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The World of Employment Practices Claims

Sex, Lies & Religion- What's Next?

PLAN Regional Meeting: Chicago

July 29, 2015

Employment Law Trend No. 1

- Sexual Orientation or Sexual Stereotyping

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Policy

Discrimination Includes:

1. Age – 23.2%
2. Gender – 29.3%
3. Race – 35%
4. Color – 3.1%
5. National Origin – 10.8 %
6. Religion – 4%
7. Sexual Orientation or Preference
8. Pregnancy
9. Disability – 28.6%

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Types of Claims

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- What is the current federal law of sexual orientation discrimination?
- It is not protected.
- However, same sex harassment is protected.

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Regardless of the sexual orientation of a plaintiff, same sex harassment is prohibited.

Three ways to assert a same sex claim:

1. Harasser was motivated by sexual desire;
2. Harasser was expressing a general hostility to the presence of one sex in the workplace;
3. Harasser was acting to punish the victims non-compliance with gender stereotypes.

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What's Next?

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Hedwig from “Hedwig and the Angry Inch”

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Transgender Claims

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How to prevent?

- Training your supervisors

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Employment Law Trend No. 2

Lies

Should you conduct background checks before hiring?

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To screen, or not to Screen, that is the Question.

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Search for people, places and things

Home Ophelia

Hamlet

To screen, or not to screen, that is the question—
Whether 'tis Nobler in the mind to suffer
The Slings and Arrows of an outrageous hire,
Or to take Arms against a Sea of troubles,
And by screening end them? To hire, or not to hire
No more; and by screening, to say we end
The Heart-ache, and the thousands of dollars
A Bad Hire costs? 'Tis a consummation
Devoutly to be wished. To screen,
Or not to screen, perchance to Dream of a good employee;
Aye, there's the rub . . .

Like · Comment · Share 4 hours ago

Rosencrantz and Guildenstern like this

Write a comment...

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The Benefits of Cyber-Screening

A. It's Natural
B. Ease of Use
C. Hiring isn't Easy
D. Hiring is Important
E. A Bad Hiring is Costly

What are the Risks?

A. Inaccuracy
B. Morale
C. Lawsuits

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The Risks of Cyber-Screening

C. Legal Liability

- Use of social networking sites in the hiring process may give an employer access to information about a candidate which may not be a legitimate criterion for a hiring decision.

- Can the employer demonstrate a job-related necessity for asking the question?

- The same question should be posed with respect to information learned during an internet search: does this information provide a job-related reason for refusing to hire the applicant?

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The Risks of Cyber-Screening

C. Legal Liability (cont.)

What protected characteristics will be not be discovered during a job interview which may be discovered when screening applicants?

- Age – You may have some idea when you interview the applicant.
- Disability – Maybe Yes or No
- Sexual orientation – No
- Workers' compensation claim – No
- Arrest record – No

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Information Obtained During an Internet Search –

Would it be Legal or Illegal to Base a Hiring Decision on These Factors?

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Jon's Blog

Search

Mexico

Search

1

I can't wait to visit my parents in Mexico next month. I love going back home!

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Illegal.

- Issue – National origin.
- You may not ask an applicant where he/she was born or where his/her parents were born.
- You cannot ask an applicant if he or she is a United States citizen.
- You can ask whether the applicant is legally eligible to work in the United States.
- After an offer of employment has been made, the employer can then request appropriate documentation that the employee is legally eligible to work in the United States.

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Illegal.

- Issue – Spanish Speaking
- Some employers today are implementing English only policies. Such a policy must be justified by business necessity. Otherwise, it could be a form of national origin discrimination.

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You are tired of working in the insurance industry – hours are too long and the stress is giving you migraines and causing you to gain weight. You decide to apply for a position as a bartender at your local drinking establishment. You sit down to complete the application below. Does the application raise any concerns to you?

Application

Champ's is an equal opportunity employer. You may request any needed accomodation to participate in the application or hiring process.

Personal Information

Last Name	First	Middle	Social Security #
Other Name(s) Used			Home Telephone # ( )
Address			Cell or Message # ( )
Height	Weight		Date of Birth
Have you ever interviewed with Champs/Laser Zone before? ☐ Yes ☐ No			If yes, last date(s)
Do you have any relatives employed by Champs/ Laser Zone? ☐ Yes ☐ No			If yes, last date(s) & job title(s)

Education

Circle Highest Grade Completed:

High School	7	8	9	10	11	12
College, Trade or Business	1	2	3	4		
Graduate Studies						

School	Name & Address	Major Studies	Degree, Diploma, License or Certificate
High School			
College/University			
Vocational/other			

Other Special Knowledge, Skills or Qualifications

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Illegal.

