Labor & Employment

Sexual Orientation Discrimination In the Summer of #LoveWins

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A MARRIAGE equality banner in Manhattan following the June 26, 2015 5-4 decision of the U.S. Supreme Court in *Obergefell v. Hodges*.

BY NANCY V. WRIGHT AND JANICE P. GREGERSON

Borrowing from #LoveWins, a popular hashtag used in social media, many may call the summer of 2015 the summer that love won.[1] On June 26, 2015, the U.S. Supreme Court issued a landmark decision in *Obergefell v. Hodges*,[2] holding that the 14th Amendment requires every state to license a marriage between individuals of the same sex and to recognize such marriages licensed in another state.

On the heels of that decision, the U.S. Equal Employment Opportunity Commission's Office of Federal Operations[3] (EEOC-OFO) announced in a federal sector case, *Baldwin v. Department of Transportation*,[4] that employment discrimination on the basis of sexual orientation is prohibited under Title VII of the Civil Rights Act of 1964. *Baldwin* caused many to believe that a new protected class—sexual orientation—had been created. A closer analysis of *Baldwin*, however, reveals that the EEOC did not create a new protected class based on sexual orientation. Further, the EEOC's decision is not entitled to deference by the federal courts.

Baldwin v. Department of Transportation. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion. In 1972, Congress enacted 42 U.S.C. §2000e–16, which extended the protections of Title VII to federal employees.

Like their private sector counterparts, federal sector employees must exhaust their administrative remedies prior to bringing suit for employment discrimination in federal court. First, a federal sector employee must file an informal complaint of discrimination with the equal employment opportunity office of the federal agency where he or she works.[5] After informal attempts to resolve the matter have failed, the employee may then file a formal complaint of discrimination to be investigated by the equal employment opportunity office of the agency.[6] Following the conclusion of agency investigation, the employee may either elect to request the issuance of a Final Agency Decision (FAD) or a hearing before an EEOC Administrative Judge or, in certain circumstances, to proceed directly to federal district court.[7] An employee who elects to receive a FAD or hearing before an EEOC Administrative Judge may appeal the decision to the EEOC-OFO.[8] If still dissatisfied with the result, the employee may then bring "a civil action in an appropriate United States District Court."[9]

> Like their private sector counterparts, federal sector employees must **exhaust their administrative remedies** prior to bringing suit for employment discrimination in federal court.

Such was the process followed by the complainant in *Baldwin*. David Baldwin was a supervisory air traffic control specialist with the Federal Aviation Administration in Miami. Assuming that he would automatically be considered for an open permanent front-line manager position, Baldwin did not apply for the position. In July 2012, when he learned that he had not been selected for the position, Baldwin filed a complaint of discrimination with the Department of Transportation (DOT) alleging that he had not been selected because of his sexual orientation.

Baldwin's complaint could not be resolved during informal counseling, and he filed a formal complaint of discrimination in December 2012. Following completion of the DOT's investigation, Baldwin requested a FAD. On July 12, 2013, the DOT issued a FAD, finding that it did not have jurisdiction over Baldwin's complaint as he was alleging discrimination on the basis of sexual orientation.

Baldwin appealed the FAD to the EEOC-OFO. In its decision, the EEOC-OFO acknowledged that "the narrative accompanying his formal complaint makes it clear that [Baldwin] believes he was denied a permanent position because of his sexual orientation" and that Title VII does not explicitly list sexual orientation as a prohibited basis for employment actions. On July 15, 2015, the EEOC-OFO reversed the agency's determination that there was no jurisdiction of sexual orientation claims under Title VII and remanded Baldwin's complaint back to DOT's EEO office for determination on the merits.[10]

The EEOC's Decision Did Not Create a New Protected Class. Following the issuance of the EEOC-OFO decision, various news outlets and blogs, characterizing the decision as "groundbreaking" or "landmark," proclaimed that sexual orientation discrimination would now be prohibited under Title VII.[11] The reality is that the decision did little to advance protection of sexual orientation discrimination in employment, at least with respect to private sector employees. The EEOC-OFO decision rests on three different justifications for the protection of sexual orientation under Title VII, all of which have been previously addressed by various federal courts and none of which have been universally adopted by the federal courts.

These justifications are:

• First, the EEOC-OFO opined that "sexual orientation is inextricably linked to sex," and as such, the EEOC-OFO went on to conclude that "sexual orientation is inherently a sex-based consideration" of the type prohibited by Title VII. Thus, the EEOC-OFO concludes Title VII prohibits discrimination on the basis of sexual orientation.

• Second, the EEOC-OFO proffered that sexual orientation discrimination could also be considered associational discrimination. In associational discrimination cases, the aggrieved asserts that he or she was discriminated against not based on his or her membership in a protected class, but based on his or her close association, either through marriage or other such close relationships, with someone in a protected class.[12] With respect to a claim of associational discrimination based on sexual orientation, it would be based on the allegation that "his or her employer took his or her sex into account by treating him or her differently for *associating* with a person of the same sex."[13]

• Third and finally, the EEOC-OFO proffered that sexual orientation discrimination was covered under Title VII under the theory of gender stereotyping. Under this theory, the employer is alleged to have treated the employee differently because of assumed societal norms as to how a male or female should behave.

The federal courts are unlikely to apply any of these theories to private sector litigants. First, while there may be some logic that discrimination on the basis of sexual orientation is "inherently sex-based," the EEOC-OFO's proposition that a legislative change is not necessary to prohibit discrimination on the basis of sexual orientation is flawed. To this end, the federal courts (some within the same circuit) are divided in their interpretation of whether "sex-based" discrimination includes discrimination on the » Page 14

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Take a **Fresh Look** at the FLSA

New activity addresses overtime, interns and independent contractors.

BY LAWRENCE PEIKES AND CHRISTINE SALMON WACHTER

This past summer yielded a slew of activity on the wage and hour front, including newly proposed regulations issued by the U.S. Department of Labor (DOL) that will, if finalized, severely restrict the scope of the overtime exemptions for so-called white-collar workers under the Fair Labor Standards Act (FLSA).

There was also a Second Circuit ruling addressing the exempt status of lawyers hired on a temporary basis to perform document reviews; another significant Second Circuit opinion interpreting the FLSA, this time in regard to the status of unpaid interns; and a new and clear warning from the head of the DOL's Wage and Hour division that independent contractor classifications will be closely scrutinized by a watchful and skeptical eye. Management-side attorneys take note.

The DOL's Proposed Update to the FLSA's Overtime Regulations. On June 30, 2015, the DOL issued a set of proposed regulations designed to dramatically alter, and narrow, the most commonly invoked exemptions to the FLSA's minimum wage and overtime requirements for "white-collar" employees. It is estimated that, if implemented in the proposed form, some five million heretofore exempt workers would suddenly become eligible for overtime pay.

The 10-year-old regulations currently in place limit the white-collar exemptions to employees whose "primary duty" consists of exempt executive, administrative or professional work and are paid a salary of at least $455 a week, or $23,660 a year. Generally speaking, an employee satisfies the "primary duty" test for executive status if he or she primarily performs management duties and directs the work of at least two other employees; an exempt administrative employee must primarily perform office or non-manual work directly related to general business operations and exercise independent judgment; and a putative professional will qualify for an exemption if he or she primarily engages in work requiring advanced knowledge "in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction" and consistently exercises discretion. For now, at least, the DOL has not proposed any changes to the primary duty test.

Rather, the DOL has fixed the salary standards in its sights. The proposed regulations seek to more than double the minimum salary requirement for exempt status to $921 per » Page 12

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Violence in the **Workplace:** What Is An Employer's Liability?

BY SLOANE ACKERMAN AND ERIN P. ANDREWS

The WDBJ massacre in Virginia in August 2015 was the harrowing culmination of an unstable individual's turbulent relationship with his former employer.

The Occupational Safety and Health Administration (OSHA) estimates that approximately two million Americans are exposed to workplace violence each year.[1] Employers seeking to ensure a workplace free from violence can face liability for taking too little or too much action to protect their employees. While safety should be an employer's number one priority, this article discusses the spectrum of claims employers can face as a result of violence in the workplace and provides practical tips for employers to avoid both tragedy and liability.

