specified term or pursuant to stated contractual terms will vary the "at will" rule. Additionally, termination of employment cannot be for an illegal reason. Consequently, it is legal to fire an employee for any reason, unless it is an illegal reason.

Discrimination in employment based upon a race, gender color, religion and national origin is illegal. The Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) *et seq.*, states:

It shall be an unlawful employment practice for an employer-

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national status.

"The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."<sup>ix</sup>

Title VII covers employees with at least fifteen (15) or more employees.

The 1991 amendments to Title VII, provide for trial by jury, which was not available until that time, and placed statutory caps on compensatory and punitive damages according to the number of employees:

- 14 to 100 employees - \$50,000.00;
- 101 to 200 employees - \$100,000.00;
- 201 to 500 employees - \$200,000.00;
- 500 employees or more - \$300,000.00.

The statutory cap does not apply to race discrimination claims brought pursuant to 42 U.S.C. §1981.<sup>x</sup>

In addition to Title VII causes of action for discrimination, claims for race discrimination can also be brought pursuant to 42 U.S.C. §1981. This statute provides that:

### (a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and

equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of law.

42 U.S.C. § 1981

Further, the Arkansas Civil Rights Act, Ark. Code Ann. §16-123-101 *et seq.*, makes discrimination based upon race, gender, national origin, religion, color and disability illegal. It covers employers with nine employees. Actions must be brought within one year of the discriminatory act or within 90 days of the issuance of a right to sue by the EEOC. It is not a requirement that an EEOC charge be filed in order to maintain an action under the Arkansas Civil Rights Act. This provides an alternative for claimants who have missed the 180-day requirement of Title VII. It does not prohibit discrimination based upon age.

The Americans With Disabilities Act (42 U.S.C. §12101 *et seq.*) provides that:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12112

The term “disability” is defined by the ADA as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. §12102(2)

Congress recently amended the ADA to address narrowing of the interpretations of who qualifies for the Act’s protection. The Act provides that a covered employee or potential employee may not be discriminated against and must be provided with a reasonable accommodation if the employee could otherwise perform the essential functions of the job. Again, a well-crafted job description will clearly identify those duties which are essential and those which are marginal.

Much like Title VII, the Age Discrimination in Employment Act, 29 U.S.C. Section 621-634, prohibits employment decisions made because of age. It limits its protections to individuals who are at least 40 years of age. In 1990, Congress amended the ADEA with the Older Workers Benefit Protection Act. The OWBPA prohibits discrimination against older workers in all employee benefits “except when age-based reductions in employee benefit plans are justified by significant cost considerations.” No suit can be commenced without the filing of a charge of discrimination with the EEOC within 180 days of the alleged discrimination. The ADEA provides for double damages to employees who have been subjected to age discrimination, but only where the employer’s violation is willful. Willful is defined as when the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA”.<sup>xi</sup> Double damages known as liquidated damages are provided for in Sec. 216(b). Equitable relief is also available.

The Supreme Court has stated that the plaintiff’s age must have “actually played a role in [the employer’s decision-making] process and had a determinative influence on the outcome.”<sup>xii</sup> The *Reeves* case reiterated that the trier of fact is permitted to conclude that the employee unlawfully

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discriminated if the plaintiff meets his *prima facie* burden and presents sufficient evidence to find the employer's asserted justification false.

It prohibits statements or specifications in job notices of age preference. It prohibits discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs and prohibits denial of benefits to older employee.

The standard of proof required in a disparate treatment case was articulated in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The plaintiff was fired weeks before reaching the ten-year vesting level in the pension plan. This violated ERISA, but the Supreme Court held it was not violative of the ADEA. When the factor motivating the employer is something other than the employee's age, there is no disparate treatment under the ADEA, the Court said. Age must have had a "determinative influence on the outcome."

