



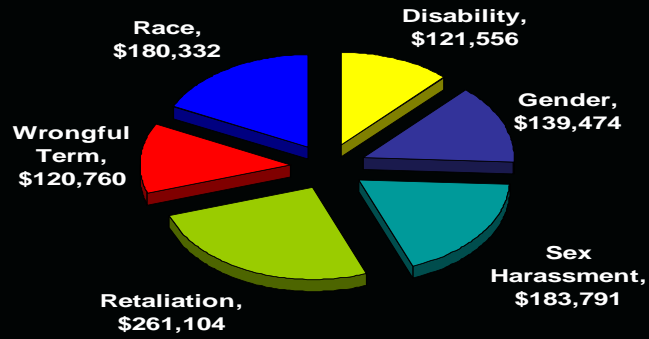
Legal Issues in Human Resources Management

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Overview

- Five basic steps to remember
- Evolving legal principles
- Settlements

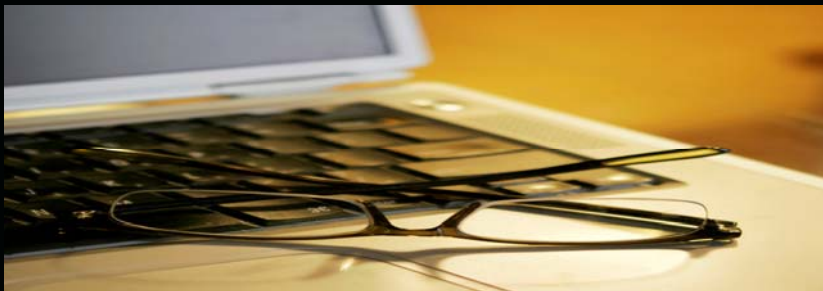




What are some of the costs of not getting it right at UC?

HYPOTHETICAL

Robert the IT Programmer

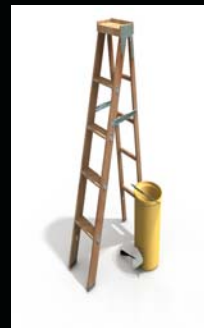


Robert – I T Programmer

- Best Programmer in the unit
- Frequently exhibits “odd” behaviors, soft noises, grimaces – during one-one meetings
- Unit manager retires and Robert applies for the position
- Dept. Director believes he has Tourette’s syndrome – feels that his strange behaviors would be unnecessary liability for this critical position
- Assume many qualified people apply and Robert is most qualified when you consider his experience with the University

Five Steps To Remember

- Ask basic questions
- Spot issues
- Develop the facts in context
- Call on resources
- Follow through



Ask Basic Questions

- Is a UC employee involved?
- Has the matter been resolved?
- How long ago did this happen?
- Has anyone else been notified?
- Is this employee disabled?
- Does this employee qualify for leave



Ask Basic Questions

- Is there a Whistleblower/False Claims Act issue?
- Is there a Worker's Compensation claim?
- Should we do a formal investigation?
- Is there a simple way to fix this?
- Who do I need to involve?



Spot Issues



Workplace violence/Safety

- Is there a possibility of workplace violence or a security issue?
 - Review security and safety procedures
 - Reiterate and reinforce policies about discrimination, harassment and retaliation
 - Review leave policies

Spot Issues



References

- Must you disclose information?
- Five things to remember:
 - **T** is for Truth
 - **E** is for Evidence
 - **R** is for Respond to a request
 - **M** is for Malice: not allowed
 - **S** is for Scope

Spot Issues



References

- **Randi W. v. Livingston Union School District, et al. (1995) 50 Cal.App.4th 447.** A case of negligent misrepresentation
- **Noel v. River Hills Wilsons, Inc. (2003) 113 Cal.App.4th 1363.** Incorrect information given in a reference check is not actionable where the mistake was inadvertent error and there was no evidence of malice

Spot Issues

Disability rights laws

- Federal Americans with Disabilities Act (ADA)
- Cal. Fair Employment and Housing Act (FEHA)
- Worker's Compensation
- Privacy Interest



Spot Issues

Disability rights laws

- General principle: Employer may not discriminate against a qualified individual with a physical or mental disability
- AB 2222 dramatically changed FEHA to liberalize the standards for disability rights under state law.



