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EEOC Report Details Strategies For Employers To Curb Workplace Harassment

By Brian B. Garrett

Last year, the U.S. Equal Employment Opportunity Commission ("EEOC") issued a major report on the subject of sexual and other unlawful harassment in the workplace. The EEOC's Report (which is available at the following link: https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm) highlights the persistent nature of workplace harassment and suggests ways for employers to reboot their harassment prevention efforts.

Given all of the costs entailed by harassment claims, as well as the EEOC's prominent role in enforcing federal anti-discrimination laws, employers would be wise to review the Report carefully and consider how their policies and procedures for preventing and remedying workplace harassment may need to be modified.

Harassment: The Basics

Under the main federal employment discrimination statute, Title VII of the Civil Rights Act of 1964, unlawful workplace harassment takes two general forms.

First, *quid pro quo* harassment refers to a situation in which an employee's submission to sexual advances or similar behavior (i) is made, explicitly or implicitly, a term or condition of employment, or (ii) is used (or threatened to be used) as a basis for employment decisions affecting the employee. An example is a supervisor's hinting to

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Head Of School Employment Agreements: What Independent Schools Should Know

By Brian D. Carlson And Gary D. Finley

Extending an offer to a new Head of School is an important and exciting step for an independent school – generally, the culmination of a long search process, and the beginning of a new stage in the school's life.

The next step in the process, however – formalizing the offer through a written employment agreement – is equally important. In part, because a school's contractual relationship with its Head is so different from its relationships with its other employees, it is critical that the employment agreement be negotiated and drafted in a careful, thoughtful and thorough manner. Among other considerations, the agreement needs to protect the school against the possibility that its relationship with its new Head does not prove as successful – or as long-term – as the parties hope.

Following is an outline of some key provisions that independent schools should consider carefully in structuring employment agreements with their Heads. Indeed, as many of these topics often come up during the interview process, before the successful candidate is chosen, we recommend that a school begin thinking about these issues even before it commences its formal search for a new Head.

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an employee that she will get a promotion or raise if she agrees to date the supervisor. (By its nature, *quid pro quo* harassment, unlike hostile environment harassment, is virtually always sexual in character.)

The second (and more common) type of harassment is "hostile environment" harassment, in which an employee is subjected to offensive verbal or physical conduct in the workplace that is (i) based on a protected characteristic (sex, race, religion, age, national origin, etc.), and (ii) sufficiently severe or pervasive as to unreasonably interfere with the employee's work performance or create an intimidating, hostile, or offensive work environment. Hostile environment harassment need not involve any actual or threatened change in the victim's compensation, job duties, or other tangible terms and conditions of employment.

Prevalence And Costs Of Workplace Harassment

As the EEOC details in its Report, workplace harassment remains a persistent problem in the United States. Approximately one-third of the roughly 90,000 charges of discrimination filed with the EEOC in 2015 included claims of workplace harassment. In turn, nearly half of those 30,000 discrimination charges alleged harassment of a sexual nature. These numbers have remained fairly steady over time – in total, since 2010, employees have filed nearly 175,000 EEOC charges alleging workplace harassment.

At the same time, workplace harassment often goes unreported. Indeed, the EEOC's Report indicates that the least common response by an employee targeted with harassment is to take formal action. The reasons that harassment victims often do not report the conduct are varied, including (i) fear that management will not believe, or will fail to act on, their allegations; (ii) concern that they will be blamed for sparking or inviting the offender's actions; and (iii) worries about potential repercussions for complaining, both in their current workplaces and in their overall careers.

When employees do complain of workplace harassment, the repercussions for employers can be substantial, including bad publicity, lost productivity, attorneys' fees, and potential damage awards. Since 2010, the EEOC has recovered more than $700 million (through settlements and court judgments) on behalf of employees alleging harassment, including approximately $125.5 million during 2015. Given that most harassment cases are brought by employees themselves, as opposed to the EEOC, these figures represent only a small percentage of the monies paid out by employers in recent years as part of harassment settlements and damage awards.

Preventing Harassment In The Workplace

The EEOC's Report suggests a number of important steps that employers should take to minimize instances of workplace harassment:

Successful Anti-Harassment Policies.

As a threshold matter, every employer should have a formal, written, anti-harassment policy. (Indeed, such policies are legally required in Massachusetts and some other jurisdictions.) The policy should include all of the following: (i) a clear definition of prohibited conduct, along with specific examples; (ii) a detailed description of how to file a complaint, including multiple reporting avenues; (iii) a statement that complaints will be kept confidential to the extent practicable; and (iv) an assurance that an employee will not be subjected to retaliation for complaining in good faith of harassment.

The Report also recommends certain policy provisions based on current technology trends. For example, given the prevalence of social media in today's society, an employer's anti-harassment policy should make clear that inappropriate behavior toward co-workers on social media may violate the policy.

Anti-Harassment Training.

In its Report, the EEOC strongly recommends that employers conduct regular anti-harassment training sessions for employees. By helping employees better understand the broad range of actions that can qualify as unlawful harassment – as well as the fact that harassment can be based on characteristics such as age, religion, and national origin, in addition to sex – such training can help reduce future instances of harassment.

