PRACTICAL COMPLIANCE, WORKABLE POLICIES & EFFECTIVE MANAGEMENT WITHIN THE LAW

HR MANAGER'S LEGAL Reporter

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CONTENTS

Disney World Docked $433,000 in Back Wages; Managers Ignored Policies

The U.S. Department of Labor's Wage and Hour Division (WHD) has recovered $433,819 in back wages owed to 69 employees of Walt Disney Parks and Resorts U.S. in Orlando, Fla.

A WHD investigator found that inventory control clerks in the park's Food and Beverage Department (1) were not paid for work activities occurring before and after their normal shifts, (2) were not paid for working through their meal times, and (c) were not paid when working from home.

"While Walt Disney has specific rules regarding off-clock work … managers within the company were not adhering to those important policies," said WHD Deputy Administrator Nancy Leppink.

The FLSA requires that covered employees be paid time-and-one-half their regular rates of pay, including commissions, bonuses, and incentive pay, for hours worked over 40 per week.

In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal work activity of the workday.

Additionally, the law requires that accurate records of employees' wages, hours, and other conditions of employment be maintained.

Comment: *Leppink summed it up pretty well: "It is not enough to have policies. Management must also ensure that all supervisors are implementing them."* ■

HR Staffing Company to Pay $184,400 For Rejecting Deaf Applicant

Staffing company Smith Personnel Solutions will pay $184,400 to a deaf applicant who was turned away when she tried to apply for a job as a stock clerk.

The jury in the suit brought by the U.S. Equal Employment Opportunity Commission (EEOC) awarded "Roberta Brandy" $34,400 for lost wages and emotional harm and an additional $150,000 in punitive damages.

EEOC had charged that Smith refused to consider her for an open job of a stock clerk because of her deafness.

Smith did not take Brandy's application nor interview her for the job, instead telling her through her sign language interpreter that there was no open job for her. She was also told that she could be "dangerous" because she "couldn't communicate." Brandy had worked for almost 3 years as a stock clerk in a previous job, and had never experienced problems communicating because of her disability.

Heather Bise, deafness resource specialist for the Deaf Action Center, who offered expert witness testimony for the EEOC at trial, said, "I believe this case will have a holistic effect on the deaf community, and the walls of audism—an attitudinal barrier towards people with hearing loss—will eventually fade. Deaf individuals are simply asking for a chance, and I don't think we are asking for much." *EEOC v. Smith Personnel,* No. 3:08-cv-1552D (N.D. Texas 9/22/10). ■

Dillard's Department Store Chain Sued over Firing 61-Year-Old, Replacing with 24-Year-Old

The U.S. Equal Employment Opportunity Commission (EEOC) has filed an age discrimination lawsuit against department store chain operator Dillard's, Inc.

The suit alleges that Dillard's discriminated against "Amy Arnold" when it discharged her from the position of area sales manager at its store in Cary, North Carolina.

According to the EEOC's complaint, Dillard's terminated Arnold and replaced her with a 24-year-old employee who only had 4 months of experience as an area sales manager. Arnold, on the other hand, had successfully worked as an area sales manager for over 4 years.

At the time of her termination, Arnold ranked second out of six area sales managers at the Cary store in terms of sales, and had received positive reviews in her two most recent performance appraisals, and had twice been recommended for promotion.

Throughout the course of her employment with Dillard's, Arnold's managers made repeated references to her age, telling her she was "too old" for a sales job and that it might be time for her to "let the younger [managers] take over." *EEOC v. Dillard's, Inc.,* No. 5:10-cv-00398 (E.D. NC 9/22/10).

Comment: *Does it raise any red flags when you fire a 61-year-old and replace her with a 24-year-old? We hope so. This case is a good example of why every termination needs to be cleared with HR.* ■

Tyson Fresh Meats Sued over Systematic Discrimination Against Women

The U.S. Department of Labor has filed an administrative complaint against Tyson Fresh Meats, the world's largest supplier of premium beef and pork and a wholly owned subsidiary of Tyson Foods Inc.

The complaint alleges that Tyson systematically rejected female job applicants at its plant in Joslin, Ill.