An Employer's Obligation to Provide a Safe Work Environment. There are no federal statutes or regulations that expressly require employers to prevent workplace violence, but the Occupational Safety and Health Act (OSH Act) obligates an employer to provide a safe work environment. Specifically, the OSH Act's general duty clause requires an employer to provide a workplace free from recognized hazards that cause or are likely to cause death or serious physical harm to its employees.[2]

OSHA's role in enforcing the OSH Act's general duty clause is limited. But the Secretary of Labor can issue citations to employers for failing unannounced inspections.[3] In 2011, for example, OSHA fined a New York substance abuse facility for violating the general duty clause after an inpatient fatally attacked an employee.[4] OSHA determined that the facility had not established adequate safeguards against workplace violence.[5] In settling the matter, the substance abuse facility agreed to pay a reduced fine of approximately $17,000, as well as create a violence prevention program, establish a system to identify patients with violent propensities, ensure adequate staffing, and conduct extensive training and regular site-specific workplace violence hazard analyses.[6]

State laws may supplement the OSH Act's requirements. The New York Public Employee Safety and Health Act (PESH Act), for example, requires public employers with at least 20 full-time employees to design written workplace violence protection programs that identify methods to prevent workplace violence, including, but not limited to, making high-risk areas more visible to the public, installing good external lighting, using drop safes to minimize cash on hand, providing training in conflict resolution and non-violent self-defense responses, and implementing an effective reporting system for acts of aggression.[7] The PESH Act is similarly enforced by unannounced inspections, which may result in fines of up to $200 for each day an employer remains uncompliant.[8] The New York State Department of Labor has developed a compliance guide to help assist public employers in implementing workplace violence protection programs, which is available on its website.[9]

OSHA has also published recommendations on its website for workplace violence prevention programs in at-risk industries, including health care and social services and late-night retail industries, though many of its recommendations can broadly apply to all industries. These recommendations include:

• Performing a worksite analysis of security;

• Implementing safety training for employees and management;

• Evaluating recordkeeping and workplace prevention programs;

• Allocating sufficient resources to effectuate prevention programs;

• Developing a system of accountability for implementing workplace violence protection programs (e.g., creating a safety team); and

• Creating a zero-tolerance policy for violence in the workplace.[10]

An Employer's Liability for Actual or Threatened Workplace Violence. An employee injured on the job has no private right of action under the OSH Act or the PESH Act. Generally, employees are limited to workers' compensation benefits for injuries arising out of or in the course of their employment.[11] In New York, however, there is an exception to workers' compensation exclusivity for intentional torts, where the employee's injury is the product of an intentional or deliberate act by an agent of the employer, such as assault.[12]

An employer may be liable for workplace violence, moreover, under several common-law negligence theories, including negligent hiring, retention, and supervision. Under these theories, an employer may be liable for injuries caused by any violent conduct of its employees if the employer knew or should have known that an employee posed a risk of harm to others.[13]

To minimize the » Page 14

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Inside

Pre-Employment **Testing and Screening:** Common Practices, Potential Issues

BY JAMES R. HAYS
AND SEAN J. KIRBY

Many employers conduct some type of pre-employment testing and/or screening of prospective employees. These tests run the gamut from credit checks and criminal history background checks to drug and cognitive testing.

While such testing and screening may be common, over the past few years many jurisdictions have enacted laws which limit the types of pre-employment testing and screening employers may conduct. Similarly, the U.S. Equal Employment Opportunity Commission (EEOC) has been active in litigating actions against employers where it believes certain pre-employment testing or screening to have a disparate impact on the hiring of individuals in a protected class. In light of these recent trends, it is important for employers to review the types of pre-employment testing and screening that they are conducting and to be aware of potential pitfalls associated with such testing.

Credit Checks

One common form of pre-employment screening is to conduct credit checks of potential employees. In most jurisdictions, pre-employment credit checks are legal provided that the employer complies with the Fair Credit Reporting Act (FCRA), and any similar state or local laws, by obtaining the applicant's consent to obtain the credit report, providing the applicant with a warning and a copy of the report if the applicant is going to be denied employment on the basis of the report, and providing the applicant an adverse action notice if the employer ultimately does not hire the applicant because of the content of the report. However, many jurisdictions have recently enacted laws (or have legislation pending) that will severely limit or bar an employer's ability to utilize pre-employment credit checks in making hiring decisions.

For instance, as of Sept. 3, 2015, employers in New York City are now prohibited, in all but limited circumstances, from requesting or using consumer credit reports in any employment decision. This law not only bars employers from considering credit reports themselves, but also prohibits the consideration of credit scores or any other credit information. While there are some exceptions to the law for employers hiring into certain positions in certain industries, such as certain positions in the financial services sector or positions in which an employee requires security clearance under federal or state law, the vast majority of employers who hire employees in New York City can no longer request credit information from current or prospective employees.

In addition to New York City, according to the National Conference of State Legislatures, 11 states currently impose limits on an employer's ability to use credit information in making employment-related decisions, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington.[1] Likewise, 31 bills in 17 states are pending regarding the use of credit information in employment decisions, with 28 of those bills addressing restrictions or exemptions on an employer's use of credit information in making employment decisions.[2]

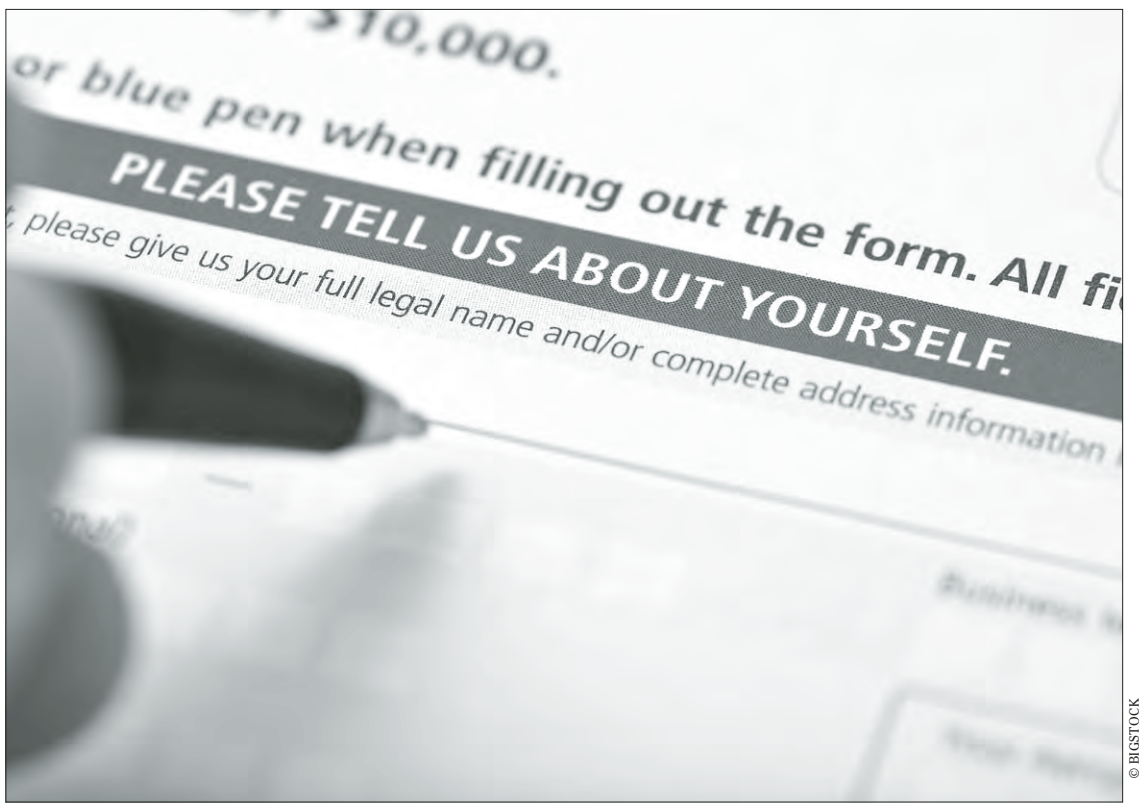
In light of the increasing number of jurisdictions that are imposing restrictions or outright bans on the use of credit information in making employment decisions, employers who utilize credit checks should be vigilant in monitoring the laws of the jurisdictions in which they do business to ensure that they do not run afoul of new legislation. Likewise, in states that have not sought to limit the use of credit checks, employers still need to ensure that their credit check procedures and reports are FCRA compliant, thereby avoiding potential litigation arising out of the use of credit checks.

Criminal History Records

As with credit checks, many employers also utilize background checks regarding prospective employee criminal history records when making employment decisions. However, also like credit checks, many jurisdictions and the EEOC have been active in monitoring or attempting to limit this practice through legislation and litigation.