The Report also suggests that anti-harassment training be individually tailored for different types of employees. "Generic" training presentations that do not take into account employers' specific workforces and cultures may not resonate with employees and, accordingly, may be of limited effectiveness. Instead, trainings should incorporate realistic examples and scenarios from the specific worksite(s) involved.

In addition, the Report recommends that employers provide additional training to middle-management and first-line supervisors. Such training should include practical suggestions on how to recognize and respond to instances of possible harassment in the workplace, even before the conduct reaches a legally actionable level.

Promoting Leadership And Accountability.

Finally, the Report urges that employers' top-level leaders take appropriate steps to promote an inclusive, respectful workplace culture. In particular, executives and other high-level management should personally model civility and respect and stress the importance of promoting, fostering, and maintaining a harassment-free work environment.

Positive leadership, alone, is not enough – employers need to have systems in place to ensure that reports of harassment are addressed appropriately. Thus, it is also critical for each employer to maintain:

- A safe and supportive reporting system that assures harassment victims and witnesses that complaints will be addressed promptly and seriously;

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- A neutral, thorough investigative process that ensures that alleged perpetrators of harassment are treated fairly, and that all steps in the investigative process are carefully documented;
- Clear policies providing for appropriate corrective action when harassment is found to have occurred, with regard to offenders as well as individuals who may have knowingly permitted harassment to occur;
- A system that rewards managers for promptly and appropriately responding to complaints of harassment; and
- Regular and direct communications to employees, through a variety of means, making clear that harassment (or retaliation for reports of harassment) will not be tolerated.

Recommendations For Employers

In light of the EEOC's Report, and the agency's continued overall focus on unlawful workplace harassment, we recommend that employers take the following steps:

- Review and update their anti-harassment policies as appropriate, in consultation with experienced employment counsel;
- Regularly and clearly communicate to employees the principles and procedures set forth in their anti-harassment policies;
- Ensure that their anti-harassment policies and procedures are carefully and consistently followed when reports of harassment are made, including prompt, thorough, and objective investigations, as well as timely and proportional disciplinary consequences for substantiated complaints of harassment;
- Have their leadership exemplify model behavior and promote a workplace culture that values civility and respect and does not tolerate harassment; and
- Assess their workplaces for potential risk factors that could lead to instances of unlawful harassment.

If you have any questions about the EEOC's Report or would like guidance in connection with any of the issues it raises, please do not hesitate to contact us.

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Head Of School Employment Agreements: What Independent Schools Should Know

Term Of Agreement

Unlike most other employees at independent schools – who generally work under either "at will" offer letters or annual letter agreements – Heads of School are usually hired for multi-year terms. Thus, a critical threshold issue for a school is the duration of the Head's employment agreement.

A variety of factors come into play in considering this issue. In particular, the new Head's experience level – both in equivalent roles at prior schools and in the education field generally – is likely to be a significant consideration. On this point, an experienced Head who is being courted by a number of different schools may have bargaining power to insist on a longer term.

A school should also carefully consider the respective advantages and disadvantages of longer versus shorter terms of employment. A longer term may help to "lock up" a desirable candidate for a greater length of time, but also may lead to an uncomfortable situation if the employment relationship does not turn out as anticipated. Conversely, hiring a new Head for a shorter term can help to preserve flexibility to make a change, if necessary, but can also create instability.

Another important issue is whether the Head's employment agreement should renew automatically from year to year (absent an official notice of non-renewal by one of the parties). Many schools favor such renewal provisions, since they obviate the need to negotiate a new agreement for as long as both sides remain satisfied with the arrangement. Other schools, however, prefer that their Heads' employment agreements be limited to fixed durations, thereby ensuring that the employment terms will be regularly reviewed and updated.

Compensation

The appropriate compensation package for a new Head of School depends upon a wide range of factors, including a school's size, geographic location and financial resources, compensation levels at peer schools, and the successful candidate's qualifications and expectations.

Not surprisingly, the annual salary is virtually always the major component of the compensation package. However, employment agreements for Heads often include other forms of compensation as well, such as allowances for car expenses and club dues, as well as deferred-compensation payments (particularly as part of final contracts for Heads who are nearing retirement).

The employment agreement should also address the employee benefits for which the Head will be eligible. Many of these benefits – such as health, life and disability insurance, 403(b) retirement plan contributions, and tuition remission for children attending the school – may be standardized for all regular, full-time employees. Others – such as relocation benefits and expenses for attendance at professional conferences – are likely to be individually tailored for the Head.

Independent schools need to be aware that the Internal Revenue Service prohibits non-profits from paying their executives "excess compensation" – *i.e.*, compensation deemed to go beyond what is "fair and reasonable." Paying excess compensation to an executive may cause a non-profit to face large fines or even potential loss of its tax-exempt status.

Thus, it is critical for a school to engage in benchmarking – *i.e.*, analyzing the proposed compensation package for its Head against the compensation provided to Heads of peer schools – to ensure that the proposed compensation package is reasonable.

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Notably, if a school engages outside counsel to conduct the benchmarking, this creates a "rebuttable presumption" of reasonability, thereby providing the school with additional legal protection against a potential IRS challenge.