Office of Federal Contract Compliance Programs (OFCCP) seeks to recover back wages owed to more than 750 rejected applicants, and offer employment to more than 100 of the women.

OFCCP's investigation revealed that Tyson utilized a hiring process and selection procedures that discriminated against women seeking entry-level positions.

Executive Order 11246, under which this lawsuit was brought, prohibits federal contractors such as Tyson from discriminating on the basis of gender when making their hiring decisions and empowers OFCCP to monitor their compliance with the law.

"The Labor Department is firmly committed to ensuring that federal contractors give all individuals a fair and equal chance at employment," said Patricia A. Shiu, director of the department's OFCCP.

"Taxpayer dollars must never be used to discriminate. In our efforts to uncover workplace discrimination, OFCCP will utilize a host of remedies, including debarment, to protect workers, promote diversity, and enforce the law."

The complaint requests that:

- All of Tyson's federal contracts be canceled,
- It be debarred from future government contracts until it has remedied the violations, *and*
- It provide complete relief, including lost wages, interest, and other benefits of employment, to affected individuals.

OFCCP believes that more than 750 women are owed back wages and more than 100 women should be given the option of working for the company.

This filing follows recent litigation by OFCCP involving another Tyson Foods Inc. subsidiary, TNT Crust, located in Green Bay, Wisconsin.

A Department of Labor administrative law judge found that TNT Crust systematically discriminated against Latino applicants in its entry-level position hiring.

Comment: *Presumably, Tyson, no stranger to employment lawsuits, has clear policies at the corporate headquarters. But these days, there is a lot of autonomy at division and branch levels, and that's where the problems begin. Unaudited, they fester and grow.* ■

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'Where's My Raise?': How to Handle Tough Pay Conversations with Employees

We've gone through two tough years in compensation, and 2011 isn't shaping up to be much better. And that means another year of tough questions from employees.

Teresa Murphy and David Wudyka have some ideas about how to make those conversations go as well as can be expected.

Murphy is the principal consultant for HR Partner Advantage, an independent Human Resources advisory firm based in Raleigh, N.C. Wudyka, SPHR, MBA, BSIE, is the founder and managing principal of Westminster Associates, a Massachusetts-based human resource and compensation firm that specializes in pay, performance, and productivity issues.

They made their comments during a recent webinar sponsored by BLR®, publishers of this newsletter.

Three Critical Steps

To prepare for 2011, says Wudyka, HR departments should consider these three critical steps:

1. **Know the compensation trends for the new year—across the country, within your region, and within your industry (as much as possible).** In comp, you have to be scanning the market and analyzing surveys. You have to have the data to make good decisions. Ideally, you have a survey that gives information that is local and in your industry.
2. **Decide up front how you'll divide the available compensation dollars.** Before you're scheduled to allot and award any increases, make the broad decisions about compensation budgets.

   Some companies just divide up the budget, but others allocate funds differently across departments depending on the value of the function to the organization.
3. **Prepare your managers and supervisors.** Most of all, says Wudyka, prepare your supervisors and managers for dealing with tough pay conversations with their teams. You especially want to manage any unrealistic expectations your rank-and-file employees may already have.

Factors to Consider In Calculating Raises

Most U.S. employers consider one or more of the following factors in calculating and awarding pay raises to their workforces, says Wudyka:

- **Performance/merit increases.**
- **Cost-of-living increases.** Beware of this terminology, he says. If you are just giving an across-the-board raise, don't call it a COL raise; if you do, people will expect it every year.
- **Collective bargaining agreements.** Of course, you have to observe the requirements of your CBAs. Also, take great care in negotiating 3 years out—it's hard to tell what's going to happen, Wudyka says.
- **Local pay rates.** Know where you are hiring your employees, he says. Some positions you'll hire local, some regional, some, generally higher level, you'll recruit on a national basis.

Beyond the "macro" factors above, also take into account the "micro" considerations of your individual employees.

When they ask you "How much will my raise be this year?" you will have to think about these criteria, Wudyka says:

- **The employer's overall financial situation.** No matter how much you want to give big raises, if the company doesn't have the money, it doesn't matter. Employees have to be sensitive to these realities, Wudyka says.

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You Be the Judge

Agreed There Was No Interactive Process, But Was It Required?