In 2012, the EEOC issued enforcement guidelines regarding the use of arrest and conviction records in employment decisions.[3] These enforcement guidelines explained how the use of an individual's criminal history in making employment decisions could potentially violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). More specifically, the enforcement guidelines discussed disparate treatment liability and disparate impact analyses under Title VII resulting from an employer's use of criminal history records in employment decisions. The guidelines provided "employer best practices" in the use of criminal history records in employment decisions, which included, among other things: (1) eliminating policies or practices that exclude people from employment based on any criminal record; (2) developing a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct; and (3) limiting inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.[4]

Applying these guidelines, the EEOC has been active in attempting to limit what it deems to be overbroad screening of prospective employees' criminal history records. For example, in the matter of *EEOC v. BMW Manufacturing Co.*, Case No. 13-cv-1583 (D. S.C.), the EEOC and BMW entered into a consent decree to resolve a lawsuit in which the EEOC alleged that BMW's process of checking applicants' criminal histories disproportionately screened out African-American candidates. Specifically, the EEOC alleged that BMW's former policy of barring employment of individuals with convictions of certain types of crimes, regardless of when the conviction occurred or the severity of the crime, disparately impacted African-American applicants. As stated by P. David Lopez, EEOC General Counsel, in a press release announcing the settlement, the "EEOC has been clear that while a company may choose to use criminal history as a screening device in employment, Title VII requires that when a criminal background screen results in the disproportionate exclusion of African-Americans from job opportunities, the employer must evaluate whether the policy is job related and consistent with a business necessity."[5]



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In addition to the EEOC's actions, a number of jurisdictions have enacted laws limiting an employer's ability to consider an applicant's criminal history in making employment decisions. For example, New York City has enacted a law that goes into effect on Oct. 27, 2015, which prohibits employers from inquiring into candidates' criminal background at any time prior to extending a conditional offer of employment, except in instances where such information is otherwise mandated by federal, state, or local law.[6] Similarly, seven states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island) as well as numerous cities have enacted laws prohibiting employers from asking questions about a prospective employee's criminal history on a job application.

Given the EEOC's enforcement guidelines, litigation commenced by the EEOC, and the trend by state and city governments in prohibiting questions about an applicant's criminal history, employers who utilize criminal background checks/questioning should review their policies to ensure that the policies conform with the EEOC's enforcement guidelines. In particular, employers should review whether their criminal background screening results in the disproportionate exclusion of certain protected classes of employees and, if it does, employers must ensure that the policy is job related and consistent with a business necessity. Likewise, employers need to continually monitor the laws of the jurisdictions in which they do business to ensure that no prohibitions against questioning a prospective employee about their criminal history have been enacted and, if such laws have been enacted, employers should revise their employment policies and applications accordingly.

Drug Testing

Another type of testing that employers frequently utilize in screening applicants is testing for illegal drugs. In general, employer policies requiring post-offer, but pre-employment testing for illegal drugs are permissible. However, in enforcing such policies, employers must be wary not to run afoul of disability discrimination laws.

> Many jurisdictions have recently enacted laws (or have legislation pending) that will **severely limit or bar** an employer's ability to utilize pre-employment credit checks in making hiring decisions.

Indeed, the EEOC has instituted a number of lawsuits against employer use of pre-employment drug screening where the EEOC believes that such drug screening resulted in disability discrimination under the Americans with Disabilities Act (ADA). For example, in the matter of *EEOC v. Kmart*, 13-cv-2576 (D. Md.), the EEOC brought suit against Kmart alleging that its requirement of pre-employment drug screening was discriminatory under the ADA. In this matter, Kmart refused to hire a prospective employee because he did not provide the requisite urine sample for a drug screen, even though Kmart had been informed that his medical condition prevented him from providing such a urine sample. In the lawsuit, the EEOC alleged that Kmart failed to reasonably accommodate the prospective employee by not allowing him to utilize another type of drug screen before deciding not to hire him for failing to provide a urine sample. The parties entered into a settlement in January 2015 for $102,000 to resolve this matter.

In addition to potential liability under the ADA and related state disability discrimination laws, with the advent of legalized medical marijuana employers must also be careful not to deny employment for a positive marijuana drug screen where the employee is eligible to utilize medical marijuana. For instance, the New York Compassionate Care Act, signed into law on July 7, 2014, deems patients receiving medical marijuana to be "disabled" under New York State Human Rights Law. As a result, a New York employer may not withhold employment from an applicant who is entitled to use medical marijuana based solely on a positive drug screen for marijuana.[7]

In light of the EEOC's recent actions against employer's for violating the ADA with respect to pre-employment drug screening, as well as related legislation regarding medical marijuana, employers who utilize pre-employment drug screens for illegal drugs should review their policies to ensure that such policies address instances in which a reasonable accommodation will need to be provided to a prospective employee. Likewise, employers should stay abreast of the laws in their jurisdiction regarding legalized medical marijuana and any related prohibitions against adverse employment actions resulting from a positive drug screen.

Cognitive and Other Testing

Finally, a number of employers utilize pre-employment testing of prospective employees' cognitive abilities, physical abilities, and/or personality traits to determine whether an applicant is qualified for the job. However, as with the other types of testing/screening discussed above, the EEOC has issued a fact sheet regarding such testing and has brought a number of lawsuits challenging what is alleged to be discrimination arising out of such tests.

In December 2007, the EEOC issued a fact sheet titled Employment Tests and Selection Procedures, which addresses the propriety of pre-employment cognitive and other testing, and potential legal ramifications arising out of such testing.[8] After reviewing the statutes that may be implicated by such testing, including Title VII, the ADA, and the Age Discrimination in Employment Act, the EEOC offered its best practices for employers in conducting cognitive testing. These best practices include: (1) ensuring that employment tests are job-related; and (2) if a test screens out a protected group, determining whether there is an equally effective alternative selection procedure that has less adverse impact on protected groups.

Applying these best practices, the EEOC has brought a number of lawsuits involving instances in which the EEOC deemed an employer's cognitive testing to be discriminatory. For example, in August 2015, the EEOC and a major national retailer entered into a settlement agreement, in which the retailer agreed to pay $2.8 million to resolve claims that the pre-employment cognitive testing required by the employer disproportionally screened out potential employees based on their race and gender.[9] More specifically, the EEOC alleged that the employer's use of three employment assessments violated Title VII because the tests disproportionately screened out prospective employees for certain positions based on race and gender, and that such tests were not job-related and/or consistent with business necessity of the employer.

In light of the EEOC fact sheet and lawsuits addressing employer use of cognitive and other testing, employers should review their applicant screening tests to ensure that such testing is actually related to the job being applied for and that the testing does not result in the inadvertent screening out of a protected group from employment.

Conclusion

While pre-employment testing and screening continues to be a valid method of determining whether applicants are qualified for a position or a good fit for the company, employers need to ensure that such testing is compliant with EEOC guidelines and legislation enacted by the jurisdictions in which they do business, and does not disproportionately screen out prospective employees based upon protected characteristics. Accordingly, employers should review their pre-employment testing policies and procedures to ensure compliance with these laws and the EEOC guidance, and they should continue to monitor the laws of the jurisdictions in which they do business for new legislation that may affect the testing policies already in place.

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1. See Nat'l Conf. of State Legislatures, Use of Credit Information in Employment 2015 Legislation, June 2, 2015, available at http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-information-in-employment-2015-legislation.aspx.
2. Id.
3. See EEOC Enforcement Guidance No. 915.002, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," April 25, 2012, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
4. Id.
5. EEOC Press Release, Sept. 8, 2015, available at http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm.
6. In addition, with certain limited exceptions, New York state law prohibits employers from denying employment to a prospective employee based upon prior criminal convictions. See New York State Human Rights Law §296(15).
7. But see *Coats v. Dish Network*, 350 P.3d 849 (2015) (finding that since use of medical marijuana is illegal under federal law, employees can be terminated for violating their employers' drug policies).
8. EEOC Fact Sheet, "Employment Tests and Selective Procedures," available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last modified Sept. 23, 2010).
9. See EEOC Press Release, Aug. 24, 2015, available at http://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm.

Law Firms Must Address **Changing Employment Realities**

BY DAVID WIRTZ AND MAAYAN DEKER

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The demise of Dewey & LeBoeuf has been front-page news in this publication and many others for months, and it will undoubtedly be front-page news for many months to come. It is no wonder. People like train wrecks, particularly self-inflicted train wrecks, and most particularly train wrecks in which lawyers are the victims.[1]

This article is not about ways for law firms to avoid meeting the same end. Rather, it contemplates the new realities that law firms face with increasing frequency—litigation involving applicants and the law firm's current and former employees. It also offers suggestions for ways firms can reduce litigation risk by adopting methodologies more in line with current workforce trends and by understanding and addressing the new family-based priorities of their employees.

Too many law firms continue to underestimate the growing likelihood that there will be litigation with their own partners, associates, and staff—and may be unaware of the emerging risks and growing trends, including what has come to be known as "family responsibility discrimination." Before discussing this in detail, we offer a brief review of the current employment-related litigation landscape that law firm's face.

