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EMPLOYMENT LAW NEWS

Sex and Money . . . mirroring life, these topics form the basis for a lot of important issues in employment law. In the workplace, both invoke issues of **equal employment opportunity**, and both often form the basis for employees' claims against their employers. Because both sex and money have recently spurred trends in employee lawsuits and class actions, they are ripe topics for discussion, and warning to employers. As discussed below, the "golden rule" of employment law is treating all employees fairly and equally when it comes to money, sex, or any other legally protected characteristic, and confining the distinctions made between employees to legitimate and verifiable business reasons.

Equal Employment Opportunity truly is the foundation for the wise and fair treatment of all employees. Most savvy employers have some kind of a written policy, specifying that the company is an "equal opportunity employer" – but many may fail to consider what this actually means on a day to day basis.

In truth, "equal employment opportunity" simply means giving everyone the same chance, treating people fairly, and all of those other rules of conduct we learned from our parents and kindergarten teachers. However, as all employers know, application of those "simple" rules is often not so simple in today's workplace.

Of course, fairness (and the law) dictates that these rules apply both ways – so in theory at least, employers are entitled to the same equity as employees. This means that "equal employment opportunity" is just that: **equal** – not more than that.

In practice, this means that an employee with a protected characteristic is entitled to the same treatment he or she would otherwise receive, **but no greater benefit**. For example, the disabled or minority employee should receive the same chance to correct a performance problem before receiving discipline, but no greater chance, than any other employee. Similarly, if an employee whose job is about to be eliminated for business reasons goes on maternity leave, the maternity leave does not insulate her from the job elimination. The key of course is the employer's ability to prove that the action taken resulted from equal application of the rules, rather than from discrimination on the basis of the employee's protected characteristic.

And what about sex (substitute love, gender, sexual preference, etc. as appropriate) in the workplace . . . Again, the key is equal employment opportunity. For the most part, issues related to sex are irrelevant to work performance, and should be kept separate from work. No employee should be treated differently because of gender, intimate relationships, attractiveness or lack thereof to the boss, willingness to engage in any kind of relationship with a supervisor, threshold for listening to off-color jokes, or anything else related to sex or gender. While apparently fundamental, this basic premise often gets forgotten in the midst of workplace relations.

Again, **the rule applies both ways**: While at work, employees must not let their personal lives interfere, and must refrain from introducing matters pertaining to sex into the workplace. They also must comply with the employer's legitimate business-related rules and policies, regardless of their personal preferences. In a recent Federal court case for example, the 9th Circuit Court rejected a casino employee's claim that her employer's requirement that women wear makeup to work was sex discrimination. The Court explained that because both men and women were held to reasonable grooming standards, the makeup requirement did not impose an unfair burden on the women.

Workplace romance is a sensitive issue. On one hand, as workers spend more time working, intimate relationships between co-workers are inevitable. On the other hand, employers do have some legitimate reasons for regulating sexual relationships among employees: concerns about sexual harassment and improper preferences are among them, as is the potential for a conflict of interest when a supervisor and subordinate are intimately involved. An egregious example comes from a recent case where a male supervisor had intimate relationships with several of his female subordinate employees, who flaunted their preferred status to co-workers, received promotions when others were clearly more qualified, and generally made work life miserable for the women who were not sleeping with the boss. One interesting thing about this case was that the employees filing the sexual harassment claim were **not** those engaging in sex with the boss, but the others, who received inferior treatment because of **not** sleeping with the boss. The court found a hostile work environment, created by the boss' general message that women in the workplace were considered "sexual playthings."

Another recent case illustrates that men too can successfully claim they have suffered sexual harassment at work, even when the conduct involves a heterosexual male supervisor. A man who was fired after complaining that his supervisor forced him to attend after hours "business" meetings at strip clubs was recently awarded $1.62 million on his sexual harassment claim. The ruling turned on the fact that the man was subjected to this treatment because of his gender – his female co-workers were not required to attend. Also crucial to the jury's finding was the employer's doing absolutely the **worst possible things** in response to his complaint: First, the employer **ignored** the complaint, and then **retaliated** against this employee, by promptly terminating his employment.

These cases are instructive: getting back to fundamental lessons of human interaction – it is important for employers to treat all employees fairly, without regard for their gender, sexual preferences, or intimate relationships inside or outside of the workplace. Fair and equitable treatment includes leaving private matters private,

avoiding personal favoritism, and not imposing one's own predilections on one's staff.

Finally, the basic premise that we do **not retaliate** against someone who makes a reasonable complaint seems fundamental, but often is easier said than done. All employers must institute an effective means of addressing employee complaints, quickly, sensitively and confidentially, while avoiding even the appearance of retaliation. Using "fairness" as a touchstone is a simple, but helpful way for the employer to judge its own response.

Retaliation is never a good idea. Again, this may seem like a simple concept, but one that requires consideration before acting. Human nature favors retaliation against someone who treats us badly, or makes life difficult. Of course, we all have known this since childhood. The reflex remains with us, and engages when an employee claims to have been harassed, discriminated against, injured or otherwise mistreated at work. When I receive a call from a client asking for advice in responding to an employee's complaint, the employer often indicates the preference for removing the employee from the workplace.

Unfortunately, employees and their attorneys have identified this human frailty as a tremendous source of income, and juries apparently are eager to comply. Recent cases have shown that juries will award **substantial punitive damages against an employer who retaliates** – even if there is no proof of the underlying discrimination or harassment claim. So, please be warned, and keep the urge to retaliate in check, while applying a more constructive problem solving approach.

Wage claims are making all kinds of news. Large employers from FedEx to WalMart to retailer Kenneth Cole have recently defended large class actions brought by employees. The employees claim, in one form or another, that they were not paid fairly. FedEx employees claimed in one suit that they were underpaid, among other things, because of racial bias; in another suit they were awarded $5.3 million on claims they were improperly classified as independent contractors and required to pay business expenses the employer should have covered; WalMart employees won a $172 million verdict on claims the company failed to give them legally required meal breaks, and a Kenneth Cole store manager succeeded on allegations that he was improperly classified as an exempt employee, and denied overtime, rest and meal breaks.

These claims unfortunately have become quite common, and extremely costly to employers. In addition to back pay and interest, the employees can recover waiting time penalties under the Labor Code, including a day's pay for each day (up to 30 days) that payment was late, and an hour's pay, per employee, per day, for any rest or meal break denied. When multiple employees are involved, or the claims occur over a period of time, the amounts can be staggering.

Again, **general rules of equal employment and fundamental fairness** go a long way toward eliminating such legal disasters. For example, had FedEx simply covered the relatively minor expenses it imposed on the drivers, they would not have filed suit. Similarly, had WalMart provided legally mandated breaks (which though seemingly inconvenient, are generally not unduly burdensome to the employer) it would have avoided tremendous penalties.

FOR MORE INFORMATION ON THESE OR OTHER EMPLOYMENT LAW ISSUES, OR FOR SEXUAL HARASSMENT TRAINING,

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