Jolene Johnson was highly satisfied with her work as a water treatment operator for City Water Services (CWS) until the accident.

After a year off from work, CWS's workers' comp administrator told her that the doctor said she could not return to work as an operator. The administrator offered her benefits in the form of rehabilitation and retraining for another job, and Johnson accepted.

She never contacted CWS, and soon after, CWS formally terminated her employment.

Meanwhile, Johnson sued the city under FEHA (California's discrimination law). She alleged that CWS had failed to accommodate her disability and that she was capable of performing the essential functions of her job. And, she claimed, CWS had failed to engage in the required interactive process.

The trial court agreed and awarded Johnson about $124,000 in back pay and $24,200 in damages for emotional distress as well as $11,500 in other out-of-pocket losses and almost $86,900 for attorney's fees and costs.

CWS appealed. What do you think the appeals court said? Turn to page 5 to find out.

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- **The department's or division's "budget" for raises.** As mentioned, you may want to consider allocating at varying levels, he says.
- **The employee's length of service.**
- **The employee's qualifications.** (i.e., the scarcity of certain talents in the labor market and the likelihood that the employee will be paid more for them elsewhere)
- **How much other employers in the local area are paying for similar jobs.** Again, it is necessary to monitor pay surveys annually, Wudyka says.
- **What the employee requires in the way of incentives.** Or what the company believes it can do.
- **General economic conditions.** The inflation rate, changes in the cost of living, etc.

Changing the Schedules For PAs and Raises

Some U.S. employers have reported that they are "solving" the problem by changing their schedules for issuing performance appraisals and raises.

By delaying reviews and raises past their normal annual time frames, they believe, economic conditions may improve to the point that they can issue higher-than-expected raises to their employees.

For example, instead of offering its usual midsummer appraisals and pay raises tied to the July-June fiscal year calendar, an organization might consider delaying those events until November or December and telling workers the reason for the delay.

Proceed with caution if you're considering changing the traditional time frame for your reviews and raises, Wudyka says. Many workers may not appreciate the delay, arguing that they deserve whatever raises you can offer at the usual review times.

Also, you risk the appearance of being inconsistent in your compensation policies, and you could face negative fallout if you arrive at the new raise time only to discover the economy hasn't improved substantially.

How to Prepare Employees For Disappointing News

Because the economic situation is well reported, many employees will be expecting disappointing news.

Here's the number one piece of advice to prepare your workers for any unhappy surprises with their current pay and any possible raises, says Murphy: Communicate early and in full, explaining your pay policies thoroughly.

It's surprising how many employees believe that their pay levels—and whether they receive raises, and how much—are completely arbitrary decisions by HR and by management.

Many employees use pay raises as their scorecard of how they are doing. If they get no information about the basis for compensation decisions, employees will feel disappointed and deflated, Murphy says.

That's why it makes sense to explain your compensation practices—how you arrive at pay levels and pay raise decisions. Then employees will have a better understanding of delays or reductions.

What should you explain to your employees about your pay policies?

- Explain the company's compensation philosophy and how it is driven by the business mission and strategies, the organizational design and structure, and the critical skills and people needed, Murphy says.
- Cover the role of job descriptions in delineating duties and responsibilities, determining exempt and nonexempt status, and facilitating pay comparisons.
- Describe the company's pay ranges, including how they are determined, such as by market surveys, benchmarking, maintaining internal equity, and other factors.
- Help employees understand the competition by including salary and benefit comparisons.
- Present the organization's total compensation (or rewards) package.
- Explain the minimum, mid-point, and maximum in pay ranges, and talk about the role of skills in placing employees in the range.

Wind up by discussing how salary increase decisions are made: on the basis of annual budget, prevailing economic conditions, and individual performance, Murphy says.

Employees who have a good understanding tend to have better retention, she adds.

Even after identifying the organization's pay philosophies, structure, and practices, many top-management teams will resist communicating them. They won't want employees to know what the pay grades and ranges are, lest they question the wisdom of the structure.

More important, shining a strong light on structure and practices is very likely to reveal at least one, if not several, instances of true inequity—cases where the guidelines have been bent or ignored to allow someone to be paid substantially more than his or her pay grade would allow.