Spot Issues

Disability rights laws

- Mental/physical disability need only “limit” a major life activity, not “substantially limit.”
- Major life activities include working, (including a “particular employment”), studying and even social activities



Spot Issues

Disability rights laws

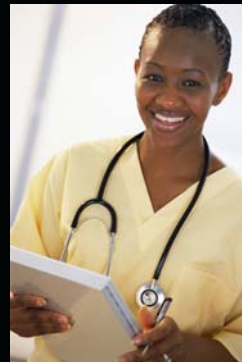
- California legislature intended to eliminate the duration element to qualify a condition as a disability under AB 2222. *Diaz v. Federal Express* (C.D. Cal. 2005) 373 F.Supp.2d 1034.



Spot Issues

Disability rights laws

- Pre-placement medical exams
- Fitness for duty



Spot Issues



Disability rights laws

- Is individual disabled?
- Is she qualified to perform essential functions of the job?
- Did she request an accommodation or do we know that one is needed?

Spot Issues



Disability rights laws

Employer has to engage in the IP “aimed at affecting a reasonable accommodation and provide a necessary and reasonable accommodation to an applicant or employee whom it regarded as physically disabled” (*Gelfo v. Lockheed* (2006) 140 Cal. App.4th 34).

Spot Issues



Interactive Process

- direct communication with employee (representative) to explore possible accommodations,
- consideration of any accommodation requested by the employee,
- offer of a reasonable and effective accommodation, if one exists, without causing the employer undue hardship.

Spot Issues

Interactive Process

- Identify barriers to equal opportunity, identifying and distinguishing between essential and nonessential job tasks.
- Assess the reasonableness of each in terms of effectiveness and equal opportunity.



Spot Issues

Interactive Process

- Implement the accommodation that is most appropriate for the employee and the employer under all the circumstances. The decision is the Employer's ultimately.



Spot Issues

Interactive Process

The accommodation must work effectively. If not, try again. The process goes on until the employee no longer needs accommodation or the employee refuses to participate in the process in good faith or we determine there is no reasonable accommodation (*Humphrey v. Memorial Hospitals* (9th Cir. 2001) 39 F.3d 1128).



Spot Issues



Interactive Process

- Reassignment to a vacant position” is considered a reasonable accommodation. The employer must make an active effort, not just give the employee a list of vacant positions and tell the employee to apply.

Spot Issues



Interactive Process

- An employer's good faith consideration of an employee's requested accommodation requires more than an uninformed rejection. The employer may not merely speculate that the employee's suggested accommodation is not feasible, but must gather sufficient information from qualified experts to determine the accommodation's effectiveness (*Hughes v. U. S. Foodservice* 2006 U.S.App. Lexis 4554 (Unpublished)).

Spot Issues

Interactive Process

- Leaves of absence may be a reasonable accommodation.
- Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA):
Threshold issues and notice - 1250 hours for eligibility.



Spot Issues

Free Speech/First Amendment

Statement made by public employees pursuant to their official duties are not protected under the 1st Amendment and such communications are not insulated from employer discipline (***Garcetti v. Ceballos*** (2006) 126. S. Ct. 1951).



Spot Issues

Religious Speech

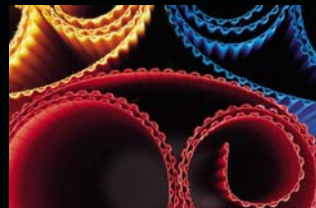
Regulation of speech in the workplace by a governmental employer, religious or otherwise, is subject to the same balancing test under the First Amendment (*Berry v. Dept. Of Social Services* (9th Cir. 2006) 447 F.3d 642).



