

REPORT FROM COUNSEL

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FAMILY RESPONSIBILITIES AND THE WORKPLACE

There is no federal law called the “Family Responsibilities Discrimination Act” or the “Caregiver Discrimination Act.” Nonetheless, there has been an increase in claims brought under a variety of federal statutes on behalf of job applicants or workers who assert discrimination by an employer on the basis of family-related decisions. Relevant federal statutes include the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Family and Medical Leave Act (FMLA). If the employer is a government entity, the claim may be couched in terms of a violation of constitutional rights.

The trend is clear enough that the federal Equal Employment Opportunity Commission (EEOC) recently published an extensive “Enforcement Guidance” on the subject. (Go to www.eeoc.gov.) In it, the EEOC sets out to assist investigators, employees, and employers in determining whether a particular employment decision affecting a caregiver may unlawfully discriminate under federal law.

Recommendations for Employers

Some basic recommendations may be gleaned from the EEOC Guidance and relevant court cases. For example, when an employer interacts with, or makes decisions about, a job applicant or an employee, the employer should focus on the requirements for the job, not on the

individual's family circumstances. It is also important for an employer to avoid any tendency to assume that a decision made for the employee's "own good," even if made in good faith, can only be seen as benevolent. It could well be considered discriminatory, since an action that an employer sees as generous may be seen by a court as paternalistic and resting on stereotypical thinking.

The EEOC Guidance includes a collection of 20 examples of prohibited discrimination, each of which falls within 1 of 6 categories: (1) sex-based disparate treatment of female caregivers; (2) pregnancy discrimination; (3) discrimination against male caregivers; (4) discrimination against women of color; (5) unlawful caregiver stereotyping; and (6) hostile work environment.

A few of the prohibited scenarios from the examples are illustrative:

An employee, who is the mother of two preschool-aged children, is passed over for an executive training program, where some of those chosen were not as qualified, and the only people chosen who had young children were men.

- An employer refuses to temporarily relieve a pregnant worker of the part of her job that requires lifting heavy objects, despite her doctor's advice to avoid such lifting. An investigation shows that the employer previously had allowed the reassignment of lifting duties for both male and female workers due to injuries or other medical conditions.
- Although he is subject to a union contract allowing up to one year of unpaid leave to care for a newborn child, a male teacher is denied his request for such leave, with an explanation that "[w]e have to give childcare leave to women." The male teacher is told to request the shorter-lasting unpaid emergency leave instead.
- A previously good relationship between an employee and his supervisor deteriorates

rapidly when it is learned that the employee's wife has a severe form of multiple sclerosis. Despite his history of good performance, the employee is removed from projects, subjected to unrealistic deadlines, yelled at in front of his co-workers, and told by the supervisor that the co-workers doubt his ability to do his share of the work, "considering all of his wife's medical problems."

In the Courts

In one of the leading-edge court decisions, a school psychologist who was denied tenure in her position with an elementary school sued the school district and school officials, alleging that she was subjected to employment discrimination based on gender stereotypes. The employee was terminated after her maternity leave.

A federal appellate court ordered that the case proceed to a trial and, in so doing, it set an important precedent in some of its pronouncements. For example, "sex plus" or "gender plus" discrimination, involving a policy or practice by which an employer classifies employees on the basis of sex, plus another characteristic, such as motherhood, is actionable in a civil rights case brought by a public employee. In other words, it is possible to support a claim based on discrimination against a sub-class of men or women, and not just the class of men or women as a whole.

In addition, the court confirmed that gender-based stereotyped remarks can be evidence that gender played a part in an adverse employment decision. This principle applies as much to the supposition that a woman will conform to a gender stereotype (and therefore will not, for example, be dedicated to her job when she has young children) as to the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype.

The school psychologist claimed that her supervisors repeatedly told her that her job was “not for a mother,” and that they were worried that, as the mother of “little ones,” the employee would not continue her commitment to the workplace. Such decision-making-by-stereotype runs counter to the relevant federal statutes.

THE MURKY WATERS OF WETLANDS PROTECTION

It has been over a year since a splintered United States Supreme Court issued a decision on the scope of the federal government’s jurisdiction under the Clean Water Act to regulate wetlands. In that time, confusion has reigned as lower courts have interpreted the decision. The Act, now 35 years old, prohibits dumping certain pollutants into the “waters of the United States,” which are defined as “navigable waters.” Property owners of isolated wetlands have the “murky” task of determining whether their property is protected or not.