Employers nationwide are confronted with what seems like a never-ending wave of wage and hour collective/class actions, in which plaintiffs' lawyers seek their fees and enormous damages on behalf of large classes of employees for misclassifying them as ineligible for overtime, or requiring them to work off-the-clock, or for committing some hyper-technical violation of a statute or regulation. Law firms are no exception. For example, temporary attorneys employed by two local firms have sued, claiming they were misclassified and should have been paid overtime.[2]

Law firms have also been, and will continue to be, subject to lawsuits for unlawful discrimination. Following the 2008-2012 financial crisis, thousands of employees nationwide lost their jobs. Law firms were not immune, and downsized as well.[3] As a result,, law firms and employers generally saw an increase in discrimination-based litigation brought by current and former employees, claiming that race, national origin, sex (or some other category protected by federal, state or local law) drove the decision makers to fail to hire them, to terminate their employment, or to cause them to suffer some other adverse employment action, harassment or discrimination.[4]

The mere filing of complaints in these cases can have devastating consequences on a law firm's ability to recruit talented minority lawyers, the firm's reputation, and the firm's morale, regardless of the actual merits of the claims. The press, the firm's competitors, and the firm's own attorneys have ready access to daily court filings on the Internet, which are often further dispersed through social media. Plaintiffs' lawyers know this and their demand letters reflect the leverage that a threat of negative publicity can give them. Instituting a discrimination lawsuit is fairly simple. The specificity required remains minimal, even post-*Iqbal* and *Twombly*,[5] and a plaintiff can easily file a publicly-accessible complaint alleging discrimination against a law firm and sometimes its individual partners, shareholders, or employees. It is these unsworn complaints, sometimes filled with false or purposely inflammatory allegations, that can generate the first—and most damaging—headlines.

The filing of the complaint is also sometimes the first time a firm hears that it has allegedly discriminated against a former or current employee, and firms may find themselves spending thousands of dollars to investigate claims and many more thousands litigating, and potentially settling, the case. *Marchuk v. Faruqi & Faruqi* is a recent example.[6] The plaintiff in that case sought millions of dollars in damages and attorney fees for alleged unlawful sex discrimination. The jury awarded the plaintiff a mere $140,000; her attorneys were awarded nearly $223,000, but far less than the millions they sought for fees and costs. The defendant's fees can only be imagined. Both parties appealed to the Second Circuit, causing more headlines, fees, and costs, and as of August 2015, after the parties had litigated the case through trial, they settled for an undisclosed amount—hardly vindication for either party.[7]

It is certainly not news that negative publicity is bad, that litigation is expensive, and that law firms are no exception to these two general rules, and it is not the purpose of this article to delve any further into the costs (financial and non-financial) of litigation with employees. Rather, it is to suggest that there are the makings of a perfect storm on the horizon in a relatively new discrimination context—family responsibility discrimination—and that all law firms need to pay attention to this storm, perhaps more attention than the average business given the particular nature of those who often choose to work for law firms.

> The **mere filing of complaints** in these cases can have **devastating consequences** on a law firm's ability to recruit talented minority lawyers, the firm's reputation, and the firm's morale, regardless of the actual merits of the claims.

Family responsibility discrimination (FRD) is a category of protection that is not expressly addressed in federal, New York State or New York City law. Rather, it is a type of claim that has gained traction in the last decade or so—and will likely further develop in the future as a result of societal changes, shifting priorities, and changes to traditional gender roles.

What, then, is FRD? FRD is "discrimination against employees based on responsibilities related to care for family members, such as children, aging parents, or sick partners."[8] Discrimination claims brought under the standard categories protected by federal, state, or local law are included, but with the twist that FRD claims are founded in "family rights" or "caregiving responsibilities."[9] Since federal, New York state and New York City laws do not expressly recognize such rights and responsibilities, as noted above, the claims are filed under established discrimination prevention statutes like Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and separately, the Family and Medical Leave Act. Also, inferential claims under these statutes may not long be required, as laws are beginning to directly address these issues. For example, the District of Columbia Human Rights Act expressly incorporates "family responsibilities" into its protections.[10]

What kinds of FRD-related claims are we seeing? First, "FRD claims—most commonly, but not necessarily, brought by women—are often rooted in gender stereotyping."[11] Second, these kinds of lawsuits confront assumptions about the capabilities and/or commitment of working parents of both sexes who take leaves of absence to meet their caregiving responsibilities.[12]

For example, in *Walsh v. National Computer Systems*, the Eighth Circuit Court of Appeals upheld a verdict in favor of the plaintiff's hostile work environment claim, in which she alleged that she was subjected to numerous comments by her supervisor; that her supervisor called her son "the sickling" and that when she needed to leave work early to get her son from day care because he was ill, her supervisor asked, "Is this an April Fool's Joke? If so, not at all funny." When she fainted, her supervisor's response was to tell her: "You better not be pregnant again."[13]

Why the focus on FRD at this time, when it is not even expressly prohibited by federal, state or local law here in New York? The discussion below postulates several societal changes that have likely influenced the recent development of FRD litigation:

First, there has been an increase in the percentage of women entering the workplace generally[14] and the legal profession more specifically.[15]

Second, women continue to bear the brunt of family responsibilities, regardless of how many hours they spend at their job as employees.[16] The minimum billable hours requirement common in law firms, therefore, falls particularly hard on female lawyers.

Third, women have successfully entered the ranks as troops at law firms in large numbers, but the leadership roles remain disproportionately dominated by males.[17] Therefore, the majority of lawyers making policy decisions for their firms are males, who generally have fewer caregiving responsibilities.

Fourth, many of the new employees being hired are "Millennials" (i.e., those born between 1976 and 1994).[18] When it comes to their employment, they are generally characterized as caring more about having job flexibility, liking what they do (even if it means making less money), feeling included, having a "sense of purpose" and making an impact.[19] Their expectations and motivations often differ from those of previous generations.

Fifth, the nation's workforce has become extraordinarily mobile, and it is not uncommon for employees to leave jobs after a few years.[20] Law firms are no exception, particularly with newer lawyers.[21] As a result, employees may be more likely to move to firms that have a stronger focus on "work-life" balance, to seek flexible schedule arrangements that are more in tune with their preferences,[22] and less likely to tolerate law firms that fall short of these expectations.

Sixth, this desire for more flexibility is not coveted only by women. A recent article describes how male lawyers as well are increasingly prioritizing flexibility and a "work-life" » Page 13

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FLSA

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week, or $47,892 annually, representing the 40th percentile of earnings for salaried workers. In an effort to prevent the regulations from becoming outdated, the proposal provides for periodic automatic increases that would keep the minimum salary levels at the 40th percentile of weekly earnings for full-time salaried workers.

Over the course of a 60-day comment period, the DOL received over 250,000 submissions. As expected, criticism came primarily from a business community concerned about the potentially crushing cost of doubling the salary required for workers to be exempt from overtime. A number of commentators lamented the absence of any consideration for market variances: The salary threshold for exempt status is the same in Dubuque and Mobile as it is in New York and San Francisco. Support for the rule changes predictably came from unions, employee advocates and nonprofits, many of whom took the position that the new regulations would protect low income workers from exploitation and represent a much needed modernization of the white-collar exemptions.

Now that the comment period is over, the regulations are expected be finalized within the next several months. Employers may have as little as 120 days following publication to comply with the new regulations. Practitioners are therefore well-advised to encourage their clients to start preparing by identifying employees currently earning less than $50,440 a year (the estimated adjusted threshold if the regulations go into effect in 2016) who are classified as exempt and determining what impact the new salary limits will have on the company's organizational structure and bottom line. Although, contrary to expectations, the DOL did not make any changes to the primary duties test, practitioners should be alert to the possibility of further reshaping of the white-collar exemptions in the near future.

Second Circuit Rules That Attorney Tasked With Document Review Is Not Necessarily Exempt Under the FLSA. The white-collar exemptions recently took center stage in a case before the U.S. Court of Appeals for the Second Circuit that was closely watched by the legal community. At issue in *Lola v. Skadden, Arps, Slate, Meagher & Flom*, __ F. App'x __, 2015 WL 4476828 (2d Cir. July 23, 2015), was whether temporary lawyers retained by Tower Legal Staffing to perform document reviews for Skadden in connection with a multi-district litigation qualified for the FLSA's professional exemption, which applies to licensed attorneys engaged in the practice of law. The lead plaintiff, David Lola, albeit licensed, claimed to not actually be practicing law, and hence entitled to overtime pay, because he operated under the close supervision of Skadden attorneys in performing rudimentary tasks, in particular "(a) looking at documents to see what search terms, if any, appeared in the documents, (b) marking those documents into the categories predetermined by Defendants, and (c) at times drawing black boxes to redact portions of certain documents based on specific protocols that Defendants provided."