Housing

Many independent schools – both boarding and day – provide housing on or near campus for their Heads, typically on a rent-free or reduced-rent basis. The terms of any housing arrangement should be spelled out clearly in the Head's employment agreement, including not only the monthly rent (if any) but also terms such as who bears responsibility for utility and upkeep expenses, a description of the fixtures and furnishings that are considered part of the home, and the length of time the Head will be given to move out of the home following the end of his or her employment.

Duties

While the job duties of a Head of School might seem self-evident, in fact there can be significant variation from one institution to another. Thus, an employment agreement should spell out the Head's responsibilities fairly specifically. Topics frequently covered include student development, curriculum development, hiring and management of faculty and staff, and fundraising.

The duties section should also address the Head's right to engage in outside professional activities (such as consulting work and charitable endeavors), as well as whether the Head will be a member of the school's Board of Trustees/Directors.

Evaluation

We recommend that a Head of School employment agreement include language establishing a process for the Board to conduct annual evaluations of the Head's performance. A formal evaluation process assists the Board in maintaining appropriate oversight, while at the same time ensuring that the Head is made aware of any performance concerns.

Early Termination And Severance

While both parties obviously hope that their relationship will be a long one, the reality is that not every Head of School hiring works out as anticipated. Thus, it is critical for the Head's employment agreement to specify how each party may terminate the relationship before the end of the term of the agreement, as well as the legal consequences of early termination.

Typically, an employment agreement provides for the Head to receive severance compensation – generally, continued salary payments (and often health insurance benefits) for some defined period of time – if he or she is terminated without cause. (While the definition of "cause" varies somewhat from agreement to agreement, it generally encompasses serious misconduct and/or grossly deficient job performance by the Head.) It is important that the agreement condition payment of the severance compensation on the Head's signing a release of claims.

Conversely, the agreement should make clear that if the Head is terminated for cause, or voluntarily resigns, his or her compensation ends immediately. In the case of resignation, the agreement should require the Head to provide ample notice, so that the school has sufficient time to search for a successor.

Finally, a Head's employment agreement typically includes language permitting the school to terminate the relationship if the Head experiences a lengthy disability. In that event, the agreement may provide for the Head to receive severance compensation, or he or she may be limited to disability benefits under the school's disability insurance plans.

Intellectual Property, Confidentiality, Non-Solicitation

A Head of School employment agreement should include clear provisions relating to intellectual property, confidentiality, and non-solicitation. The intellectual property section defines the school's ownership rights with regard to concepts, publications, research materials, and other types of intellectual property developed during the Head's tenure at the school. Along similar lines, the confidentiality provision describes the types of sensitive, non-public information to which the Head is likely to be privy and obligates the Head not to use or disclose such information except in the course of his or her employment, and for the benefit of the school.

Finally, non-solicitation covenants are an important means of protecting a school's relationships with its employees, students, and donors. Such covenants prohibit a Head from soliciting the school's employees, students, or donors – typically on behalf of another school that the Head has joined – for a defined period of time following the end of his or her employment. State law may limit the enforceability of such provisions, so it is important to consult legal counsel on these points.

Conclusion

A school's employment agreement with its Head serves as the legal foundation for the school's relationship with its most important employee. As such, the agreement should reflect thoughtful consideration of the subjects outlined above, as well as other important matters not addressed in this article.

Our attorneys have significant experience assisting independent schools (as well as individual Heads) with negotiating and drafting Head of School employment agreements, and we would be pleased to assist you with this vital process.

Motions *In Limine:* When To File, And How To Win

By Brian M. Doyle

When defending the British soldiers accused of committing murder during the 1770 Boston Massacre, John Adams famously argued that "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." The prosecution's key witnesses offered little more than unreliable eyewitness testimony playing on the growing public sentiment against the British government, which Adams rebutted by pointing to the facts that were in evidence concerning the events of that evening.

In a climate teeming with struggle, and against long odds, Adams was successful in obtaining an acquittal for six of the eight soldiers on trial. Ever since, this trial has stood as a lesson to lawyers on the importance of developing the factual record in a way that supports your theory of the case.

Nature Of Motions *In Limine*

One way for a trial lawyer to proactively assert control over the facts that will be presented to the jury is by thoughtfully utilizing motions *in limine*. A motion *in limine* is a procedural mechanism that allows litigators to seek to exclude certain evidence from being presented to a jury – typically evidence that is irrelevant, unreliable, or more prejudicial than probative.

Importantly, motions *in limine* are generally made before a trial begins, and always argued outside the presence of the jury. Thus, a motion *in limine* allows key evidentiary questions to be decided without the jury present and, if the motion is granted, will preclude the jury from ever learning of the disputed evidence.

While the potential topics of motions *in limine* are virtually without limit and will vary greatly depending on the specific evidentiary issues in a given case, below are several examples of motions *in limine* that are commonly filed by employer-defendants in employment cases:

- Motions to preclude evidence of similar claims previously brought against the employer by other employees;
- Motions to preclude evidence that relates only to claims dismissed on summary judgment;
- Motions to preclude evidence of alleged employee or manager misconduct that is unrelated to the unlawful conduct being alleged;
- Motions to preclude evidence of lost wages damages where an employee voluntarily resigned from employment or failed to mitigate his or her damages;
- Motions to preclude treating physicians from testifying as to medical opinions or diagnoses unless they are properly certified as expert witnesses; and
- Motions to preclude evidence of the employer's financial condition if punitive damages have not been sought.