## Anti-Retaliation Provisions.

The number of retaliation claims filed with the EEOC has proliferated in recent years. Retaliation charges filed with the EEOC doubled between 1992 and 2007, according to EEOC statistics. Even if the underlying charge of discrimination is found to be without merit, or there is a defense verdict ren-

dered, an employee may still recover if it is found by the trier of fact that the employer took an adverse action because of the exercise of a protected right.

Title VII makes it illegal for an employer to take an adverse employment action against an employee who files a charge of discrimination or participates in the investigation of a charge. To make a *prima facie* showing the plaintiff must establish that he participated in a protected activity; that an adverse employment action was taken against him; and that a causal connection exists between the two events.<sup>xiii</sup>

Suspension, even though it is not an "ultimate employment decision" can qualify as a retaliatory act by an employer. The U.S. Supreme Court recently concluded that "[t]he scope of the anti-retaliation provision [of Title VII] extends beyond workplace-related or employment-related retaliatory acts and harm."<sup>xiv</sup> In so ruling, the Court rejected the Eighth Circuit's more restrictive approach of requiring an "ultimate employment decision" such as hiring, granting leave, discharging, promoting and compensating before finding liability for retaliation. The Court held:

There is strong reason to believe that Congress intended the differences that its language suggests, for the two provisions differ not only in language but in purpose as well. The

anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.

To secure the first objective, Congress did not need to prohibit anything other than employment-related discrimination. The substantive provision's basic objective of "equality of employment opportunities" and the elimination of practices that tend to bring about "stratified job environments" would be achieved were all employment-related discrimination miraculously eliminated.

But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose" namely, "[m]aintaining unfet-

tered access to statutory remedial mechanisms.”

Thus, purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.

In *Burlington Northern*, the Court upheld a jury verdict in favor of White’s retaliation claim based upon a reassignment of duties to a track laborer where the duties were considered more arduous and dirtier than her former position as a forklift operator.<sup>xv</sup> Burlington’s argument was that a 37-day suspension without pay was not retaliation. The Court noted that “many reasonable employees would find a month without pay a serious hardship.” It also said that an “indefinite suspension without pay could well act as a deterrent to the filing of a discrimination complaint, even if the suspended employee eventually receives back-pay. Thus, the jury’s conclusion that the suspension was materially adverse was reasonable.”<sup>xvi</sup>

Further, to be protected under the anti-retaliation provision, the exercise of the right is not narrowly construed according to the Supreme Court. In *Crawford*, the Supreme Court rejected the Sixth Circuit Court of Appeals requirement that there be “active, consistent” opposition of perceived discriminatory conduct which would not cover a response provided by a witness during an internal investigation, as opposed to an EEOC investigation. The Court held that there is “no reason to doubt that a person can” oppose “by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”<sup>xvii</sup>

### Harassment in Employment.

Harassment which rises to the level of altering the terms and conditions of

the employment, if based upon an illegal criteria (race, age, gender, national origin, color disability, religion) is actionable. The U.S. Supreme Court decided two cases together in June 1998 which changed the landscape for sexual harassment litigation: *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998).

Prior to that time, the law regarding illegal sex discrimination followed this general outline:<sup>xviii</sup>

Employment decisions motivated by gender either under a disparate impact or disparate treatment theory; or Harassment based on gender to include:

*Quid pro quo* sexual harassment where terms or conditions of employment are made conditional upon submission to sexual conduct; or

Creation of an environment permeated with hostility based on gender which is sufficiently severe and pervasive so as to alter the terms and conditions of employment.