- Minimum height and weight requirements are illegal if they screen out a disproportionate number of minority group individuals or women, and the employer cannot show these standards are essential to the safe performance of the job in question.

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The insurance industry doesn't look so bad now, does it?

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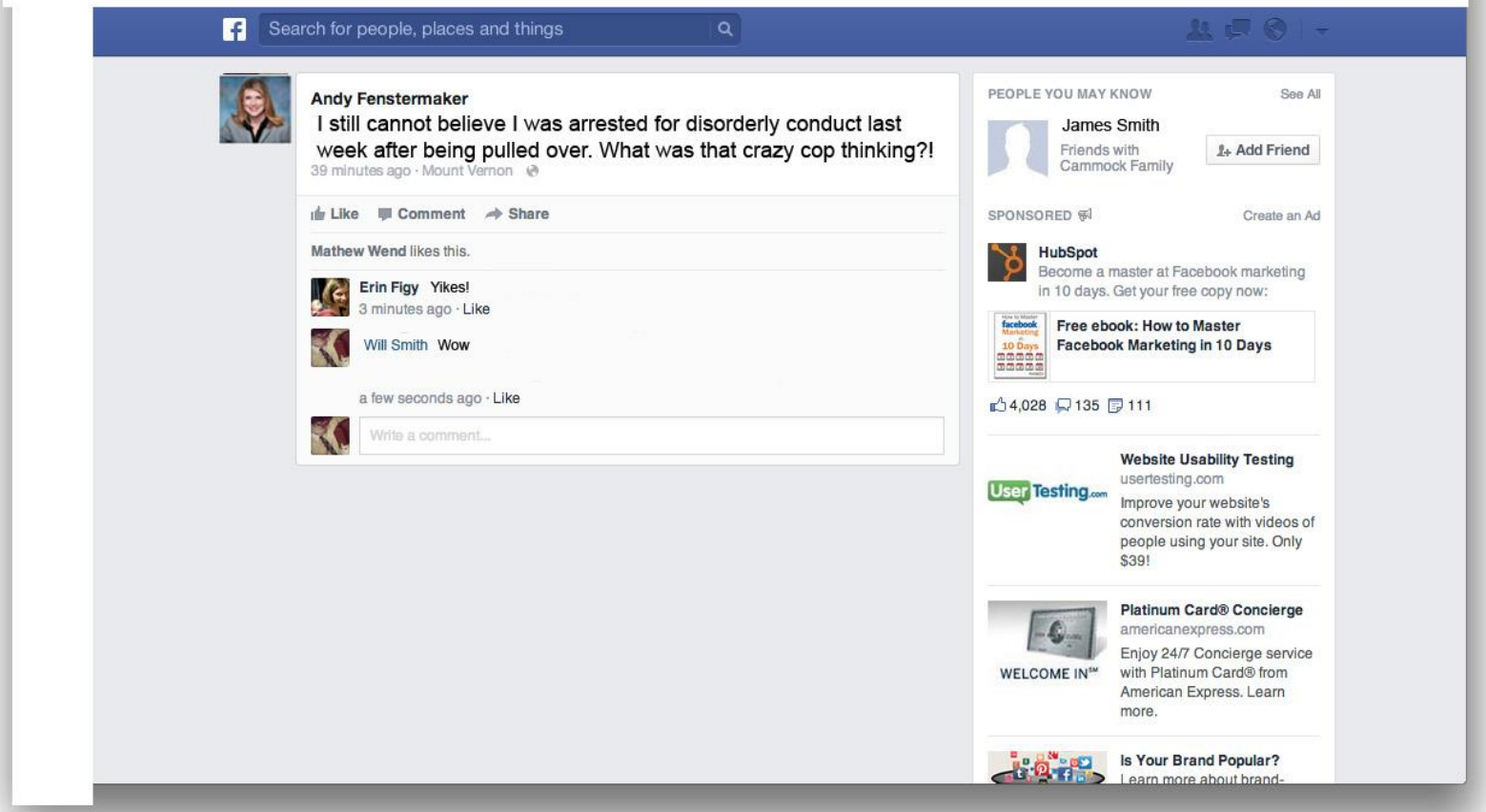

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Illegal.