Skadden and Tower successfully sought dismissal of the complaint, with the district court holding that Lola, who rendered the services in North Carolina, where he resided, was not engaged in the practice of law as defined by North Carolina precedent. The Second Circuit had a different read of North Carolina precedent and reversed. As the Second Circuit saw it, the ethics opinion issued by the North Carolina State Bar relied upon by the district court strongly suggested that inherent in the concept of practicing law is "at least a modicum of independent judgment." Because Lola's complaint alleged that he exercised *no* such judgment whatsoever in performing his assigned tasks, "a fair reading of the complaint … is that [Lola] provided services that a machine could have provided," and therefore was not engaged in the practice of law, as required in order to qualify for the professional exemption.

The suit was sent back to the district court level, where the parties have turned their attention to discovery aimed at divining whether Lola actually exercised any legal judgment. In the meantime, this case serves as yet another reminder that the white-collar exemptions should never be viewed in cookie cutter fashion. Rather, the actual work performed by each employee classified as exempt must be examined closely to make sure the classification would pass close scrutiny by either a court or DOL auditors.

Second Circuit Adopts "Primary Beneficiary" Test for Determining Status of Interns Under the FLSA. The Second Circuit tackled another vexing and hotly contested FLSA-related question this summer, namely, in what circumstances will an intern working in the for-profit private sector qualify as an employee so as to garner protection under the FLSA's minimum wage and overtime pay provisions.

In *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (2d Cir. 2015), two former unpaid production interns who worked on the movie *Black Swan* filed suit under the FLSA and New York Labor Law alleging minimum wage violations. According to the plaintiffs, they performed basic functions normally undertaken by paid employees, such as making copies and answering phones. For purposes of determining whether the plaintiffs qualified as "employees," the district court looked to the test promulgated by the DOL in a Fact Sheet published in 2010.

Noting that unpaid internships must include some type of training designed to develop skills that are fungible in the industry "beyond on-the-job training that employees receive," the district court determined that because the benefits enjoyed by the plaintiffs, like résumé building and job references "were incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them," the internship failed to meet the DOL's test. The district court also granted class certification to a group of unpaid interns who worked across multiple divisions of the Fox Entertainment Group.

Now that the comment period is over, the **regulations are expected be finalized within the next several months.** Employers may have as little as 120 days following publication to comply with the new regulations.

The Second Circuit disagreed with the district court on both fronts. As to the merits, the Court of Appeals concluded that the DOL's test was "too rigid" and instead crafted a more flexible "primary beneficiary" test that focuses on "whether the intern or the employer is the primary beneficiary of the relationship" and includes the following "non-exhaustive set of considerations":

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation;
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training;
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or receipt of academic credit;
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern;
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The Second Circuit remanded the case to the district court with instructions to evaluate the particulars of the plaintiffs' internships under the newly conceived "primary beneficiary" test. The court also threw out the district court's class certification ruling, concluding that because the primary beneficiary test requires a "highly individualized inquiry," class certification—which must be accomplished with "generalized proof"—is inappropriate.

The new test is already gaining traction: In *Schumann v. Collier Anesthesia, P.A.*, __ F.3d __, 2015 WL 5297260 (11th Cir. Sept. 11, 2015), the U.S. Court of Appeals for the Eleventh Circuit followed the Second Circuit's lead and rejected the DOL's approach in favor of the primary beneficiary test. Regardless of the governing test, employers are well-advised to memorialize the parameters of internships in writing, including specifics regarding compensation, if any, each intern's duties, and the opportunities for hands on training.

More News from the DOL: Limitations on the Scope of Independent Contractor Status. The DOL continued its busy summer with the July release of Administrative Interpretation No. 2015-1 (AI), authored by David Weil, head of the DOL's Wage and Hour Division. The AI represents yet another element of the DOL's ongoing efforts to expand the FLSA's coverage, and the ranks of those entitled to overtime pay and other statutory protections, by broadly construing the term "employee" and thereby limiting the capacity to engage independent contractors. The DOL has long taken a skeptical view of consultancies and has recently partnered with the Internal Revenue Service and state governments to track down and penalize perceived abusers of the independent contractor label. As Weil explained in the AI, when employees are not properly classified as such, they "may not receive important workplace protections such as the minimum wage, overtime compensation, unemployment insurance, and workers' compensation. Misclassification also results in lower tax revenues for government and an uneven playing field for employers who properly classify their workers."

The FLSA defines "employ" as "to suffer or permit to work." Using this vague definition as a starting point, the AI takes the position that the FLSA contemplates "as broad a scope of statutory coverage as possible" such that a "broader or more comprehensive coverage of employees … would be difficult to frame." Accordingly, the AI explains, workers should only be classified as independent contractors, and therefore non-employees, on the rare occasion when the worker "is really in business for him or herself" rather than "economically dependent on the employer (and thus its employee)."

Courts have historically used an "economic realities" test, comprised of the factors listed below, to determine whether a worker has been properly given independent contractor status:

1. The extent to which the work performed is an integral part of the employer's business;
2. The worker's opportunity for profit or loss depending on his or her managerial skill;
3. The extent of the relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. The permanency of the relationship; and
6. The degree of control exercised or retained by the employer.

The AI does not alter the elements of this well-established inquiry; rather, it details the DOL's view on each element with an obvious tilt in favor of employee status and a dismissive attitude toward several factors that have historically tended to support an independent contractor designation. For example, the AI explains that "investing in tools and equipment is not necessarily a business investment or a capital expenditure that indicates that the worker is an independent contractor," rather, the worker's investment must be compared to that of the employer. Thus, when a "substantial" investment by the worker is "relatively minor" as compared with expenditures by the employer, the factor will weigh against independent contractor status.

Significantly, the AI downplays the control factor, which courts have relied upon heavily in the past as a key element of the economic realities test. According to the AI, this factor only indicates independent contractor status if the worker controls "meaningful aspects of the work performed such that it is possible to view the worker as a person conducting his or her own business." The AI also emphasizes that all six factors must be considered in each case "with an understanding that the factors are indicators of the broader concept of economic dependence" and the ultimate objective being to determine whether the worker "is really in business for him or herself (and thus its independent contractor)."

Because the AI is by definition an interpretation rather than a proposed regulation subject to the pre-implementation notice and comment process required whenever the DOL issues new legislative-type rules, it will likely be afforded less weight by the courts than the DOL's proposed changes to the white-collar exemptions. That being said, courts often rely on the interpretations of government agencies, particularly when that agency has taken a consistent position in an otherwise unclear area of the law. It would therefore be foolhardy to discount the AI and ignore the DOL's broader message that aggressive efforts to root out and fine employers who improperly classify workers as independent contractors remain a staple of the agency's enforcement protocol. Indeed, the Wage and Hour Division has requested over $30 million to hire hundreds of new employees to facilitate the agency's goal of "planned enforcement—as opposed to reactive." The writing on the wall is clear and management-side attorneys should counsel clients to closely examine each independent contractor, consultant, or freelancer relationship to ensure the non-employee designation is supported by application of the economic realities test, as interpreted by the DOL, with an eye toward minimizing potential exposure to DOL audits, fines, claims for back wages, and misclassification lawsuits.

Law Firms

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balance by moving to firms that support these priorities.[23]

Seventh, the EEOC has recognized these societal trends, reviewed related case law, and defined what it considers to be "caregiving responsibilities" that are protected under existing law, promulgating a "best practices" guide for employers that contains practice pointers and suggested tips.[24] Stated another way, it has done what it can to put FRD on the plaintiffs' bar's radar screen.

Eighth (and perhaps most significantly), it has not gone unnoticed among lawyers who represent employees that plaintiffs in FRD cases tend to have more success litigating these claims than other types of discrimination claims.[25] This is in part because comparator or "similarly-situated" evidence (i.e., evidence that a "similarly situated" employee was treated differently, creating the inference that race or some other protected category must have been a factor to explain the disparate treatment) in traditional discrimination cases no longer carries as much weight when gender-stereotyping is at issue.[26]

The success rate may also be explained in part by the facts that FRD claims appeal to and likely affect almost every employee in some capacity, and that lawsuits involving FRD are likely to affect a cross-section of jurors: "Few things are likely to stir jurors' emotions as much as fact scenarios in which hard-working employees lose their jobs or are otherwise mistreated because they are caring for their children."[27] Jurors have children too, and many wrestle with child care issues on a day-to-day basis, and for some that struggle includes dealing with child care issues created by their very jury service.