Practical Tips

As with any litigation tactic, there are potential drawbacks to filing motions *in limine*. Most of those, however, can be avoided with strategic and thoughtful planning. Here are some tips to keep in mind when considering potential motions *in limine:*

Carefully select issues of importance.

As you consider possible issues to raise in your *in limine* motions, keep in mind that you should focus on raising only those issues that have thematic importance to your case. A litigant who is perceived to have abused the *in limine* process will quickly earn the ire of the tribunal the litigant is seeking to impress. Motions *in limine* should be crafted so that they streamline the trial process by resolving key evidentiary issues at the outset. Mundane evidentiary objections that do not involve issues of critical importance to your case should be reserved for trial.

Focus on expert witnesses and damages.

Motions *in limine* are a commonly used tool for raising evidentiary issues relating to expert witnesses and damages. Motions *in limine* concerning expert witness testimony, which are known as *Daubert* motions, can seek to limit or exclude expert testimony that is not supported by sufficient facts or data, not based on reliable principles or methods, or not relevant to the issues on trial. In certain cases – most notably, medical malpractice cases – a successful *Daubert* motion to exclude a medical expert can end the case.

Similarly, a successful motion *in limine* to preclude or limit categories of potential damages can fundamentally change the trajectory of a case. For example, an employer that is successful at precluding a former employee from recovering lost wages on the basis that the employee resigned, or failed to adequately mitigate damages, has significantly reduced its exposure in the event of an adverse verdict.

Know your judge's preferences.

Before you expend the time to prepare comprehensive motions *in limine*, learn what you can about your judge's preferences for such motions. Judges have a great deal of latitude in how they handle evidentiary matters, and no two are exactly the same. There also may be procedural requirements that are unique to your judge. Some judges require motions *in limine* to be briefed well in advance of trial and heard at a pre-trial conference, while others may prefer to hear them on the first day of trial. Some judges want thorough briefing in support of *in limine* motions, while others prefer to have succinct

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submissions (or may even want to just hear them orally). Be sure to learn everything that you can about how your judge prefers to handle motions *in limine*, and ensure you comply with those practices.

File motions you can win.

A motion *in limine* should not be filed unless you believe there is a high likelihood of winning. In addition to potentially catching the ire of the court with a frivolous motion, you could be giving your opponent insight as to the evidentiary issues you consider to be critical to your case. For example, if you are seeking to exclude evidence that calls into question the credibility of your star witness, you may be providing your opponent a road map as to how to most effectively leverage that evidence against your witness. You may also unwittingly include arguments in your motion that your adversary had not considered, and that he or she may adopt after reading your papers. Be sure that the motion is important and that you are confident that it has a good chance to succeed before you file it.

Understand and clarify the court's rulings.

Rulings on evidentiary motions are not always final, especially when the defect causing the evidence to be inadmissible can be cured. For example, if the court holds that a piece of evidence is inadmissible because the party proffering the evidence cannot establish the proper foundation, that ruling should change the moment a proper foundation is laid. If you are on the losing side of an evidentiary ruling, be sure you understand any conditions to the ruling so that you can take any necessary steps to get your evidence admitted. If evidentiary orders are not properly conditional, request the court to make the conditions explicit on the face of the order.

Conclusion

As you prepare for trial, motions *in limine* should be a key part of your strategy. Success on these motions will aid you greatly as you attempt to create a favorable record before the jury. In many instances, success on key motions *in limine* can even facilitate a favorable settlement before trial. If you are uncertain about whether, or how, to favorably position motions *in limine* as you approach trial, consult with legal counsel who is experienced and familiar with your court and judge.

Joseph E. Santucci, Jr. Is Recognized As **"Lawyer of the Year"** By *Best Lawyers In New England*

Schwartz Hannum is pleased to announce that Senior Counsel Joseph E. Santucci, Jr. has been recognized by ***Best Lawyers in New England*** as the 2017 **"Lawyer of the Year"** in Labor Law – Management for the Boston, MA region. He was also named a **"Best Lawyer"** in the categories of Labor & Employment Law and Employment Law – Management.

A nationally-renowned labor and employment law attorney, Joe has extensive experience advising clients with collective bargaining, labor and employment counseling and litigation, and arbitration. Joe has been selected for inclusion on the ***Best Lawyers*** list for almost 20 years at local, regional and national levels.

Best Lawyers is the "oldest and most respected peer-review publication in the legal profession," and recognition is widely regarded as a significant honor conferred on a lawyer by his or her peers. Congratulations, Joe!

New EEOC Guidance Highlights Important Considerations For Workplace Retaliation Claims

By Jacqueline M. Robarge

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued a new "Enforcement Guidance" addressing workplace retaliation claims. This is the first time in nearly 20 years that the EEOC has updated its official Enforcement Guidance on this topic.