- Issue – arrest record
- An employer cannot refuse to hire an individual based on his or her arrest record, because it has been established that minorities are arrested more frequently than non-minorities. An employer can only refuse to hire an individual based on a conviction or felony which relates to an employee's ability to perform his or her job.

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According to the EEOC's Revised Policy Statement on the use of convictions by employers in making employment decisions, the following should be considered in deciding business necessity:

1. Nature and gravity of the offense for which convicted;

2. Amount of time that has elapsed since the applicant's conviction and/or completion of sentence; and

3. The nature of the job in question as it relates to the nature of the offense committed.

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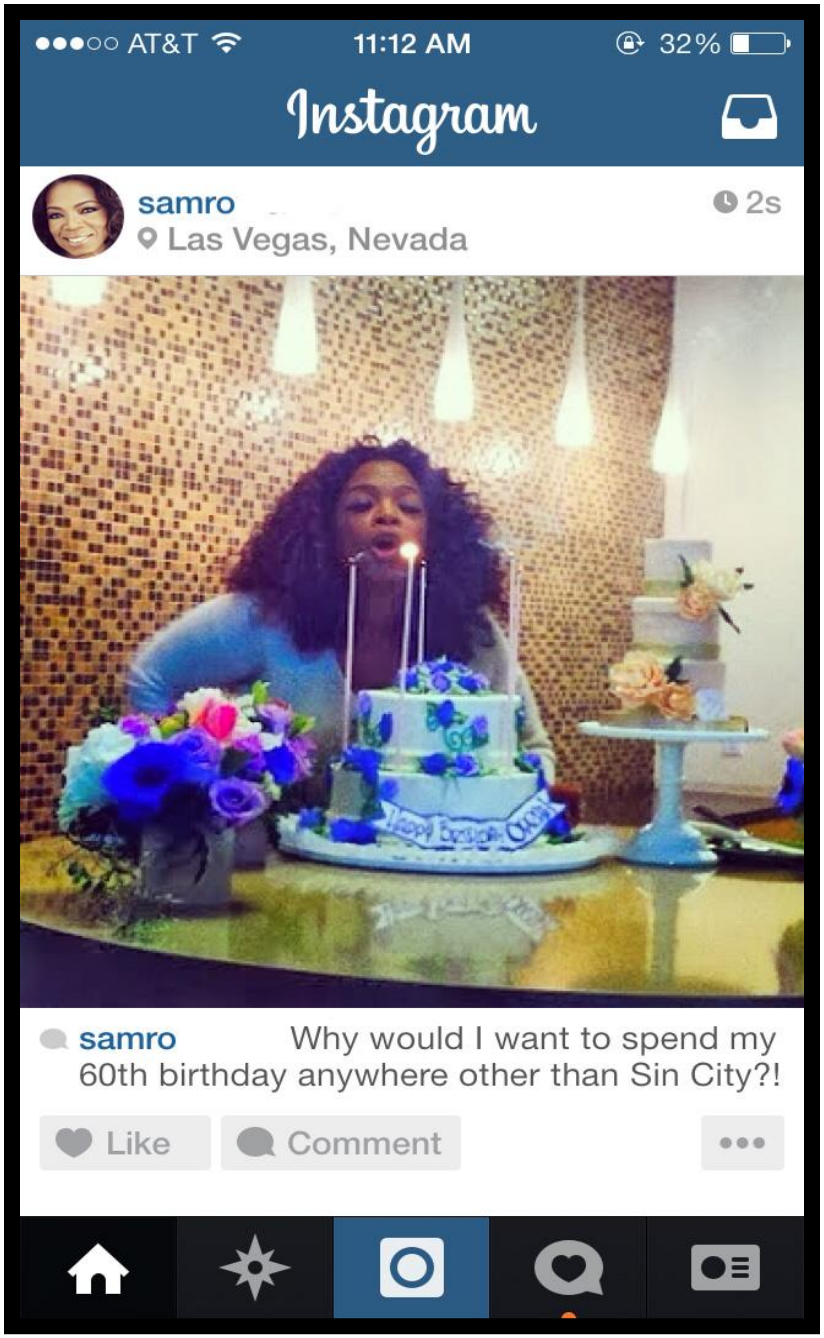

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Illegal.

