



HOT EMPLOYMENT TOPICS: 2013 & BEYOND

October 30, 2013

Agenda

1. Supreme Court Recap
 - *Vance v. Ball State*
 - *Univ. of Texas Southwestern Med. Ctr. v. Nassar*
2. Hiring Practices: Background Checks & Social Media
3. Workplace Bullying
4. FLSA Issues
5. DOMA: What *U.S. v. Windsor* means for employers
6. ADA: Leave as an accommodation
7. Unique Non-Profit Organization Issues
8. Withholding Income Taxes from Settlement Amounts
9. Sweet Irony in the EEOC

Vance v. Ball State

133 S.Ct. 2434 (June 24, 2013)

Background

- Title VII prohibits the creation of a hostile work environment.
- **Direct Liability:** If an employer negligently allows racial (or other) discrimination to occur at work, it is liable.
- **Vicarious Liability:** *Ellerth* and *Faragher* framework provides that employers may be liable for its employees' actions under principles of agency.

Vance v. Ball State

133 S.Ct. 2434 (June 24, 2013)

- Employer liability for one employee harassing another depends upon the status of the harasser
 - Co-worker
 - Supervisor
 - Tangible employment action
 - No tangible employment action

New Law

- Supervisor defined for purposes of vicarious liability under Title VII
 - “Empowered by the employer to take tangible employment actions against the victim”

Univ. of Texas SW Med. Ctr. v. Nassar

133 S.Ct. 2517 (June 24, 2013)

Background

- Tort claims require the plaintiff to show “but-for causation”
- Age discrimination claims require the plaintiff to show “but-for causation”
- However, an employee alleging status-based discrimination under Title VII must only show that his status was a “*motivating factor*” for the discrimination

Univ. of Texas SW Med. Ctr. v. Nassar

133 S.Ct. 2517 (June 24, 2013)

New Law

- Plaintiffs making a *retaliation* claim (under 42 U.S.C.S. §2000e- 3(a)) “must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.”
- The Title VII language that lessens the standard of proof for status-based claims to a “motivating factor” does not apply to retaliation claims

Hiring Practices

- Social Media
 - 12 states have passed laws giving employees privacy rights related to social media
- Background Checks
 - Pros
 - Provides information on character, integrity, etc.
 - Reduces employer liability
 - Reduces costs associated with bad hires
 - Cons
 - EEOC Strongly disfavors



EEOC's Best Practices for Background Checks

- Ignore arrest info
- Convictions (JR / CWBN)
- Avoid “bright-line” policies
- Individualized assessments
 - Tell applicant
 - Give opportunity for explanation
 - Consider all circumstances
- State law- no defense
- Confidentiality



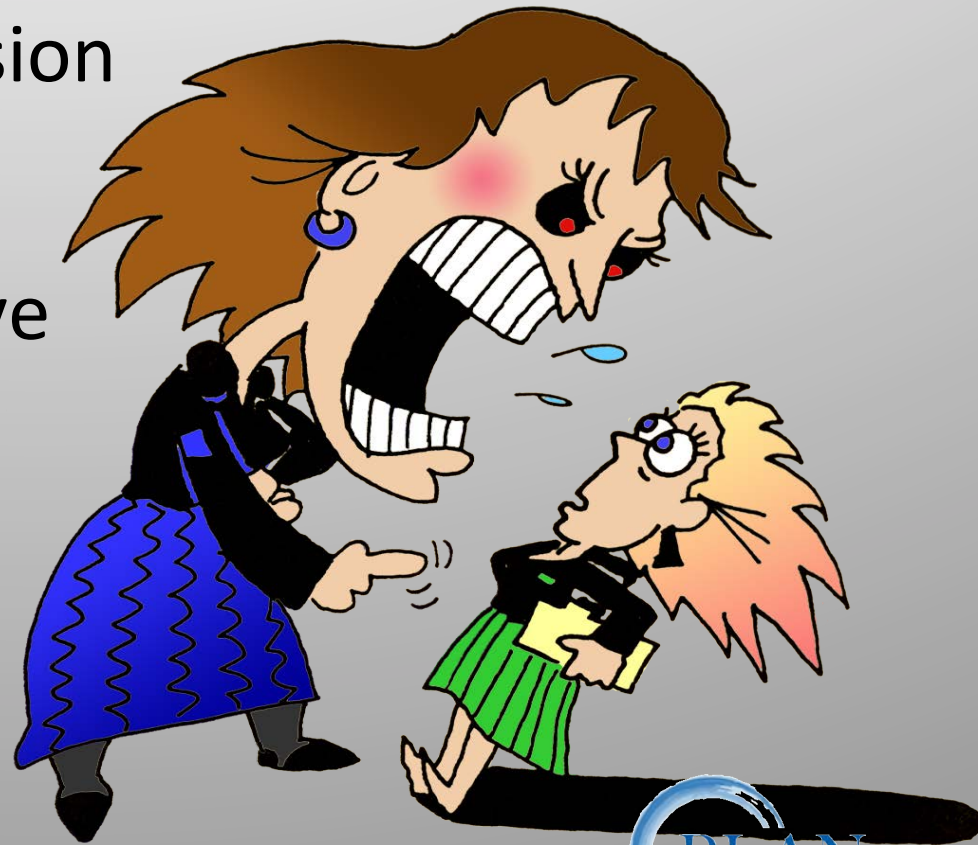
Workplace Bullying – What is it?