> Firms should review their EEO policies, discrimination complaint procedures, and leave policies to be certain they reflect employees' rights with respect to caregiving responsibilities, since they are **almost certain to become exhibits** for the employee or the employer if litigation does occur.

These eight reasons, and perhaps more not yet imagined, create new litigation risks that should be of particular concern to law firms. Assuming this to be true, what can law firms and other entities that employ lawyers do to better protect themselves?

First, law firm managers and human resources professionals need to become more familiar with FRD and FRD/caregiver-based litigation. The EEOC has provided guidance for employers that includes, among other things, increased training and "develop[ment], disseminat[ion], and enforce[ment] [of] a strong EEO policy."[28] The focus of part of that training should include references to federal, state, and local anti-discrimination statutes and family leave laws that may not have been designed for the protection of caregivers, but that are evolving in that direction.

That training should not be focused exclusively on existing employees. The EEOC has provided several "employer best practices" for recruitment and hiring as well. Specifically, those interviewing a potential candidate must be trained to avoid inquiring about caregiving responsibilities directly, or even indirectly, focusing entirely on the candidate's qualifications.[29]

Second, firms should review their EEO policies, discrimination complaint procedures, and leave policies to be certain they reflect employees' rights with respect to caregiving responsibilities, since they are almost certain to become exhibits for the employee or the employer if litigation does occur.

Third, law firms should consider efforts to change more than the words in their policies to be certain that their employees understand what those changes mean and what options may be available to them.[30] To that end, law firms may consider, if they have not done so already, providing or establishing "flex-time" schedules for requesting employees,[31] making certain that flexible arrangements are available to both working mothers and fathers as well.

Fourth, law firms should consider the EEOC's recommendations to employers: to remove "barriers to re-entry" for employees who have taken time away due to familial responsibilities; and to avoid penalizing applicants or current employees who have taken time away from work to care for family members and instead "focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service."[32] For example, a year's gap on an applicant's resume may not necessarily be due to "traveling the world" or a lack of motivation; the truth may simply be that the applicant had familial responsibilities that required time away.

Fifth, law firms with multiple locations in the United States and beyond need to keep abreast of state and local statutory developments in this area. The District of Columbia has acted to protect caregivers directly as noted above, and there is an explosion of local laws in recent years on a wide range of topics from credit check restrictions to mandatory sick leave. Given this trend, it is critical to stay current.[33]

Sixth, to address the financial and other costs of bad publicity and litigation, law firms should consider implementing an arbitration policy/arbitration agreement that requires all employment-related disputes be resolved via private arbitration. The U.S. Supreme Court has made it clear that such agreements are enforceable,[34] and all employers, including law firms, need to at least consider this option.

In sum, it is a beautiful thing to watch laws adjust to changes in society over time, but not so beautiful for those who fail to pay attention to these changes and adjust what they do accordingly. After more than 50 years of litigation over the requirements set forth in the Civil Rights Act of 1964, it is rare for a law firm to fail to recognize that religion or race or sex discrimination is unlawful. But it is perhaps not so rare for a firm to underestimate the consequences of its failure to consider FRD, especially in light of all the changes to the new workforce described above. All employers—law firms included—need to keep attuned to these shifts and make appropriate adjustments along the way to stay competitive in their field.

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2. See *Lola v. Skadden Arps Slate Meagher & Flom*, No. 14-3845-cv (2d Cir. July 23, 2015); *Henig v. Quinn Emanuel Urquhart & Sullivan,* No. 13-cv-01432 (S.D.N.Y).

3. Richmond, Douglas R., "Changing Times and the Changing Landscape of Law Firm Disputes," 2009 J. PROF. LAW. 73, 75 (2009).

4. Ho, Catherine, "Law Firms Hit With Workplace Discrimination Suits," WASHINGTON POST, July 1, 2012, http://www.washingtonpost.com/business/capitalbusiness/law-firms-hit-with-workplace-discrimination-suits/2012/06/29/gJQADOVjGW_story.html; see id. (citing *EEOC v. James E. Brown & Associates*, No. 12-cv-00262 (D.D.C.)); see also *Levinson v. Wilmer Cutler Pickering Hale and Dorr*, No. 13-000515 (Sup. Ct. D.C.).

5. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

6. 13-cv-01669 (S.D.N.Y.).

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9. Earp, Naomi C., "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities," EEOC Notice No. 915.002 (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html.

10. Richmond, Douglas R., "Changing Times and the Changing Landscape of Law Firm Disputes," 2009 J. PROF. LAW. 73, 93 (2009) (citing District of Columbia Human Rights Act §§2-1401.01, 2-1401.02(12), 2-1402.11, 2-1411.02).

11. Id.

12. Id. (citing *Trezza v. Hartford*, No. 98 Civ. 2205, 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); *Schafer v. Bd. of Public Educ. of Sch. Dist.,* 903 F.2d 243 (3d Cir. 1990)); Scheiber, Noam, "Attitudes Shift on Paid Leave: Dads Sue, Too," N.Y. TIMES, Sept. 15, 2015, at A1.

13. *Walsh v. Nat'l Computer Sys.*, 332 F.3d 1150 (8th Cir. 2003).

14. See U.S. Census Bureau, "How Do We Know?: America's Changing Labor Force," available at https://www.census.gov/how/pdf/EEO_infographic.pdf (percentage of women in the workforce in 1970 was 38 percent compared to 47.2 percent between 2006 and 2010).

15. See http://www.dol.gov/wb/stats/Womens_Percentage_total_occupations_85_12_txt.htm (women lawyers rose from 29.2 percent of those employed in 2000 to 50.4 percent in 2012) ; Williams, Joan C., Bornstein, Stephanie, Reddy, Diana and Williams, Betsy A., "Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces," 34 PEPP. L. REV. 2, 399- 400 (2007), available at http://digitalcommons.pepperdine.edu/plr/vol34/iss2/13 ("By 2003, women constituted more than 50% of law school students and 41% of new associates at large law firms.").

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24. U.S. Equal Employment Opportunity Commission, "Employer Best Practices for Workers with Caregiving Responsibilities," http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last modified Jan. 19, 2011).

25. 34 PEPP. L. REV. 2, 396 (2007) ("FRD cases had a higher likelihood of success (50% win rate) than employment discrimination lawsuits in general (20% win rate.)").

26. 2009 J. PROF. LAW. 73, 95; 34 PEPP. L. REV. 2, 398 (2007).

27. 2009 J. PROF. LAW. 73, 96.

28. "Employer Best Practices," supra note 24.

29. Id.

30. Oathout, Monica F. and Barnish, James T., "Figuring Out Family Responsibilities Discrimination," LAW360, April 28, 2015.

31. Id.

32. "Employer Best Practices," supra note 24.

33. "Figuring Out Family Responsibilities Discrimination," supra note 30; see also D.C. Human Rights Act §§2-1401.01, 2-1401.02(12), 2-1402.11, 2-1411.02 (incorporating definition of "family responsibilities" in anti-discrimination statute).

34. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).

Orientation

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basis of sexual orientation.[14] This interpretative inconsistency among the courts has resulted in disparate results depending on the jurisdiction in which the claim is brought. The unpredictable enforcement of Title VII will continue until the U.S. Supreme Court decides the issue or Congress amends Title VII. Congressional action is not unprecedented—Title VII was amended to include pregnancy as sex-based discrimination to legislatively overrule a court decision that held pregnancy was not a sex-based consideration.[15]

Likewise, the EEOC-OFO's reliance on a theory of associational discrimination to recognize claims of discrimination based on sexual orientation is not sound. Generally, discrimination based on association is asserted by an individual who is not in a protected class. For example, courts may find that there was discrimination based on association against a Caucasian individual because that individual is married to an African American individual.[16] Here, the EEOC-OFO appears to believe that Title VII can be broadly read to preclude discrimination based on sexual orientation when a male "associates with" another male or a female "associates with" another female. By doing so, the agency expands "association" to assume a sexually motivated relationship. Such an expansion is tenuous, at best.

Finally, finding that Title VII prohibits sexual orientation discrimination based on the gender stereotyping theory is problematic. In evaluating gender stereotyping claims, courts must determine whether a plaintiff was discriminated against because he or she did not adhere to stereotypical gender norms.[17] For example, a woman may claim that she was discriminated against on the basis of her gender because she was acting more like a man instead of a stereotypical female who wore makeup or jewelry. In other words, she was subjected to gender discrimination because she did not comply with social stereotypes of how women should act. In the case of a gay or lesbian employee, the reliance on stereotypical norms is likely to produce inconsistent results. For example, a gay employee who acts in an effeminate manner would be covered while a gay employee who acts like a heterosexual male would not. However, both employees are gay and both should be protected, regardless of appearance or mannerisms. Thus, the EEOC-OFO's decision to allow social stereotypes to define a protected class based on sexual orientation will likely be rejected.