- Issue – Age
- It is illegal to refuse to hire an applicant based on his age if the applicant is 40 years of age or older.
- The only question an employer can legitimately ask about age is whether the applicant is over 18 years of age, and, if not, if the employee has an employment permit.
- Teenagers in Pennsylvania under 18 years of age need employment permits in order to work.

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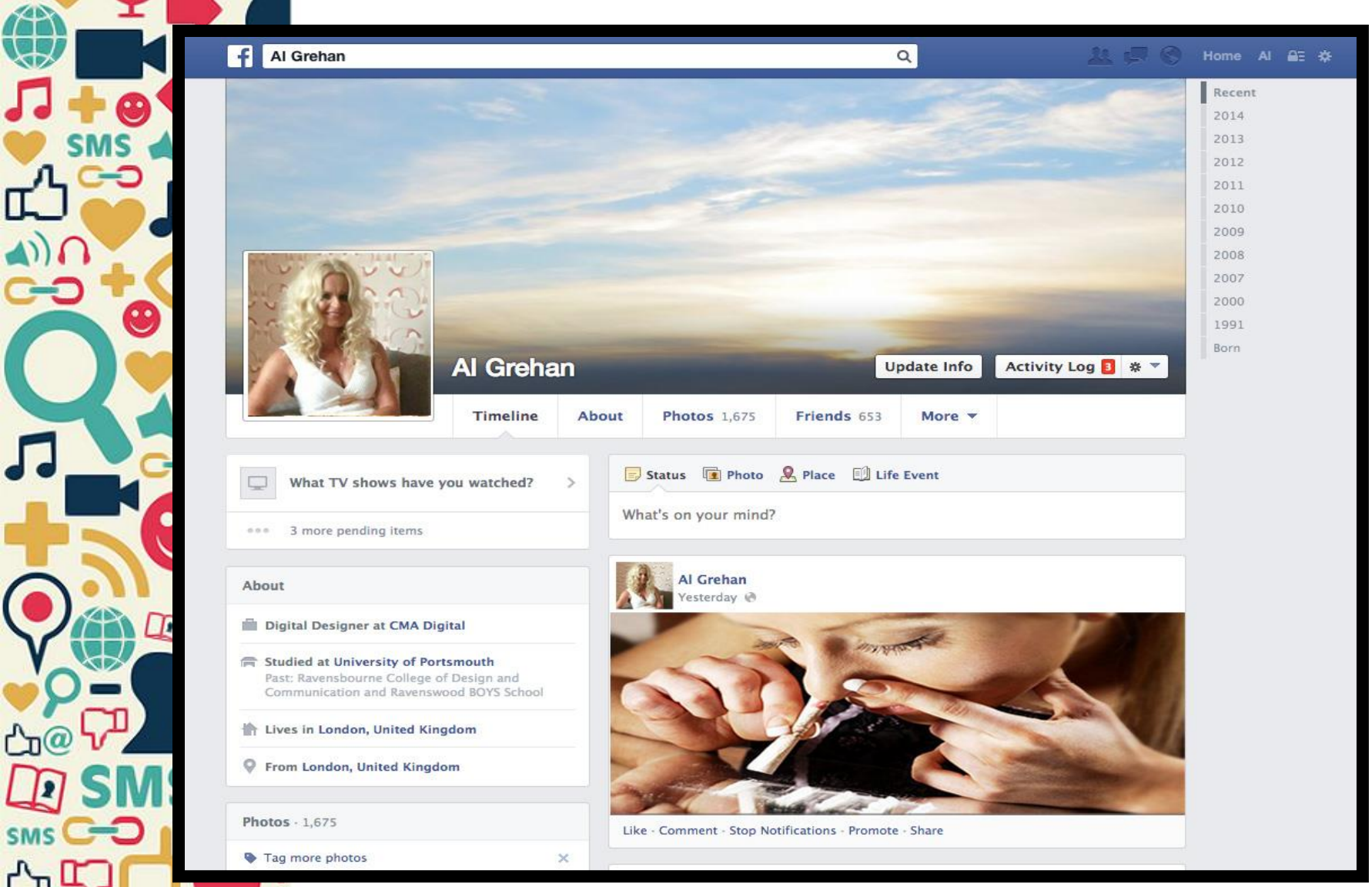

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Legal.