The Supreme Court, however, has held that the key issue is not based on the distinction between *quid pro quo* sex harassment and hostile environment sex discrimination, but should focus instead on whether the employee took all reasonable steps to avoid becoming a victim and whether the employer upon learning of the employ-

ee’s complaint, took steps to stop the discrimination. Now employers are vicariously liable for a supervisor’s sex harassment even when no tangible employment action is taken against the employee, unless the employer can prove it exercised reasonable care to prevent and promptly correct the offensive behavior. If the employee unreasonably fails to take advantage of the opportunities offered by the employer to avoid victimization, then the employer is entitled to an affirmative defense. The affirmative defense, however, is unavailable to an employer who has taken an adverse employment action against an employee after the employee rejects sexual advances.<sup>xix</sup>

Same sex sexual harassment is also covered under Title VII where the plaintiff can prove that the harassment is because of the plaintiff’s sex.<sup>xx</sup>

The Eighth Circuit has held that sporadic, stray remarks, teasing and joking, are not sufficient to state a cause of action for sex harassment unless the behavior is so extreme to have altered the terms of employment for a reasonable person.<sup>xxi</sup>

Individual supervisors, officials, and employees are not personally liable for actions which subject an employer to liability under Title VII.<sup>xxii</sup> However, notably, the Arkansas Supreme Court has been asked to answer this question as it relates to the Arkansas Civil Rights. The decision has not yet been rendered.

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## Termination Processes.

Under Arkansas law, when terminating an employee, an employer must pay the final paycheck owed immediately. If payment is not made within seven days, then the employee may perfect a right to the unpaid wages as well as a continuation of those wages owed for every week they are not paid up to 60 days of pay.<sup>xxiii</sup>

The employer is not required under state statute to pay vacation pay in the event of termination of employment nor is the employer required to pay for accrued sick leave pay. The employer is not free to deduct from a paycheck, including the final one, for spoilage or breakage, cash or inventory losses, fines or penalties for misconduct or quitting without notice. •

## Endnotes

i 29 U.S.C. §207.

ii 29. C.F.R. §778.114.

iii 29 C.F.R. §541.301(e)(7) See Opinion Letter dated January 7, 2005.

iv *Mark Minutu, Note, Employer Liability under the Doctrine of Negligent Hiring: Suggested Methods for the Hiring of Dangerous Employees*, 13 Del. J. Corp. L. 501, 507(1988).

v *Williams v. Feather Sound, Inc.*, 386 So. 2d 1241 n.9 (Fla. Dist. Ct. App. 1980).

vi *Id. Accord Saine v. Comcast Cablevision of Ark., Inc.*, 354 Ark. 492, 126 S.W.3d 339 (2003).

vii *Id.* 126 S.W.3d at 341.

viii *Id.* 126 S.W.3d at 344.

ix *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668, 676 (1973), citing, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); *Quarles v. Phillip Morris, Inc.*, 279 F.Supp. 505 (ED Va. 1968).

x *See Kim v. Nash Finch Company*, 123 F.3d 1046, 1065 (8th Cir. 1997).

xi *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

xii *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S.133, 120 S.Ct. 2097, 2105, 147 L.Ed.2d 105 (2000), quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993).

xiii For cases on retaliation, *See, Manning v. Metropolitan Life Insurance Co., Inc.*, 127 F.3d 686 (8th Cir. 1977); *Davis v. City of Sioux City*, 115 F.3d 1365 (8th Cir., 1997); *Herrero v. St. Louis University Hospital*, 109 F.3d 481 (8th Cir. 1998); *Mondandon v. Farmland Industries, Inc.* 116 F.3d 355 (8th Cir. 1997).

xiv *Burlington Northern & Sante Fe Railway Co., v. White*, 126 S. Ct. 2405 (2006).

xv *Burlington Northern & Sante Fe Railway Co., v. White*, 126 S. Ct. 2405 (2006) (citations omitted).

xvi *Id.* at 2418.

xvii *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, \_\_\_ S. Ct. \_\_\_, 2009 WL 160424 (Jan. 26, 2009).

xviii *See, Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993).

xix *Faragher/Ellerth*.

xx *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75, 118 S. Ct. 998 (1998).

xxi *Gilbert v. City of Little Rock*, 722 F.2d 1390 (8th Cir. 1983).

xxii *Bonomolo-Hagen v. Clay Central-Everly Community School District*, 121 F.3d 446 (8th Cir. 1997)

xxiii A.C.A. §11-4-405.