Although the Enforcement Guidance is not formally binding, most of the principles it details are well established, and courts often give significant weight to the EEOC's views in deciding these types of cases. Further, EEOC investigators will almost certainly consider the Enforcement Guidance in evaluating potential claims of workplace retaliation and deciding whether to initiate litigation. Accordingly, employers should carefully review the Enforcement Guidance and consider how their policies and practices may need to be modified.

Background

Since 1998, when the EEOC's Enforcement Guidance in this area was last revised, the percentage of employment discrimination charges alleging unlawful retaliation has more than doubled, with nearly 40,000 charges alleging retaliation filed with the EEOC in 2015 alone. Indeed, since 2009, retaliation has been the single most frequently alleged basis of discrimination under the federal equal employment opportunity ("EEO") statutes.

Further, over the intervening years, the Supreme Court and lower federal courts have issued a number of significant rulings regarding employment retaliation claims. Thus, the EEOC's updated Enforcement Guidance seeks, in part, to analyze and distill how courts have formulated and applied these precedents.

The major portions of the new Enforcement Guidance are summarized below.

Overview Of Retaliation Claims

Unlawful retaliation occurs when an employer takes a "materially adverse action" against an employee in response to his or her engaging in activity in furtherance of the statutes enforced by the EEOC, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), Title V of the Americans with Disabilities Act, the Rehabilitation Act, the Equal Pay Act, and Title II of the Genetic Information Nondiscrimination Act.

To establish a claim of retaliation, a plaintiff must establish that (1) he or she engaged in "protected activity," (2) the plaintiff was subjected to a "materially adverse action," and (3) a causal connection exists between the protected activity and the materially adverse action.

Protected Activity

As the Enforcement Guidance explains, a plaintiff alleging retaliation must first show that he or she engaged in protected activity, either by participating in an EEO process or by expressing opposition to an unlawful discriminatory practice.

Participation in an EEO process refers specifically to asserting a discrimination claim or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the EEO laws. Notably, an individual can establish protected "participation" even if the underlying discrimination claim was not meritorious or was not timely filed. Likewise, a complainant alleging retaliation need not show that he or she actually believed that the plaintiff in the EEO proceeding was the victim of unlawful discrimination.

An individual is also protected from retaliation by an employer for opposing any practice made unlawful under the EEO laws. "Opposition" is construed broadly and includes actions such as complaining to a manager about alleged discrimination, intervening to protect a perceived victim of discrimination, refusing to obey an order reasonably believed to be discriminatory, and calling public attention to an employer's alleged discrimination.

A plaintiff must demonstrate that his or her opposition was reasonable in form (*e.g.*, not violent or inordinately disruptive) and motivated by conduct believed, in good faith, to be unlawfully discriminatory. However, that belief need not be objectively correct. Thus, for instance, if an employee honestly, but incorrectly, believes that he was denied a promotion based on his race and complains about that decision, the employer may not penalize the employee for raising the complaint, even if the employee's race played no role whatsoever in the decision.

This is a particularly crucial point for an employer to keep in mind when a current employee asserts a claim of discrimination. Supervisors whose conduct is brought into question may well be upset and tempted to lash out against the employee for raising an accusation perceived as unfounded and damaging. Doing so, however, is likely to subject the employer to liability for retaliation, even if the underlying claim of discrimination is meritless.

Materially Adverse Action

As the EEOC's Enforcement Guidance goes on to detail, the second required element of a retaliation claim is a showing that the employer took a materially adverse action against the plaintiff. The term "materially adverse action" is construed broadly, encompassing any action that might deter a reasonable person from engaging in protected activity.

Notably, under the Supreme Court's 2006 *Burlington Northern v. White* decision, the "materially adverse action" standard for retaliation claims is broader than the "adverse action" standard applicable to other types of discrimination claims. For instance,

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if an employee alleges only that he received a negative performance review based on his religion, without any direct effect on his position or compensation, it is unlikely that the employee will succeed in demonstrating the requisite "adverse action" needed to support a religious discrimination claim. By contrast, if the negative performance review were motivated by the employee's participating in an EEO proceeding or complaining of discrimination, the review would likely qualify as a "materially adverse action" for purposes of a retaliation claim.

Other examples of materially adverse actions that may support a retaliation claim include a denial of a promotion or pay increase; a demotion or pay cut; a disciplinary warning, suspension, or termination; an unwanted job transfer; and any other action that may diminish an employee's work status or make the employee believe that his or her job is in jeopardy.

Importantly, a materially adverse action may even take place outside the workplace or have no direct effect on a plaintiff's employment. Examples include disparaging an individual to others or the media, subjecting a complainant to verbal abuse, threatening an employee with deportation, making false reports to the authorities, or taking some negative action toward a person in a close relationship to the plaintiff. Any such action may qualify as a "materially adverse action" if it would tend to deter a reasonable person from engaging in protected activity, even if the adverse action is not directly related to the individual's employment.

Causal Connection

Finally, a plaintiff alleging retaliation must show a causal connection between his or her protected activity and the materially adverse action. For most retaliation claims, this requires a showing that "but for" an unlawful retaliatory motive, the employer would not have taken the adverse action. Thus, even if a retaliatory animus partially motivated an adverse action, the employer may still be able to prevail, if it can show that the action nonetheless would have been taken for other, non-retaliatory reasons.