The answer? Address such situations and rectify them, Murphy says. Continuing to coddle the individuals who've benefited from the inequities is less important than a comprehensive communications program regarding the company's pay practices that will pay off quickly in greater overall satisfaction and better retention and productivity. (Meanwhile, those who were being paid "too much" don't have to get pay cuts, just endure a suspension of raises until their pay rates are sufficiently in line with those in the same grade, Murphy says.)

Even if you decide not to share more details with your workers about pay policies, it's absolutely critical that you train your frontline managers and supervisors in these policies.

Training Managers

Training managers and supervisors is your armor against lawsuits, says Murphy. They'll take most of the hits, at least initially.

If supervisors aren't prepared for the tough question, they can give a wrong answer that makes things worse. Employees assume that managers know what they are talking about. They'll listen and they will pass on what they heard.

If your supervisors understand how pay levels are set and raises are determined, they can head off many uninformed complaints from their workers before those complaints fester and get out of control.

Often supervisors aren't involved in the budgeting process, yet they have to respond to the tough questions.

Consider holding one 90-minute training session before compensation plans or allocations are public knowledge, Murphy advises.

Watch out for your managers, says Murphy. For example, they may try to arbitrarily move people to be exempt because there's no money for overtime.

Most Common Complaints

Murphy shared her suggestions for handling the most common compensation complaints.

☛ Complaint: "I'm one of your best workers!"

Honor the employee's contributions, says Murphy, but don't overdo it. Use concrete examples in your conversation to show that you do, indeed, realize how valuable this worker has been. At the same time, if the worker hasn't honestly been that great an asset, don't "overpraise" what he or she has done. Overly positive statements might come back to haunt you later if the worker files any sort of claim, Murphy explains.

Help the employee to understand that the situation isn't a reflection of individual performance, but a reflection of the overall economy and state of the organization.

Be as upfront as you can if you've "maxed out" your ability to reward this employee. If you've done all that you can do to offer this worker a pay raise, make sure he or she understands (in dollar terms) how you fought for the money to offer a raise in the first place. (**Example:** If he or she got a raise that's larger than two-thirds of the workforce, it's important that this worker recognize how well he or she made out.)

You do want employees to feel that their contributions are appreciated. But you also want to be genuine, says Murphy—employees know when you are not.

You should have performance appraisals in place that will provide a basis for your discussion.

Accept that some pieces of recognition may not be possible. So, seek inexpensive ways you can recognize your people. For example, a newsletter is an excellent way to call out great performance with little outlay.

Explore nonmonetary rewards that might appeal to this employee and recognize his or her efforts. You want to have some of these in place—leave early, work on a special project, modest gift card—so you can use them when needed without breaking the bank.

☛ Complaint: "I can't live on what you're paying me!"

You can't fall into the trap where you are responsible for individual employees' finances, says Murphy. Don't assume any responsibility for the employee's personal budget.

You can commiserate with him or her, emphasize that you did all that you could do to provide a raise, etc., but, at the end of the day, if you've done all that you can do as the employer, it's the employee's job to make his pay stretch or not, Murphy says.

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The Decision

Appeals Court: Company Had No Obligation To Engage in the Interactive Process

On appeal, CWS argued that it had no duty to offer Johnson an accommodation because she never requested an accommodation nor indicated that she wanted to continue working—even though she was given notice that the employer didn't believe she could return to her job.

Both the ADA and the FEHA require employers to engage in a timely and good-faith interactive process with employees or applicants with disabilities. The process must be conducted even if it is ultimately determined that no reasonable accommodation is possible.

However, as the court of appeals noted, the employee or applicant must initiate the process—although no "magic words" are required to trigger the employer's duty. The duty to engage in the process arises as soon as the employer becomes aware of the need to consider an accommodation.

The court found that good faith demanded that Johnson directly inform the city of her interest in keeping her water treatment operator position—only then would the city be obligated to engage in the interactive process. The court of appeals, therefore, reversed the trial court's finding of employer liability.