Moreover, many federal courts have refused to acknowledge claims of sexual orientation discrimination masquerading under the gender stereotyping theory.[18] Specifically, the Second Circuit held in *Simonton v. Runyon*[19] that a gender stereotyping claim should not be used to "bootstrap protection for sexual orientation into Title VII."[20] Similarly, the Sixth Circuit has rejected such claims, finding that to do otherwise would "have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination."[21] The Seventh Circuit went so far as to proffer that it is "wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit."[22]

The EEOC-OFO's Decision Will Be Afforded Little Deference, If Any. By rendering its interpretation in an OFO decision as opposed to through interpretative guidance, the EEOC's action will have little effect to expand Title VII's protections to homosexual employees. In *Chevron USA v. Natural Resources Defense Council*, the Supreme Court acknowledged that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. As such, courts defer to reasonable agency interpretations or permissible constructions when the statute does not clearly answer the question at hand. *Chevron* affords the strongest judicial deference to agency actions taken after a notice and comment period or through formal rulemaking.

In *Skidmore v. Swift & Co.*, the Supreme Court also held that deference must be afforded to agency interpretations, although not as considerable, so long as the agency's interpretation was consistent with the thoroughness of the agency's research and persuasiveness of its reasoning.[23] Traditionally, EEOC guidelines are afforded *Skidmore*-type deference.[24]

To date, the EEOC has not issued any interpretative guidance on the protection of employees because of their sexual orientation. The EEOC also has not issued any enforcement guidance with respect to discrimination on the basis of sexual orientation.[25] Rather, its consideration of sexual orientation discrimination has been largely limited to a passing reference in its Strategic Enforcement Plan for FY2013 to 2016, and decisions issued in the context of federal sector employment discrimination cases, such as *Baldwin*. To the extent that the EEOC-OFO's decision is appealed to a federal district court, the court will review the matter de novo. Thus, decisions like *Baldwin* and other such agency actions have little impact on the agency's enforcement authority and are not entitled to any deference.

> Contrary to the position taken by some commentators, **'Baldwin' did little to impact the debate** regarding whether Title VII prohibits sexual orientation discrimination.

Conclusion

Contrary to the position taken by some commentators, *Baldwin* did little to impact the debate regarding whether Title VII prohibits sexual orientation discrimination. Until the U.S. Supreme Court resolves the conflicts in the federal courts, or until Congress amends Title VII, this issue will continue to be litigated in the courts with conflicting results based on jurisdiction. To be sure, protecting individuals against discrimination based on sexual orientation in the employment context is a matter of "when" not "if." The "when," however, is not the summer of 2015.

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2. 576 U.S. ___, 2015. http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.
3. The EEOC-OFO is responsible for hearing appeals of decisions rendered on complaints of employment discrimination from each federal agency's respective equal employment opportunity offices.
4. EEOC Appeal No. 0120133080 (July 15, 2015). http://www.lambdalegal.org/sites/default/files/us_20150715_baldwin_decision.pdf.
5. 29 C.F.R. §1614.105.
6. 29 C.F.R. §1614.106.
7. 29 C.F.R. §1614.108.
8. 29 C.F.R. §1614.401.
9. 29 C.F.R. §1614.407.
10. The EEO office of the DOT has until Dec. 7, 2015, to issue a decision on the merits of Baldwin's claim, assuming Baldwin elects to proceed with the federal sector employment discrimination complaint process and does not file a civil action. See EEOC Appeal No. 0120133080 at 15-16; 29 C.F.R. §1614.405(c). If Baldwin elects to file a civil action in district court, he must do so by Oct. 19, 2015. See EEOC Appeal No. 0120133080 at 16.
11. See, e.g., Julia Robins, "Gay in the Workplace? EEOC Says Your Job Is Safe," July 17, 2015, available at http://msmagazine.com/blog/2015/07/17/gay-in-the-workplace-eeoc-says-your-job-is-safe/; and Allie Kuester, "EEOC: Sexual Orientation Now a Protected Class Under Title VII," Aug. 5, 2015, available at http://www.mybinc.com/blog/eeoc-sexual-orientation-now-a-protected-class-under-title-vii/#.VfbbK53D_cs.
12. See, e.g., *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks*, 173 F.3d 988 (6th Cir. 1999); *Drake v. Minnesota Mining & Manufacturing*, 134 F.3d 878 (7th Cir. 1998); *Alizadeh v. Safeway Stores*, 802 F.2d 111 (5th Cir. 1986); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980).
13. EEOC Appeal No. 0120133080 at 8.
14. See *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002) ("Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone."); *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999) (treating sexual orientation claim as a sex-based consideration); *Samborski v. W. Valley Nuclear Servs.*, No. 99-CV-0213E(F), 2002 WL 1477610, at *1 (W.D.N.Y. June 25, 2002) ("These allegations, however, are merely an attempt to bootstrap non-actionable harassment based on sexual orientation into sex-based harassment. …); *Capouch v. Cook Grp.*, No. 3:04 CV 421 H, 2006 WL 1582388, at 6 (W.D. N.C. June 5, 2006) (noting that sexual orientation harassment was not sex-based).
15. 42 U.S.C. §2000e(k).
16. *Holcomb v. Iona College*, 521 F.3d 130 (1st Cir. 2008).
17. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (female employee advised to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry" to improve chances at partnership); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005).
18. *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 292 (3d Cir. 2009); *Lynch v. Baylor Univ. Med. Ctr.*, No. CIV.A.3:05-CV-0931-P, 2006 WL 2456493, at 6 (N.D. Tex. Aug. 23, 2006) aff'd, 236 F. App'x 918 (5th Cir. 2007); *Essary v. Fed. Express*, 161 F. App'x 782, 786 (10th Cir. 2006); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Kay v. Independence Blue Cross*, 142 Fed. Appx. 48 (3d Cir. 2005); *Simonton v. Runyon*, 398 F.3d 211 (2d Cir. 2005); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 142 (4th Cir. 1996); *Rivera v. HFS Corp.*, No. CIV. 11-1116 JAG, 2012 WL 2152072, at *4 (D.P.R. June 12, 2012); *Swift v. Countrywide Home Loans*, 770 F. Supp. 2d 483 (E.D.N.Y. 2011).
19. 398 F.3d 211, 217 (2d Cir. 2005).
20. 398 F.3d 211, 217 (2d Cir. 2005).
21. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).
22. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002).
23. 323 U.S. 134 (1944).
24. *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003); *EEOC v. Arabian American Oil Company*, 499 U.S. 244 (1991); *General Electric Company v. Gilbert*, 429 U.S. 125 (1976); *Stagi v. Nat'l R.R. Passenger*, 391 F. App'x 133, 138 (3d Cir. 2010).
25. Enforcement guidance by the EEOC with regard to pregnancy discrimination and was issued on June 25, 2015, in response to the Supreme Court's decision in *Young v. United Parcel Service*, 575 U.S. __ (2015).

Violence

« Continued from page 9

risk of liability for negligent hiring, employers should implement effective background and reference checks of applicants. For example, employers should obtain and follow up on employment references that may reveal that an applicant has violent propensities. Employers giving references, however, should be careful: Careless admonitions about an employee in negative references could provoke a defamation lawsuit, while neutral references could provide a basis for negligent referral or misrepresentation claims (depending on state law).[14]

Employers should be mindful, however, that federal and state laws may restrict an employer's ability to consider certain kinds of information regarding an applicant's background. For example, New York prohibits discrimination based on prior criminal convictions unless (1) there is a direct relationship between a previous criminal offense and the employment sought; or (2) hiring the applicant would involve an unreasonable risk to the safety or welfare of specific individuals or the general public.[15] And the Equal Employment Opportunity Commission (EEOC) has taken the position that reliance on criminal records may disproportionately impact certain protected groups.[16] Employers also must comply with the Fair Credit Reporting Act (and any state law equivalents) when obtaining and relying on background checks.[17]

To avoid a claim for negligent retention and/or supervision, an employer should implement a workplace violence policy with established disciplinary procedures for any employee that violates the policy. To be effective, the policy should also establish reporting and investigation procedures, and employers should take steps to encourage open dialogue with their employees: maintain an open door policy, designate an ombudsman, or install a confidential tip line to report concerns.