However, for Title VII and ADEA retaliation claims brought by federal-sector employees, a broader standard applies. In such cases, retaliation may be established by showing that protected activity was a "motivating factor" in the adverse action, even if other factors also motivated the action.

Defeating Retaliation Claims

The Enforcement Guidance also includes a section entitled "Examples of Facts That May Defeat a Claim of Retaliation." As that section details, an employer may prevail on a claim of retaliation by proving that the action at issue was motivated by legitimate factors, such as poor performance, insufficient job qualifications, misconduct, or a reduction in force.

Recommendations For Employers

In light of the issues highlighted in the EEOC's updated Enforcement Guidance, there are a number of steps that we suggest employers consider taking. (These recommendations closely mirror the "Promising Practices" – a term preferred by the EEOC over the more common "Best Practices" – that the EEOC outlines in the concluding section of the Enforcement Guidance.)

First, employers should carefully review the Enforcement Guidance and consider, in consultation with employment counsel, how their policies and practices relating to workplace retaliation may need to be revised.

Second, managers, supervisors, and human resources personnel should receive periodic training on how to avoid potential claims of retaliation, including recognizing and responding appropriately to activity protected under the EEO laws.

Additionally, while a discrimination claim remains pending, whether with an agency or a court, an employer might periodically check in with managers and other involved parties to ensure that unlawful retaliation prompted by the claim does not occur.

Finally, employers should remain alert for further legislative, agency, and court developments in this area of the law.

Please feel free to contact any of our experienced employment attorneys if you have questions about the EEOC's updated Enforcement Guidance or any related issues.

Federal Government Announcements Keep Employers On Their Toes During H-1B Filing Season

By Julie A. Galvin

On April 7, 2017, U.S. Citizenship and Immigration Services ("USCIS") announced that it had received a sufficient number of H-1B visa petitions – approximately 199,000 – over the first five business days of the filing period to reach the statutory cap for fiscal year ("FY") 2018. Accordingly, as it has done for the past several years, USCIS conducted a random computer generated lottery to determine which H-1B petitions would be processed.

At the same time, USCIS and other federal agencies issued announcements concerning potentially significant changes to the H-1B program, which employers that rely on H-1B employees for their staffing needs should monitor closely.

Background

H-1B visa petitions are filed on behalf of foreign nationals whom employers wish to hire in occupations that require the application of highly specialized knowledge and completion of at least a Bachelor's degree in the field. Examples of such occupations include engineers, physicians, teachers, and accountants.

H-1B visas are subject to an annual, statutory quota of 65,000. An additional 20,000 additional H-1B visas are set aside for foreign nationals who have earned an advanced degree from a U.S. college or university.

Options For Employers Following Lottery

Most employers must now wait until April 1, 2018, to submit new H-1B petitions that are subject to the annual quota. However, USCIS will continue to accept and process petitions that are exempt from the quota, such as petitions to allow workers who have already been approved for H-1B visas to change employers, extend their status, change the terms of a previously approved petition, or work concurrently under a second H-1B petition.

Additionally, USCIS will continue to accept and process H-1B petitions from employers that are exempt from the annual quota. Such employers include U.S. colleges and universities and certain non-profit institutions affiliated with them, as well as certain non-profit and governmental research organizations.

Announcements By Federal Agencies

While employers were in the process of preparing and filing their H-1B petitions for FY2018, several federal government agencies issued announcements that may significantly affect the H-1B program.

First, in anticipation of the H-1B filing season, USCIS announced that it would temporarily suspend "premium processing" of H-1B petitions for approximately six months, effective April 3, 2017, the first day of filing for FY2018. Premium processing allows employers to pay an additional filing fee of $1,225 in exchange for USCIS's commitment to adjudicate the case within 15 calendar days.

Then, on March 31, 2017, USCIS officially rescinded previous guidance stating that an entry-level computer programming job automatically qualifies as a "specialty occupation" for H-1B purposes. Instead, USCIS will focus on each computer programming position individually to determine whether it necessitates at least a Bachelor's degree, as the H-1B program requires.

On April 3, 2017, USCIS also announced its intention to take a "more targeted approach" to ferret out fraud in the H-1B program. Specifically, officers will make unannounced site visits to H-1B worksites throughout the country, with a particular focus on cases where (i) USCIS cannot validate the employer's basic business information through commercially available data; (ii) an employer is "H-1B-dependent" – *i.e.*, the employer has a high ratio of H-1B workers to U.S. workers, as defined by statute; or (iii) an employer petitions for H-1B workers who would work off-site, such as at an end-client's location. Although site visits are not new – USCIS has conducted random visits since 2009 to ensure H-1B employers are in compliance with the program – these more targeted visits will allow USCIS to focus its resources on situations where fraud and abuse of the H-1B program are more likely to occur.

In addition to USCIS, the Department of Labor ("DOL") and the Department of Justice ("DOJ") recently followed suit with their own announcements. The DOL announced plans to protect American workers from discrimination in connection with the H-1B program, including by rigorously using its existing authority to initiate investigations of apparent H-1B program violations; considering potential changes to the Labor Condition Application in future H-1B petition cycles; and continuing to engage stakeholders regarding how the H-1B program might be improved to provide greater protections for U.S. workers.