Comment: *Despite the court's ruling, it's generally best for employers to take a conservative approach when it comes to the duty to engage in the interactive process. If you're uncertain whether an employee has requested a reasonable accommodation, err on the side of caution and move ahead with the formal interactive process:*

- *Inform the employee that you are engaging in the interactive process.*
- *Work with the employee and his or her physician to clarify the employee's limitations.*
- *Notify the employee that any accommodations are subject to a final determination that he or she, in fact, has a disability.* ■

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Don't say, "We'll get back to bonuses next quarter" unless you really mean it—you'll lose your integrity very quickly if you can't live up to that promise.

Use the "times are tough all over" approach this year. Unlike other tough compensation years, the last 2 years have been a different period because all employees have seen the day-in, day-out media coverage about the economy—it's obvious that employers and employees across the country are hurting.

Remind this worker that your organization is stretching dollars as much as possible to keep everyone on the job.

If this employee is truly someone you'd rather not lose, swing into retention mode right away, particularly in search of nonmonetary rewards or benefits you might offer to keep him or her.

☛ Complaint: "I'm making less now than my direct reports!"

Often managers get trapped by this comment and respond without having the facts.

Confirm the accuracy of this claim before you do anything, says Murphy. If you have a supervisor who's honestly making less than his or her direct reports—and there's no business reason for the discrepancy—you could have a serious problem on your hands, especially if the supervisor is in a protected employment class.

If pay mistakes were indeed made, fix them as soon as possible. If you can't justify the disparity, this may be a case where, indeed, you'll have to come up with more money or better nonmonetary benefits to bridge the gap.

Point out any extenuating circumstances that led to the disparity. For example, if the supervisor's direct reports earned more recently due to larger-than-usual commission payments, that's a valid reason for the pay differences.

Don't apologize. Here's the reason, let's move on.

By the way, says Murphy, you should be looking regularly at compensation so that these situations don't stay unidentified for long.

If you feel uncomfortable by questions such as this, or put on the spot, don't feel the need to give an answer right away. Just say, I hear you, let me investigate and find out. And then you must follow up and get back to them in a reasonable time, Murphy says.

☛ Complaint: "I'll have to start looking for other jobs!"

When you hear this one, decide up front if you'd like to retain this employee. Murphy says. If so, you can focus on meeting his or her pay demands, finding benefits changes or other nonsalary compensation to bridge the gap, or offering nonmonetary improvements such as flextime.

Try to pin down exactly what this valued worker is seeking to stay on the job—you may be surprised many times to find that it's not always about a huge pay bump, says Murphy.

On the other hand, if the employee in question is an average performer—or, worse, a "problem child" you wouldn't miss—then threatening a departure may indeed be a positive development for you as the employer.

If so, try to defuse the immediacy of the threat until you can make plans as needed to cover the person's absence—and try to control how much griping this employee may do among colleagues once your conversation has ended.

"You need to do what's best for you," is a good response.

Be on lookout for "viral" employees, says Murphy. They are the ones who try to bring everyone down around them. You want to stop this. Having a policy and enforcing it helps in these situations.

☛ Complaint: "I want something else in place of my lost raise!"

Take a moment to reflect on the situation. Are demands reasonable? Is the employee a top performer? What does the employee suggest? Maybe he or she just wants to work from home one day a week.

Before you wheel and deal, decide if you're committed to keeping this employee.

Explore nonmonetary benefits and rewards that will help make up the difference in a lower-than-expected raise.

However, keep in mind any precedents you may be setting. If this employee wins a nonmonetary benefit from you, for example, and then proceeds to brag about it in the break room, you could be facing a flood of similar requests from other workers.

Tips for Retention

Despite the tough economy, your very best employees will always have plenty of opportunity to jump ship for another job. Keep these ideas in mind to improve your chances of retaining those workers while the recession is raging:

- **Stay professional just as you would with a client.**
- **Don't hide the truth about what's happening.** Be honest about your organization's current financial condition, and give your most valued workers as much detail as you can about why you can't offer raises this year. If you hide things, they're more likely than other employees to find out sooner—and they'll blame you for it.
- **Focus employees on future rewards.** If you can offer these employees goal-driven bonuses, especially if they're tied into revenue increases or cost savings, you'll have a better chance of keeping them motivated—and, you'll postpone the expense of the extra pay and tie it into your own bottom line.
- **Spend extra time with your top performers.** Train your supervisors, for example, to monitor the top performers' morale and keep everyone posted on your organization's financial progress.