- Repeated, unreasonable actions of individuals or groups
- Directed toward an employee or group of employees
- Intended to intimidate, degrade, humiliate, or undermine
- Creates a risk to the health or safety of an employee

Is Bullying a Problem?

- 42% employees report psychological aggression in the workplace
- 45% have had abusive boss
- 59% have witnessed workplace bullying



Only about 20% of bullying is unlawful discrimination or harassment, but . . .

. . . it affects employers

- Turnover
- Fear / self-preservation
- Investigations
- Bad publicity
- Misconduct / fraud
- Legal Liability
- Unions
- Workplace violence
- Destroys productivity, morale and teambuilding

. . . it could still lead to liability

- Workers' Compensation ("PTWD")
- ADA
- FMLA
- Discrimination
- Harassment
- Retaliation
- Outrage
- Defamation
- Assault/Battery
- Negligence
- Personal liability

FLSA Issues

- Misclassification
- Wage & Hour Enforcement
- Unpaid Interns
- Overtime Claims
- Off-the-clock work
 - Emails
 - Phone calls



FLSA – Class Actions

- *American Express v. Italian Colors* (Sup. Ct. June 20, 2013)
 - Limits plaintiffs' ability to bypass a class action waiver in an arbitration agreement
- *Southerland v. Ernst & Young*
 - Second Circuit found that
 - The “effective vindication doctrine” does not invalidate a FLSA class action waiver
 - FLSA does not prevent a class action waiver in an arbitration agreement from being enforced



What *U.S. v. Windsor* means for Employers

- Any policy that relies on a definition of “spouse” may change
- FMLA
- Health Coverage
- Pensions & Benefits Plans
- COBRA



IRS, DOL, and EBSA on *Windsor*

- **IRS**: Same sex marriages are recognized for federal tax purposes *if* the couple was married in a jurisdiction that recognizes same sex marriage.
- **EBSA**: The IRS rule applies to ERISA as well.
- **DOL**: Employers must allow employees to take leave under FMLA to care for a same sex spouse *if* the employee resides in a state that recognizes same sex marriage.

ADA

When is leave
time a
reasonable
accommodation?



Non Profit Organizations



Non-profits and Charities

- Any policies
- Any consistent use
- Any personnel files

IRS's Guidance on Withholding Tax from Settlement Money

- Who paid the claim?
 - Employer
 - Insurer
- Reporting
- Trust Accounts



Somers v. EEOC

The EEOC is being sued for what?

**RELIGIOUS
DISCRIMINATION!**

Somers v. EEOC

- Mr. Somers asserts that investigating sexual discrimination claims involving sexual orientation or gender identity conflicts with his religious beliefs, and that the EEOC has refused to grant him a reasonable accommodation.
- There's not an employer on the planet who's immune from discrimination claims!



Questions?