Likewise, the DOJ announced that it would investigate employers that appear to have discriminated against U.S. workers by showing a preference for the H-1B program.

Finally, on April 18, 2017, President Trump issued an Executive Order encouraging employers to "hire American." Although the Order does not change any existing rules, it directs an overall review of the H-1B program, with an aim to prioritize the most skilled and highest paid positions.

Recommendations For Employers

While these recent announcements seem likely to affect many types of employers, they may have the greatest impact on outsourcing and computer IT consulting companies, along with smaller start-ups and technology

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Federal Government Announcements Keep Employers On Their Toes During H-1B Filing Season

companies that regularly place workers with end-user clients.

Regardless of their particular business and nature, however, there are a number of important steps we recommend for *all* employers that use the H-1B program to hire foreign workers:

- Employers that use the H-1B program to hire computer programmers should be sure that the positions are sufficiently complex to require at least a Bachelor's degree.
- Employers should thoroughly review H-1B public access files to ensure that they are compliant with the regulations.
- Each H-1B employer should ensure that it has a procedure in place for responding to an unannounced site visit by a USCIS agent. This is particularly important for newer companies and businesses that place H-1B workers off-site.
- H-1B-dependent employers should ensure that they are complying their obligations to first recruit U.S. workers.
- Employers should review their affiliations with non-profit institutions to determine if they would qualify for cap-exempt visas.
- Employers should consult experienced immigration counsel to determine whether any of their H-1B workers may be eligible for any additional types of visas.
- Finally, employers should stay alert for further agency announcements, in light of the Trump Administration's stated intention to crack down on perceived abuses in the H-1B program.

The Firm regularly processes H-1B visa petitions, and we would be happy to address any questions pertaining to the recent federal agency announcements or the H-1B visa process in general.

Chambers USA 2017 Recognizes Sara Goldsmith Schwartz And William E. Hannum III

RANKED IN USA CHAMBERS AND PARTNERS 2017

LEADING INDIVIDUAL

Schwartz Hannum PC is thrilled to announce that **Sara Goldsmith Schwartz** and **William E. Hannum III** have been recognized by Chambers and Partners USA as leading attorneys in labor and employment law in Massachusetts. This is the twelfth consecutive year that Sara has been honored, and Will's fifth year being acknowledged by Chambers.

We are also thrilled that Chambers USA has listed Schwartz Hannum PC as a **"Noted Firm"** in the Labor & Employment – Massachusetts practice area.

In 2017 commentators describe Sara as *"very sharp and on point"* and *"extremely attentive to client needs"* and Will as a *"good counselor"* who is *"solid across the board."*

The rankings, which are determined by a rigorous process that includes a detailed written submission by the Firm and in-depth, objective research and interviews, were published in the recent Chambers USA 2017 guide. Chambers and Partners publishes guides worldwide, and has been a recognized leader in its field since 1990.

Congratulations to Sara and Will, and to the entire Schwartz Hannum team for their excellent work supporting all of our clients!

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NLRB Continues To Assert Jurisdiction Over Non-Teaching Employees Of Religiously Affiliated Schools

entanglement with the religious mission of the schools, in violation of the First Amendment's Establishment Clause.

For decades, however, the Board has maintained that *Catholic Bishop* does not categorically preclude it from exercising jurisdiction over *all* employees at religiously-affiliated institutions. Thus, in *Hanna Boys Center,* 284 NLRB 1080 (1987), *enf'd,* 940 F.2d 1295 (9th Cir. 1991), *cert. denied,* 504 U.S. 985 (1992), the Board held that it could appropriately exercise jurisdiction over non-teaching employees of a religious institution who do not play a specific role in fulfilling the religious mission of the organization.

Along similar lines, in *Pacific Lutheran University,* 361 NLRB No. 157 (2014), the Board announced that it would decline to exercise jurisdiction over faculty members of a self-identified religious college or university if the institution (1) holds itself out as providing a religious educational environment, and (2) holds the faculty out "as performing a specific role in creating or maintaining" that environment. (Given the clearly non-teaching roles of the University's housekeepers, the Board did not directly apply this standard in *St. Xavier*.)

The Board's *St. Xavier* Decision

In *St. Xavier,* the Board adhered to the precedent it had established in *Hanna Boys Center.* Specifically, the NLRB found that because the University's housekeepers provide wholly secular services, with no expectation that they further the University's religious mission, exercising jurisdiction over them would not implicate the types of First Amendment concerns that the Supreme Court cited in *Catholic Bishop.*

The Board emphasized several specific factors in support of its ruling:

- The employees' job offer letters contained no reference to religion.
- The University did not require that the employees be of, or abide by, any religious faith or beliefs.
- The employees' job evaluations contained no reference to religion.
- At no time were the employees instructed to proselytize or engage in similar religious activities.

In rendering its decision, the Board rejected the far more restrictive standard set forth by the D.C. Circuit Court of Appeals in *University of Great Falls v. NLRB,* 278 F.3d 1335 (D.C. Cir. 2002). In *Great Falls,* the D.C. Circuit held that the very act of analyzing the job functions of employees at a religiously-affiliated institution runs afoul of the First Amendment, and, therefore, that the NLRB may *never* assert jurisdiction over employees of such institutions.