Legal Issues

Because raises have been given like clockwork for years, people think they are owed them, says Wudyka, but generally speaking, U.S. employers

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Washington Roundup

Statement by OSHA on Long Work Hours, Fatigue, and Worker Safety

The U.S. Department of Labor's Occupational Safety and Health Administration has been petitioned by Public Citizen, a national advocacy organization, as well as other groups and individuals, to issue regulations that would limit the work hours of resident physicians.

In response to the request, Dr. David Michaels, the assistant secretary of labor for occupational safety and health, today issued the following statement:

"We are very concerned about medical residents working extremely long hours, and we know of evidence linking sleep deprivation with an increased risk of needle sticks, puncture wounds, lacerations, medical errors, and motor vehicle accidents. We will review and consider the petition on this subject submitted by Public Citizen and others.

"The relationship of long hours, worker fatigue, and safety is a concern beyond medical residents, since there is extensive evidence linking fatigue with operator error.

"OSHA is working every day to ensure that employers provide not just jobs, but good, safe jobs. No worker, whether low-skilled and low-wage, or highly trained, should be injured, or lose his or her life for a paycheck." ■

DOL Announces Partnership with US Department of Transportation to Combat Distracted Driving

Because motor vehicle crashes are a leading cause of worker fatalities, Secretary of Labor Hilda L. Solis has announced a partnership between the U.S. Department of Labor's Occupational Safety and Health Administration and the U.S. Department of Transportation to combat distracted driving.

"We call upon all employers to prohibit any work policy or practice that requires or encourages workers to text while driving," said Assistant Secretary of Labor for OSHA Dr. David Michaels. "The Occupational Safety and Health Act is clear; employers must provide a workplace free of recognized hazards." ■

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are not lawfully required to provide pay raises to their employees.

Exceptions include federal, state, and local minimum wage requirements and any contractual obligations you may have in this arena (e.g., collective bargaining agreements, individual employment contracts that require raises).

Here's a good rule of thumb to remember when making pay raise decisions that you feel might prove controversial or troubling for employees: Always have a very strong, defensible business reason for any and all pay decisions.

Here's a short list of the most common legal issues that may arise in difficult pay raise situations:

- **Changing work schedules, changing titles.** These changes may be necessary or appropriate, but be careful that you don't do something that voids an exemption. For example, a manager may take back certain decision-making responsibilities to help an overworked supervisor. In doing this, the duties that gave the job the exemption may have been taken away, Wudyka explains.
- **Discrimination claims.** Raises given (or withheld) in ways that discriminate against workers in protected classes or that have a disparate impact on them will give rise to claims. Identify alternatives (e.g., title changes, schedule changes) given in lieu of raises that have the same discriminatory or disparate impact.
- **Collective bargaining agreements.** Raises structured so that they violate CBA provisions, such as cost-of-living adjustments or automatic scheduled pay increases, will bring suits.
- **Employment agreements.** Highly compensated employees may have employment agreements that require an annual increase.

One Final Thought for Training

Make sure that your supervisors and managers understand that when troubling questions and issues come up in conversations with employees, always alert HR, says Murphy. ■

From the States

CALIFORNIA

Employer Prevails in Age Bias Case by Showing It Hired the Better Qualified Applicant

You can't stop a rejected applicant from suing you for age discrimination, but you can probably get yourself off the hook if you have a legitimate reason—like the successful applicant's superior qualifications—for your hiring decision.

In this case, "Alston Cook" was 56 years old when he applied for a position as a staff attorney with MV Transportation, Inc. (MVT). He and "Alison Steffens," the 40-year-old attorney who was hired for the job, were among approximately 60 applicants.

Cook e-mailed his résumé to the MVT's chief legal officer, "Steve Borkowski," from his e-mail account at his then-employer, a government agency. Borkowski testified in a deposition that he was put off by receiving Cook's e-mail from a taxpayer-supported government office during work hours. Cook followed up with an e-mail that Borkowski described as "arrogant."