The question before the Court was whether wetlands into which fill material was deposited were “navigable waters.” The Court set forth a confusing standard to guide the analysis. On the one hand, it said that the term “navigable waters” includes only relatively permanent, standing, or flowing bodies of water, not intermittent or ephemeral flows of water, and that only those wetlands with a continuous surface connection to such waters are covered by the Clean Water Act. At the same time, it said that wetlands may be protected by the Act if they have a “significant nexus” to navigable waters or could “affect the chemical, physical and biological integrity of other covered waters.” Lower courts have been split as to which standard to apply.

In an effort to clarify, the Environmental Protection Agency and the U.S. Army Corps of Engineers have published a Guidance that identifies those waters over which the two agencies will assert jurisdiction categorically and on a case-by-case basis. (Go to www.epa.gov.) Essentially, the agencies have not picked one of the competing standards from the Supreme Court over another, but instead will use both of them.

There definitely will be assertion of Clean Water Act authority over wetlands that abut tributaries that come within the “relatively permanent” standard. This refers to tributaries that typically flow year-round or that have continuous flow at least seasonally. Wetlands adjacent to waters not fitting in the “relatively permanent” category will be assessed on a case-by-case basis, using the “significant nexus” test. Perhaps eager to make some kind of pronouncement that is unequivocal, the authors of the Guidance also state that Clean Water Act authority will not be stretched so far as to cover swales, gullies, and ditches that drain only uplands and do not carry a relatively permanent flow of water.

SMALL BUSINESS—MAINTAINING A SAFE WORKPLACE

In theory, and often in practice, the safety of the workplace is a top priority for any business. But while large companies may have personnel devoted exclusively to the subject, safety is but one of many responsibilities for the owners of small businesses. In some cases, the matter of keeping workers safe slips down the list of priorities. There to make sure the issue is not neglected is the federal Occupational Safety and Health Administration (OSHA).

OSHA has written very detailed standards for maintaining workers’ safety. It also has an

expansive mandate to enforce those standards and the various provisions of the Occupational Safety and Health Act. Removing dangerous conditions is only common sense from any point of view, including employer-employee relations and a calculation based solely on dollars and cents.

The first step for any small employer is to be informed and educated as to workplace dangers, not all of which may be obvious. OSHA maintains an extensive website (www.osha.gov) that includes information that is especially pertinent to small businesses and guidance about specific threats to safety. Insurance companies provide another good source of information, since these companies have a vested interest in enhancing workplace safety and thereby minimizing insurance claims.

While exotic threats such as anthrax or Legionnaires' disease capture headlines, the leading causes of serious workplace injuries are more ordinary. They include overexertion, such as excessive lifting, pushing, pulling, holding, carrying, or throwing an object; falls on the same level (as distinct from falls from a height); and "bodily reaction," which covers injuries from bending, climbing, slipping, or tripping without falling. Regular inspections and repairs, not to mention a vigilant workforce, can head off many such injuries.

Apart from monetary penalties that may follow an OSHA investigation, many billions of dollars each year are paid by employers in medical costs, wage payments, and insurance claims management as a result of workplace injuries. Small businesses get some breaks from OSHA, in the form of smaller monetary penalties and some exemptions from recordkeeping requirements for employers with 10 or fewer employees. Still, given their smaller financial reserves, small businesses, in particular, are well advised to live by the truism that an ounce of prevention is worth a pound of cure.

LLC OWNER LIABLE FOR EMPLOYMENT TAXES

Sean was the sole owner of an accounting firm that was set up as a limited liability company (LLC) under state law. When the firm went out of business, it had not paid any payroll taxes for the preceding 18 months. Perhaps thinking that an accounting business, of all things, should have stayed current in its payment of payroll taxes, the IRS went after Sean personally for the \$65,000 in unpaid taxes. A federal court upheld a judgment against him.

The authority of the government to look to the business owner in his personal capacity for satisfaction of the tax liability went back to the formation of the business. Treasury Regulations allow an individual who is the only owner of an LLC to elect to have the business classified as either an “association” or a “sole proprietorship.” In the former situation, the entity is treated like a corporation. In the latter case, which had been selected by Sean, the business is not considered an entity separate from the owner.