Insufficient responses to employees that perceive threats in the workplace can also result in claims under certain federal statutes. For example, employees who are victims of workplace violence or fear they may become victims, may be entitled to time away from work under the Family Medical Leave Act (FMLA). In *Barber v. Von Roll U.S.A.*, an employee adequately pled that he was entitled to FMLA leave because he developed an anxiety-based incapacity due to fear of his co-worker, who was a gun enthusiast and displayed threatening and erratic behavior.[18]

An employer also may be liable under Title VII of the Civil Rights Act of 1964 if an employee creates a hostile work environment for a co-worker. In *EEOC v. MMR Constructors*, the EEOC sued an employer for subjecting two employees to a hostile work environment that included constant unwelcome racial harassment in the form of racist language, graffiti, and death threats.[19] The employer eventually settled with the EEOC and agreed to implement various workplace violence programs and sensitivity trainings.[20]

In order to avoid such claims, employers should be sensitive to the work environment concerns that an unstable employee creates and diligently respond if an employee is showing signs of threatening behavior. There are several telltale signs of troubled employees that employers can be on the alert for, including:

- Bragging about the use of weapons or talking about violent episodes;
- Threatening co-workers and exhibiting an "everyone is against me" attitude;
- Mood swings;
- Poor workplace relationships;
- Decreasing productivity;
- Excessive tardiness or use of sick leave;
- Repeated violation of company rules or policies;
- Increasing signs of alcohol or drug abuse; and
- Poor health and hygiene.[21]

An Employer's Liability for Discrimination. If an employee does not pose an imminent risk, employers should exercise caution in disciplining an employee for potentially threatening behavior if he is suspected of having a mental disorder. Antidiscrimination statutes, such as the Americans with Disabilities Act (ADA), protect qualified employees from discrimination and harassment on the basis of mental disabilities. Employers may need to provide reasonable accommodations to employees with mental disorders to help them abide by workplace conduct policies (unless doing so would cause undue hardship).

But not every employee demonstrating threatening behavior qualifies for protection under antidiscrimination laws. Several circuits have found that "an essential function of almost any job is the ability to appropriately handle stress and interact with others" and "an employee whose stress leads to violent threats is not a 'qualified individual.'"[22] The ADA also authorizes employers to take disciplinary action against a qualified individual that poses a significant danger to themselves or others, though a remote or speculative danger is not sufficient.[23]

In evaluating whether to impose discipline, an employer can subject an employee to a medical or "fitness-for-duty" examination if the exam is job-related and consistent with business necessity.[24] Ensuring a safe working environment for employees may qualify as a business necessity.[25] These exams should be performed in a consistent manner, however, to avoid running afoul of anti-discrimination laws, but they are not a prerequisite for taking disciplinary action for workplace conduct violations.

> There are no federal statutes or regulations that expressly require employers to prevent workplace violence, but the **Occupational Safety and Health Act** obligates an employer to provide a safe work environment.

If discharge is necessary, managers may want to take precautions during the termination meeting, such as having another person in the room. Employers can also take steps to mitigate any anger or shame an employee may feel after being fired by offering severance pay and outplacement or career counseling to help them get back on their feet. After the employee is let go, employers should consider bolstering their workplace security measures to protect against external threats, such as establishing procedures for barring nonemployees from accessing the premises.

Conclusion

While there is no perfect solution to avoid workplace violence, effective hiring and workplace conduct policies, timely and appropriate responses to complaints of workplace violence, adequate training programs, and open communication with employees will best position an employer to avoid tragedy and minimize the risk of liability associated with actual or threatened violence in the workplace.

1. U.S. DEP'T OF LABOR: OSHA, Safety & Health Topics: Workplace Violence, https://www.osha.gov/SLTC/workplaceviolence/ (last visited Sept. 18, 2015).
2. 29 U.S.C. §654(a)(1).
3. 29 U.S.C. §658(a).
4. U.S. DEP'T OF LABOR: OSHA REGIONAL NEWS RELEASE, US Department of Labor Reaches Settlement with the Renaissance Project Regarding OSHA Workplace Violence Citation, Ellenville, NY, Treatment Facility Agrees to Enhance Employee Safety (Nov. 30, 2011).
5. Id.
6. Id.
7. N.Y. LAB. LAW §27-b(4); see also 12 NYCRR 800.6.
8. N.Y. DEP'T OF LABOR, DOSH Public Employee Safety & Health, available at https://labor.ny.gov/workerprotection/safetyhealth/DOSH_PESH.shtm (last visited Sept. 18, 2015).
9. N.Y. DEP'T OF LABOR, Safety & Health: Workplace Violence Prevention Information, https://labor.ny.gov/workerprotection/safetyhealth/PDFs/PESH/WPV/How%20to%20Comply%20Guide.pdf (last visited Sept. 18, 2015).
10. See OCCUPATIONAL SAFETY & HEALTH ADMIN, Recommendations for Workplace Violence Prevention Programs in Late-Night Retail Establishments, https://www.osha.gov/Publications/osha3153.pdf; OCCUPATIONAL SAFETY & HEALTH ADMIN, Guidelines for Preventing Workplace Violence for Healthcare & Social Service Workers, available at https://www.osha.gov/Publications/osha3148.pdf (last visited Sept. 18, 2015).
11. See 29 U.S.C. §653(b)(4).
12. See N.Y. WORKERS' COMP. LAW §29(6) (noting exclusivity of workers' compensation laws applies to employees injured or killed by "negligence or wrong of another in the same employ"); see also *Kruger v. EMFT*, 87 A.D.3d 717, 718 (2d Dep't 2011) ("While an intentional tort may give rise to a cause of action outside the ambit of the Workers' Compensation Law, the complaint must allege an intentional or deliberate act by the employer directed at causing harm to this particular employee." (quotation marks and citation omitted)); see also *Lavin v. Goldberg Bldg. Material*, 274 A.D. 690, 693 (2d Dep't 1947) ("[W]here an employer, either directly or through an agent or service, is guilty of a felonious assault upon an employee he cannot relegate the latter to the compensation statute as the sole remedy for his tortious act.").
13. See *Wyatt v. New York*, 176 A.D.2d 574, 576 (1st Dep't 1991) (finding negligence where employer knew that employee demonstrated propensity to react violently); see also *Corbally v. Sikras Realty*, 161 A.D.2d 107, 107-08 (1st Dep't 1990) (holding whether defendants should have been aware of employee's propensity for violence because of his "rude, uncooperative and at times scary demeanor" and because he displayed Nazi memorabilia and knives was a question for the jury).
14. See, e.g., *Jerner v. Allstate Ins. Co.,* No. 93-09472 (Fla. Cir. Ct. Aug. 10, 1995) (finding cause of action for misrepresentation in neutral letter of reference when former employer knew employee made death threats to co-workers).
15. N.Y. CORRECT. LAW §752.
16. U.S. EQUAL EMPLOY. OPPORTUNITY COMM'N, EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#IV (last visited Sept. 18, 2015).
17. See U.S. EQUAL EMPLOY. OPPORTUNITY COMM'N, Background Checks What Employers Need to Know, http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm (last visited Sept. 18, 2015).
18. *Barber v. Von Roll U.S.A.*, No. 1:14-cv-907 (MAD/TWD), 2015 U.S. Dist. LEXIS 112190, at *22 (N.D.N.Y. Aug. 25, 2015).
19. *EEOC v. MMR Constructors*, No. 4:12-cv-04117 (SOH) (filed W.D. Ark. Jan. 24, 2014).
20. Id.
21. Eric J. Belanoff, "27 Tips to Help Prevent Violence in Your Workplace," 10 N.Y. EMP. L. LETTER 1 (October 2003).
22. See *Mayo v. PCC Structurals*, 795 F.3d 941, 944-45 (9th Cir. 2015); see also *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1114 (9th Cir. 2014) (rejecting notion that employers must choose between ADA compliance and a hostile work environment); *Palmer v. Circuit Court*, 117 F.3d 351, 352 (7th Cir. 1997) ("The [ADA] protects only 'qualified' employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one.").
23. 42 U.S.C. §12113(b); see also 29 C.F.R. §1630.2(r) ("Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."); *Sista v. CDC Ixis N. Am.*, 445 F.3d 161, 172 (2d Cir. 2006) ("[T]his Court, like every other court to have taken up this issue, does not read the ADA to require that employers countenance dangerous misconduct, even if that misconduct is the result of a disability.").
24. 42 U.S.C. §1211(d)(4)(A); see also *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 627 (6th Cir. 2014) (denying summary judgment and finding a genuine dispute of material fact regarding whether psychological counseling was job-related and consistent with business necessity).
25. See *Rivera v. Smith*, No. 7-cv-3264 (BSJ)(AJP), 2009 U.S. Dist. LEXIS 3523, at *14 (S.D.N.Y. Jan. 20, 2009) (finding a fitness-for-duty exam related to the job and was consistent with business necessity when coworker reported fearing for her life).