In his dissent in *St. Xavier*, Acting Chairman Philip A. Miscimarra agreed with *Great Falls,* cautioning that while "this case might look like an easy one – most would view housekeeping as a secular activity – cases involving nonteaching employees may present facts that lead the Board into even deeper entanglements with an institution's religious mission." The Board majority in *St. Xavier*, however, concluded that *Great Falls* sweeps too broadly in restricting collective bargaining rights afforded to employees under the Act.

Implications For Employers

Despite *St. Xavier* and similar Board rulings entrenching the NLRB's purview over certain employees at religiously-affiliated educational institutions, the larger legal landscape remains unsettled. The D.C. Circuit's ruling in *Great Falls* illustrates a contrary position and suggests that other courts (including, potentially, the Supreme Court) may similarly reject the Board's reasoning in this area.

In addition, all employers, regardless of geographic location, generally have a right to appeal to the D.C. Circuit from adverse Board decisions. As the *Great Falls* holding suggests, the D.C. Circuit is likely to be much more sympathetic than the Board to a school's argument that its religious affiliation precludes the NLRB from asserting jurisdiction over its employees.

Thus, pending greater clarity in this area, religiously-affiliated educational institutions should stay alert for further developments and promptly notify legal counsel upon learning of a union representation petition filed on behalf of any of their employees.

If you have any questions about the Board's St. Xavier *decision or its implications, or if you would like guidance regarding any other union issue affecting your organization, please do not hesitate to contact one of our experienced labor attorneys.*

NLRB Continues To Assert Jurisdiction Over Non-Teaching Employees Of Religiously Affiliated Schools

By Brian B. Garrett

In a recent ruling, *Saint Xavier University and Service Employees International, Local 1*, Case 13-RC-092296, the National Labor Relations Board (the "Board" or "NLRB") held that housekeepers at a religiously-affiliated higher education institution had collective bargaining rights under the National Labor Relations Act (the "Act").

In its decision, the Board reaffirmed its position that it may assert jurisdiction over employees of religiously-affiliated institutions unless their "actual duties and responsibilities require them to perform a specific role in fulfilling the religious mission of the institution."

Background

In *St. Xavier*, the Service Employees International Union, Local 1, petitioned to represent a unit of housekeepers employed by Saint Xavier University (the "University"). The University, a private, non-profit higher education institution in Illinois established under and affiliated with the Roman Catholic Church, opposed the petition on the basis that it was fully exempt from the Act under the U.S. Supreme Court's ruling in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In *Catholic Bishop*, the Supreme Court held that the Board could not assert jurisdiction over lay teachers employed by a group of parochial schools because doing so would create a significant risk of government

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Independent Schools Webinar/Seminar Schedule

September 28, 2017
Risk Management Strategies For Off-Campus Trips And Activities
3:00 p.m. to 4:30 p.m. (EDT)

October 12, 2017
Legal Adventures And Hot Topics In Independent Schools: An Annual Review
8:30 a.m. to 10:30 a.m. at SHPC

October 27, 2017
Drawing The Lines: Exploring Student Disciplinary Policies And Protocols
12:00 p.m. to 1:30 p.m. (EDT)

November 15, 2017
Drafting And Enforcing An Ideal Enrollment Agreement
12:00 p.m. to 1:30 p.m. (EDT)

December 6, 2017
Accommodating Applicants And Students With Disabilities
3:00 p.m. to 4:30 p.m. (EDT)

January 24, 2018
Contracts And Compensation For The Head Of School: Tips, Traps And Best Practices
12:00 p.m. to 1:30 p.m. (EDT)

January 26, 2018
Easing The Administrative Burden: Best Practices For Implementing Electronic Signatures On School Forms
3:00 p.m. to 4:30 p.m. (EDT)

Labor And Employment Seminar/Webinar Schedule

September 14 & 15, 2017
(Two Day Seminar)
Employment Law Boot Camp
Sept. 14: 8:30 a.m. to 4:00 p.m.
Sept. 15: 8:30 a.m. to 4:30 p.m.
at SHPC

October 5, 2017
But Can You Enforce It? Restrictive Covenants And Your Business
8:30 a.m. to 10:30 a.m. at SHPC

November 9, 2017
Annual Seminar: Hot Topics In Labor And Employment Law
8:00 a.m. to 12:00 p.m. at
The Andover Inn

December 14, 2017
Getting It Write: Employee Handbooks (Webinar)
12:00 p.m. to 1:30 p.m. (EDT)

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, **Kathie Duffy**, at **kduffy@shpclaw.com** or **(978) 623-0900** for more detailed information on these seminars and/or to register for one or more of these programs.

Schwartz Hannum PC focuses on labor and employment counsel and litigation, business immigration, and education law. The Firm develops innovative strategies that help prevent and resolve workplace issues skillfully and sensibly. As a management-side firm with a national presence, Schwartz Hannum PC represents hundreds of clients in industries that include financial services, healthcare, hospitality, manufacturing, non-profit, and technology, and handles the full spectrum of issues facing educational institutions. Small organizations and Fortune 100 companies alike rely on Schwartz Hannum PC for thoughtful legal solutions that help achieve their broader goals and objectives.

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