Spot Issues

Harassment, Discrimination and Retaliation

– race, color, national origin, ancestry, sex, sexual orientation, physical and mental disability, age (over 40), gender identity and religious creed.



Spot Issues

Harassment, Discrimination and Retaliation

- Under FEHA, the University is strictly liable for unlawful harassment by supervisors
- No defense to liability
- Possible defense to damages only under doctrine of “avoidable consequences” (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026).



Spot Issues



Harassment

- Court upholds \$1.55 million sexual orientation discrimination verdict (*Jones v. The Lodge at Torrey Pines P'ship* (2007) 147 Cal.App.4th 475).
- UC manager protected by anti-SLAPP Law for denying employee grievance (*Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387).



Spot Issues

Sex Discrimination

- With “Friends” like that . . . Cal. Supreme Court acknowledges that “talking dirty” in a creative environment can be an acceptable workplace practice (*Lyle v. Warner Bros. Tele. Prods.* (2006) 38 Cal.4th 264).
- 9th Cir. upholds makeup requirement for female employees (*Jesperson v. Harrah’s Operating Co.* (2006) 444 F.3d 1104).



Spot Issues

Retaliation

- Retaliatory harassment by coworkers is actionable under Title VII (*Jensen v. Potter* (3rd Cir. 2006) 435 F.3d 444).
- New standard for “adverse employment action” -- actions that are sufficiently harmful that they might “dissuade a reasonable worker from making or supporting a charge of discrimination” (*Burlington Northern and Santa Fe Railroad Co. v. White* (2006) 126 S. Ct. 2405).

Spot Issues



Releases/Waivers

- Confusing release and covenant not to sue did not satisfy the requirement of a knowing and voluntary waiver under the OWBPA (*Syverson v. IBM* (9th Cir. 2006) 461 F.3d 1147).
- Cannot waive right to file EEOC Charge – but may waive right to recover damages (*Tolbert v. Follett Higher Ed. Group, Inc.* 2006 U.S. Dist. Lexis 11770).

Spot Issues

Releases/Waivers

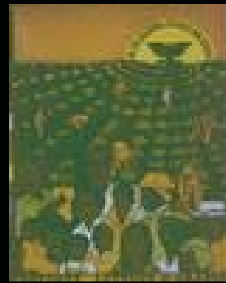
- 10th Cir. broadens requirements for waiver of age discrimination claims – failure to conform to statutory requirements can make release ineffective as matter of law (*Kruchowski v. Weyerhaeuser* (10th Cir. 2006) 446 F.3d 1090).
- Settlement of labor grievance between union and employer not necessarily intended to extend to personal claims of employee (*Butler v. The Vons Companies, Inc.* (2006) 140 Cal.App.4th 943).



Spot Issues

Union Issues

- HEERA
- CBA applicable to the unit employees
- Unfair labor practices
- Status Quo
- Strikes (Protected conduct)
- Fair Labor Standards Act



Develop the Facts in Context

- Investigate
- Service record is important!
- Look at the complete picture
- Analyze operational impact on your unit



Develop the Facts in Context

Investigate

- Generally, an employee is required to cooperate in employer investigations
- But remember constitutional protections
- Can no longer compel testimony without formal grant of immunity (*Spielbauer v. County of Santa Clara* (2007) 146 Cal. App.4th 914).



Resources

- HR
- Risk Management/EHS
- Internal Audit
- AA/EEO Office – Title IX Officers
- Employee Relations
- Labor Relations
- OGC



Follow Through

- Inaction is a decision!
 - Candidly evaluate performance annually
 - Use progressive discipline



Settlements and Post-Mortems

Why settle cases?

- Are you right? Can you win? How will it play in Peoria?
- In context, is the case worth the cost of litigation?
- New Regents' policy



QUESTIONS?
**Thank you for your kind
attention!**

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May 24, 2007