- Even if the substance is not actually cocaine, the picture shows incredibly poor judgment and is promoting the use of illegal drugs. Let this applicant work for your competitor.

- Generally, with respect to illegal drugs, an employer may ask applicants about current and prior illegal use of drugs. An employer may not ask questions about whether the applicant had any previous drug addictions – such questions would violate the ADA.

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Legal.

- The posting of this picture shows poor judgment.
- Generally, an employer may ask an applicant whether he drinks alcohol, or whether he has been convicted for driving under the influence of alcohol.
- However, an employer may not ask an applicant how much he drinks or whether he has participated in an alcohol rehabilitation program. Questions of this nature are likely to elicit information about whether the applicant has alcoholism, which is a disability under the ADA.

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My Blog

A day in the life of Sarah Smith

Search

Home Sample Page

Hello world!

1

My visit to the psychiatrist yesterday has made my day today more enjoyable. My visits are become more beneficial everytime I go!

Search

RECENT POSTS

- Hello world!

RECENT COMMENTS

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Illegal.

- The EEOC enforcement guidance on psychiatric disabilities limits the questions asked of any applicant about any psychiatric disability.

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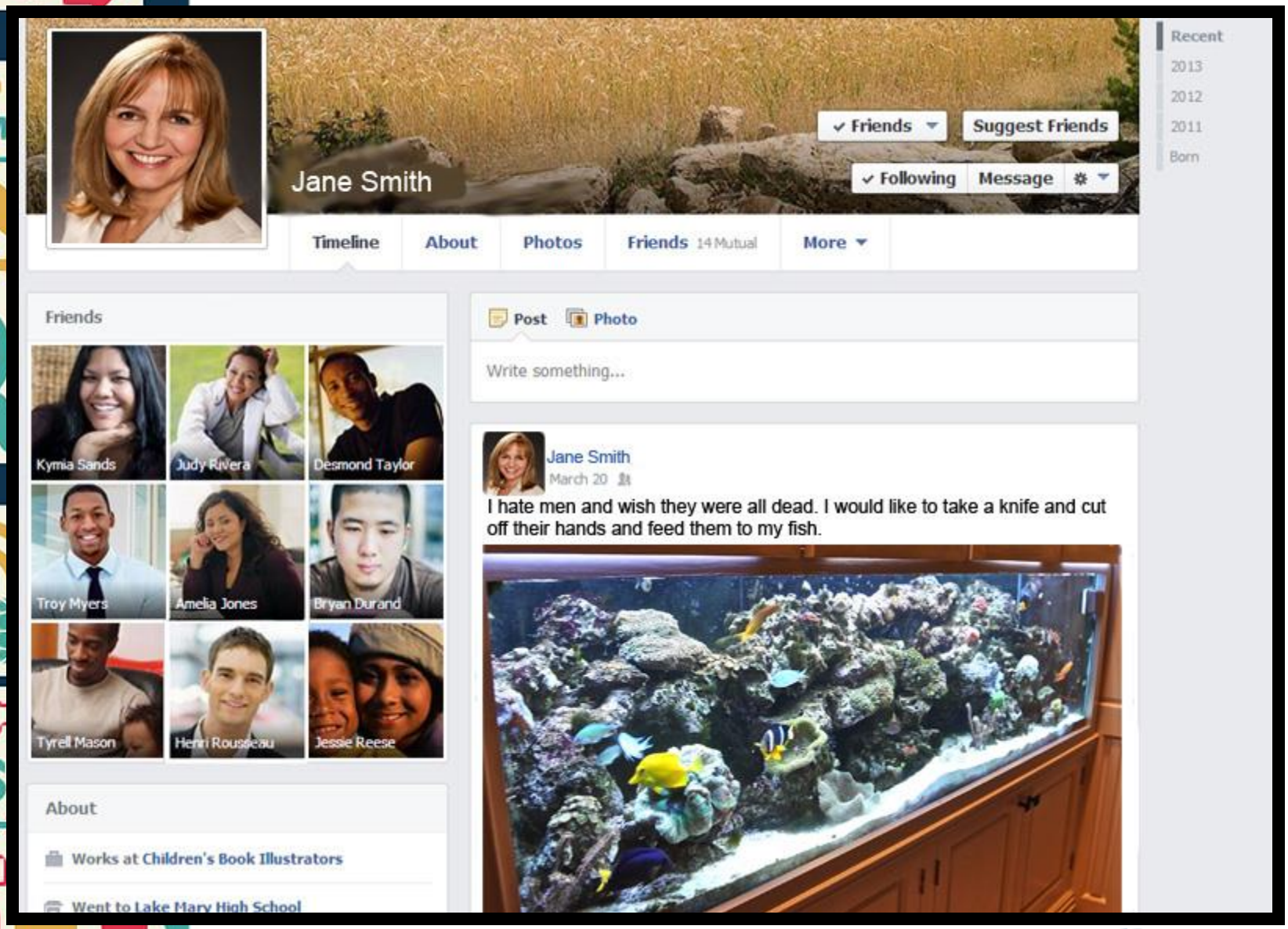