Sean challenged the tax assessment against him, but to no avail. The court rejected his argument that the Regulation imposing liability on him as an individual was invalid because the legislation itself, the Internal Revenue Code, does not expressly authorize imposing personal liability on the sole owner of an LLC. The Regulations, like many others issued by the Treasury Department, are intended as a means to “fill in the gaps” left by the Internal Revenue Code.

Notwithstanding the ultimately onerous effect on Sean of his earlier selection under the Regulations, they are not arbitrary, capricious, or unreasonable. When he checked the box on a form choosing treatment of his company as a sole proprietorship, he effectively agreed to be liable for the company’s debts, but he also had benefited by avoiding the double taxation--once

at the corporate level and once as an individual shareholder--that comes with treatment as a corporation.

MISCONCEPTIONS ABOUT FDIC INSURANCE

Misconceptions about the nature and extent of deposit insurance from the Federal Deposit Insurance Corporation (FDIC) can be risky. Especially to be avoided is a depositor's false impression that all of his funds in a bank are insured when, in fact, some of the money is over the insurance limits, thus exposing it to loss if the bank fails. Here are some of the most prevalent erroneous beliefs about FDIC deposit insurance:

- *The most any consumer can have insured is \$100,000.* In fact, accounts at different FDIC-insured institutions are separately insured, so the same consumer may qualify for up to \$100,000 at each institution. Furthermore, the same consumer may qualify for more than \$100,000 in coverage at each bank if accounts are owned in different "ownership categories."
- *The FDIC insures any product sold by a bank.* Dispelling this idea is especially important now that banks, directly or through other companies, have branched out into such financial products as stocks, bonds, mutual funds, annuities, and other insurance products. The FDIC insures the more conventional bank products, such as checking accounts and certificates of deposit.
- *Revocable trust accounts are always insured up to \$100,000 for each beneficiary.* Generally, the owner of a revocable trust account is insured up to \$100,000 per

beneficiary, but that is only for “qualifying beneficiaries,” meaning the depositor’s spouse, child, grandchild, parent, or sibling. Portions of the trust payable to any nonqualifying beneficiaries would be insured as the personal funds of the owner, only up to a total of \$100,000, along with any deposit accounts the owner may have alone at the same bank.

- *Depositors could have to wait up to 99 years for their money in insured accounts if a bank fails.* The origins of this falsehood are sketchy, but, in any event, federal law requires payment “as soon as possible” after a bank failure. In the past, this has meant no more than a few days.
- *Changing the order of names or Social Security numbers can increase coverage for joint accounts.* This practice is of no consequence whatsoever. The FDIC will just add each person’s share of all joint accounts at the same institution and insure the total up to \$100,000.

VACATION HOME TAX TREATMENT

An owner of a second home that is both rented out and put to personal use at different times in any given year should bear in mind the considerable differences in income tax liability that flow from how the two types of uses are allocated. Each year, for tax purposes, the home will be considered as either a residence or rental property, with important differences in the resulting tax calculations. The bottom line is that treatment of the home as rental property is advantageous for the owner, and keeping down the personal use of the property allows it to be so

characterized.

If personal use of the second home is less than the greater of 14 days or 10% of rental days, the home will be considered rental property. Flowing from this classification is the ability to deduct repairs, maintenance, insurance, and depreciation costs. In addition, if the expenses exceed the income from the property, the taxpayer can deduct the loss, subject to passive loss rules. Generally, passive losses up to \$25,000 may be deducted if the adjusted gross income (AGI) is under \$100,000. The ability to deduct passive losses declines as the AGI increases, eventually phasing out at an AGI of \$150,000.

If the owner exceeds the personal use threshold for treatment as rental property, the home is treated as a “residence.” In that case, the owner can deduct expenses only up to the amount of rental income, and no loss deductions are allowed. In addition, before there can be any deduction for operating expenses, the owner must use up the property’s share of mortgage interest and property taxes to offset the rental income, which effectively wastes deductions.

In short, if as an owner of a second home you rent the home for a substantial part of the year, but you also just cannot stay away from the place (that’s why it’s called a vacation home, isn’t it?), enjoy the time away but be prepared for tougher treatment by the IRS.

QUOTABLE

“A lie can travel halfway around the world while the truth is putting on its shoes.”

Mark Twain