Cook was never interviewed. After interviewing Steffens, Borkowski cancelled his remaining interviews and offered her the job. Cook responded by suing the employer for age discrimination under the California Fair Employment and Housing Act (FEHA). The trial court dismissed the case before trial, and he appealed to the California Court of Appeal.

To get a claim for age discrimination in hiring to trial, an applicant must show that he or she was age 40 or over and qualified for the position.

The employer may still avoid trial, however, by identifying a legitimate and nondiscriminatory reason for not hiring the applicant. But the claim will survive if the applicant provides substantial evidence that the employer's reason is a pretext for discrimination.

On appeal, the onus was on Cook to demonstrate that the employer's reasons for not hiring him were a pretext. Pretext can be inferred when a reasonable employer would have found the rejected applicant to be significantly better qualified for the job than the person hired. Cook contended that was the case here.

The Court of Appeal, however, found that the two applicants' qualifications were essentially equal and that Steffens had several advantages over Cook.

For example, she possessed a New York Bar Association membership that could be useful to the employer.

The court concluded that Cook's qualifications couldn't reasonably be viewed as vastly superior to Steffens's qualifications and affirmed the trial court's decision.

Cook also argued that the employer gave inconsistent explanations for its hiring decision and this was evidence of pretext.

But the Court of Appeal found no evidence that Borkowski's testimony couldn't be taken at face value. *Reeves v. MV Transportation, Inc*., 186 Cal. App. 4th 666 (Cal. App. 1st Dist. 2010).

Comment: *If the court does find inconsistent reasoning, your case will founder. Best advice? Document the reasons for your hiring decisions in detail at the time you make them.* ■

GEORGIA

Editor Fired for Changing *His* Gender Wins *Her* Discrimination Case

A male editor for the Georgia state government who was fired when he began coming to work dressed as a woman as part of a gender reassignment process has won his discrimination case.

After "Jameson Miller" was diagnosed with gender identity disorder (a psychiatric condition characterized by a strong, persistent cross-gender identification, a sense that one's biological gender is inappropriate, and consequent social impairment), he underwent a series of treatments to transition from male to female, including electrolysis to remove facial hair, hormone treatment, plastic surgery, and psychiatric therapy to help him adjust to living as a woman.

Then Miller was hired as an editor by the Georgia General Assembly's Office of Legislative Counsel (OLC). Miller informed "her" immediate supervisor that she was transitioning from male to female, but during her first year on the job she came to work dressed as a man.

One day, however, she dressed herself as a woman. The head of the OLC, "Reinhardt Maher," told her that her appearance was inappropriate and asked her to leave the office.

Miller's supervisor informed Maher that Miller was undergoing gender transition, but Miller went back to dressing as a man for the next few months.

Eventually, she informed her supervisor that she would now be presenting herself as a woman and changing her legal name.

The supervisor told Maher, who, at first, said that he supported sex changes within the workplace but later told the supervisor that he was going to fire Miller. The supervisor protested because Miller's work was excellent.

However, Maher informed Miller that he was terminating her because her gender transition was inappropriate and disruptive and because some legislators considered the transition immoral.

Miller sued Maher in his official capacity for sex discrimination.

The court first had to determine whether firing a person for being transgendered qualified as sex discrimination.

In this case, the firing was due to Miller's failure to conform to gender stereotypes.

Based the court's reading of cases that have considered similar issues, the court decided that employment decisions based on transgendered status could constitute sex discrimination.

Maher had told Miller that he was not firing her because of her performance but because he was unsettled by the thought of a person with male sexual organs in women's clothing.

The one real concern Maher presented to the court was his fear that Miller's use of workplace restrooms could present a problem.

The court did not find that Maher had a legitimate nondiscriminatory reason for the termination, so it found for Miller. *Vandiver v. Brumby,* No. 1:08-CV-2360-RWS (N.D. GA 7/2/10).

Comment: *Gender transformation is a tricky issue that shouldn't be left to managers and supervisors. Could this conceivably have been going on all this time without HR's knowledge or input?* ■

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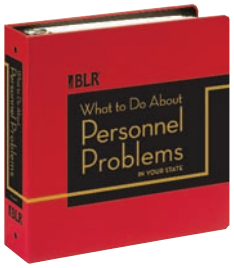

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