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Legal.

- Some of the red flags employers consider in refusing to hire applicants are any type of language or imagery that promotes hate, and threats of physical violence or other hostile or aggressive comments.

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Sarah's Blog

Avoid at All Costs: Naber Realty

Posted on January 23, 2010 by Sarah

My former employeer, Naber Realty, was charging customers and not providing any type of valuable service whatsoever. I am so glad to be out of there. I hated every single minute working in that sweatshop.

Search

Search

April 2010

M	T	W	T	F	S	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

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Legal.

- An employer may have legitimate, job-related concerns about a candidate who discloses confidential or inappropriate information belonging to a former employer or customer.

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My Blog

Hi I'm Sarah & this is my blog!

Search

Home Sample Page

Office Guest

I cannot believe Barack Obama was in our office for treatment of a deep cut he got from doing work in Michelle's garden. How can he be so clumsy.

1

Search

RECENT POSTS

- Hello world!

RECENT COMMENTS

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Legal.

- An employer may have legitimate, job-related concerns about a candidate who discloses confidential or inappropriate information belonging to a former employer or customer.

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Employment Law Trend No. 3-

Religion

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EEOC (ELAUF) v. Abercrombie & Fitch Stores, Inc.

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Discrimination, Accommodation and Retaliation

- Cannot discriminate or harass because of religion.
- Must accommodate unless employer can show undue hardship.
- Undue hardship is anything requiring more than a de minimis cost.

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Discrimination, Accommodation and Retaliation

What is religion?

- Includes all aspects of religious observance practice and belief.

What are religious practices?

- Moral or ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views.

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Work Schedules

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Possible Work Schedule Accommodations

1. Flexible scheduling and leave
2. Voluntary shift substitutions and swaps
3. Alternative work schedules
4. "Floating" holidays
5. Job reassignment and lateral transfers
6. Modified workplace policies and practices

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Real Life Examples

IT Employee scheduled to help install a new computer network and audio system in your new building.

- Employee says she cannot participate because she needs to attend ground breaking on her church.
- Absence unapproved and the employee is terminated.
- Violate the law to terminate?

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Real Life Examples

FedEx tells Jehovah's witness schedule will be changed from Monday through Friday to Tuesday through Saturday.

- Accept or take 90 days leave to apply for alternative position.
- Violate the law?

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Hypothetical

Mitch, who was hired to work in the maintenance department on weekends, asked his supervisor to schedule him for Sundays instead of Saturdays, because his religion (Judaism) observes Saturday as the Sabbath. No other staff was available to work on weekends.

- Should his request be granted?

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Dress and Grooming

EEOC 2014 Guidance

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Hypothetical

Eli has been working at the Burger Hut for two years. While in the past he has always worn his hair short, he has recently let it grow longer. When his manager advises him that the company has a policy requiring male employees to wear their hair short, Eli explains that he is a newly practicing Nazirite and now adheres to religious beliefs that include not cutting his hair.

Can Eli's observance be sincerely held since it is recently adopted?

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Hypothetical

Adarsh, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after he begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When the manager makes inquiries, the crew complains that Adarsh, who they mistakenly believe is Muslim, makes them uncomfortable in light of the anniversary of the September 11th attacks. The manager tells Adarsh that he will be terminated because the shop is losing the crew's business.

Has the manager discriminated against this employee?

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Religious Expression

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Examples of Religious Expression

1. Praying at a workstation or in another area of the workplace
2. Displaying religious icons or messages at work stations
3. Proselytizing by engaging in one on one discussions regarding religious beliefs
4. Distributing literature or using a particular religious phrase when greeting others

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Court Opinions and Litigation

Nobach v. Woodland Vill. Nursing Ctr. Inc., No. 13-60378, 2014 U.S. App. LEXIS 15236 (5th Cir. Aug. 7, 2014)

A Jehovah's witness is terminated for refusing to read the rosary to a nursing home resident as requested.

Did the employer violate Title VII?

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Hypothetical

Suzanne is a devout Catholic and likes to talk to co-workers at Acme one-on-one about her faith during the work day. After several years with Acme, one of Suzanne's co-workers asks her to stop talking to her about her faith. When Suzanne does not stop, the co-worker complains to Human Resources that Suzanne's one-on-one discussions with her are not welcome.

Does Acme have to ask Suzanne to stop talking about her faith at work?

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Hypothetical

Mia, who works in the sales department at Bullseye, wants to add "Have a blessed day" to her phone greeting. Bullseye has a policy restricting the use of company phones for business purposes only.

Should this be permitted?

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What Constitutes an Undue Hardship?

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Hypothetical

Mirna alleges that she was terminated from her job in a factory because of her religion (Pentacostal) after she told her supervisor that her faith prohibits her from wearing pants as required by the company's new dress code. Mirna requests as an accommodation to be permitted to continue wearing a long but close-fitting skirt. Her manager replies that the dress code is essential to safe and efficient operations on the factory floor, but there is no evidence regarding operation of machinery at issue to show that close-fitting clothing poses a safety risk.

Does the accommodation Mirna proposes pose an undue hardship upon the employer?

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Hypothetical

Harvinder, a Sikh who works in a hospital, wears a four inch, dull and sheathed kirpan (symbolic miniature sword) under her clothing to work as a symbol of her commitment to defend truth and moral values. When her supervisor learns about the kirpan, he instructs Harvinder not to wear it because it violates company policy regarding weapons in the workplace. Harvinder explains that her faith requires her to wear the kirpan, gives the supervisor literature and shows him that it is no sharper than the butter knives in the hospital cafeteria. The supervisor still explained that she would be terminated if she continued to wear the kirpan.

Is the hospital at risk of liability because of its denial of religious accommodation?

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Employment Law Trend No. 4-

Retaliation

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Retaliation claims continue to increase dramatically.

Now 42.8% of charges filed. This has doubled since 1997.

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More employers want to terminate employers for comments made on social networking sites. When they do, the employees can claim retaliation.

So what is the current status of the law?

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Employees Have The Right To Engage In Concerted Activity

- For:
  - Purpose of collective bargaining, or
  - Other mutual aid and protection

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Concerted Activity

- Not solely on behalf of employee but when the employee acts "with or on the authority of other employees."
  - Logical outgrowth of concerns expressed by employees collectively
  - When individuals seek to bring group concerns to management's attention
  - Can occur even if employee does not intend to engage in specific group action

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So When Can You Terminate An Employee For Calling Her Supervisor A Jerk?

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Hypothetical No. 1

- Julie
  - An office worker at a medical office
  - Performs various tasks including greeting patients
- Valerie
  - Employee who tells supervisor about Julie's Facebook page

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"They are full of shit…They seem to be staying away from me. You know I don't bite my tongue anymore, FUCK…FIRE ME…Make my day…"

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"It's getting bad here, it's just annoying as hell. It's always some dumb shit going on."

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Can Julie Be Disciplined?

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It was lawful to discipline Julie because her comments expressed an individual gripe, rather than a shared concern over the return of the former employee.

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Hypothetical No. 2

- The employer is a medical transportation company
- The employee, Mary, is an EMT, who makes the Facebook posting being questioned
- Janet is the employee who has already been terminated

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"Think about getting a lawyer and taking them to court."

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"Contact the labor board."

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Was Mary's Termination Lawful?

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Mary's termination was not lawful. The post was protected as concerted group activity and was not disloyal to the employer. Mary was responding to a matter of mutual concern of fellow employees, the condition of the employer's vehicles. Since the condition of the employer's vehicles were of common concern, Mary's advice to contact legal counsel and the Labor Board was concerted activity and entitled to protection.

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So When Can You Terminate An Employee For Calling Her Supervisor A Jerk?

- Only when:
  - It does not relate to terms and conditions of employment
    - A personal gripe
  - It was an individual action
    - Not done with or on the authority of other employees
    - It was not a logical outgrowth of concerns expressed by employees collectively

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Thanks for coming!

Isn't employment law the best?

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