

SEX, DRUGS, AND ROCK & ROLL IN THE WORKPLACE

October 25, 2011

ROMANCE

Workplace Romances, Electronic Flirting, Sexting & Out-of-Control Use of Social Networking

WORKPLACE ROMANCES

3

- **Why People Engage in Workplace Romances**
 - Long hours people spend at work.
 - Work is a non-threatening environment where people meet potential dating partners and learn more about them.

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4

- **Why People Engage in Workplace Romances**
 - When the romance flourishes, those in the relationship are “happy.”
 - When partners work for the same employer, each has someone to talk to about their problems at work because the other understands and can help resolve issues.

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5

- **Almost Everyone is Doing It!!**
 - 59% of employees have participated in an office romance
 - 65% of employees reported that the shaky economy has no effect on their willingness to take romantic risks at work
 - 1 / 3 of those who have had office romances have engaged in workplace trysts.

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6

□ **Dangers of Workplace Romance**

1. Loss of attention to work.
2. Jealousy among co-workers.
3. Potential for antagonism between the individuals if a break up occurs.

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7

□ **Legal Challenges**

- Sexual Harassment (Quid Pro Quo) Claims
- Retaliation Claims
- Hostile Work Environment Claims
- Invasion of Privacy and Wrongful Termination Claims
- Intentional Infliction of Emotional Distress
- Assault and Battery

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8

- **Sexual Harassment (Quid Pro Quo) Claims**
 - After a supervisor ends a relationship with a subordinate, the subordinate will sometimes assert an after-the-fact sexual harassment claim.
 - Usually, the subordinate contends he or she was coerced into the relationship and employment or various prerequisites of employment were conditioned upon the exchange of sexual favors.

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9

□ **Retaliation Claims**

- When a subordinate ends a relationship with a supervisor, the supervisor may be accused of retaliation if the subordinate suffers any adverse employment action.

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10

□ **Hostile Work Environment**

- Typically occurs where a combination of sexual comments, jokes, etc. take place between the couple prior to the relationship dissolving.
- Other employees who witness the office romance may also feel slighted and raise such a claim – must be widespread favoritism.

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11

□ Hostile Work Environment

□ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

- The Supreme Court held that in order to be actionable under Title VII, the sexual harassment must be so severe and pervasive that it alters the conditions of the victim's employment and creates an abusive working environment.

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12

□ *Faragher v. City of Boca Raton*

- The Court noted that a sexually objectionable environment must be:
 - Both objectively and subjectively offensive,
 - One that a reasonable person would find hostile or abusive, and
 - One that the victim in fact did perceive to be so.

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13

□ *Faragher v. City of Boca Raton*

- Courts are directed to determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including:
 - The frequency of the discriminatory conduct;
 - The severity of the discriminatory conduct;
 - Whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and
 - Whether the conduct unreasonably interferes with an employee's work performance.

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14

□ *Faragher v. City of Boca Raton*

- An employer may be indirectly liable for sexual harassment by a superior if:
 - (1) the harassment occurs within the scope of the superior's employment;
 - (2) the employer assigns performance of a non-delegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or
 - (3) there is an agency relationship which aids the supervisor's ability or opportunity to harass.

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15

- **Invasion of Privacy & Wrongful Termination Claims**
 - When employers penalize employees for dating, the affected employees may be able to assert an invasion of privacy claim.

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16

□ **Intentional Infliction of Emotional Distress (IIED)**

□ **Elements**

- (1) defendant acted intentionally or recklessly;
 - (2) defendant's conduct was extreme and outrageous;
 - (3) causation
 - (4) resulting in severe emotional distress
- A claim for IIED can be brought against an individual supervisor.

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17

□ Assault & Battery

□ Elements of Assault:

- (1) an act intended to cause apprehension of harmful or offensive contact
- (2) that does cause apprehension of such contact in the victim

□ Elements of Battery:

- (1) an intent to cause harmful or offensive contact
 - (2) and harmful or offensive contact to the plaintiff
- Claims for assault & battery can be brought against an individual supervisor.

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18

- **Employer approaches to protect against the legal impact of workplace relationships:**
 - “Love Contracts”
 - No-Fraternization Policies

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19

□ Love Contracts

- Typically used as a **supplement** to a sexual harassment policy
- A contract signed by both parties which acknowledges that the relationship is consensual (does not constitute harassment) and agreeing that based on such representation, the employer should not intervene.

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20

□ Love Contracts

□ Examples of terms/rules:

- Use of arbitration to resolve disputes
- Employees given the opportunity to consult an attorney before signing the contract.
- Dating employees are expected to follow certain guidelines such as refraining from displays of affection at work or work-related events.
- Either employee can end the relationship without fear of work-related retaliation.
- Dating employees agree to waive their rights to pursue a claim of sexual harassment that arose **prior** to the signing of the contract.

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21

□ **No-Fraternization Policies**

□ **What does it mean to fraternize?**

- When two people have a relationship within the office.

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22

□ No-Fraternization Policies

□ First Type

- Prohibits supervisory employees from dating non-management employees.
 - Rationale – the disparity of power between the two could be viewed as creating a situation where the employee was under *duress* to enter into or stay in the relationship.

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23

□ No-Fraternization Policies

- Second type –Prohibits supervisors from dating *any* employees, but allows non-supervisory employees to date each other.
- Third type –Prohibits *any* dating in the workplace (strict policy).

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24

No-Fraternization Policies vs. Employee Privacy

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25

What kind of policy is right for you?

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26

- **Advantages of NOT having a No-Fraternization Policy**
 - ▣ Allows management flexibility in establishing corporate culture and letting it change as the firm may experience a fluctuation of employees within the firm.
 - ▣ Company can still address harassment issues through its anti-harassment policy.

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27

- **Disadvantages of NOT having a no-fraternization policy**
 - Employees may not be on notice as to what kinds of behavior are prohibited, thus providing an opening for an invasion of privacy argument.
 - Employer does not have the strong evidence that the consistent enforcement of a no-fraternization policy, which goes over and above a policy merely prohibiting harassment and discrimination, provides in court.

Social Networking

28

- **Types of Social Networking:**
 - Forums
 - Blogs
 - Micro-blogging (e.g. Twitter)
 - Photo Sharing
 - Video Sharing
 - Professional (e.g. LinkedIn)
 - Purely Social (e.g. Facebook)
 - Bookmarking

Social Networking

29

□ Trends

□ Time Americans spent surfing Facebook:

- August 2010 - 41.1 million minutes
- August 2009 - 20.8 million minutes

□ Largest growing demographic on Facebook:

- Ages 35 and older

Social Networking

30

□ **Statistics:**

- 17% disciplined employees for violating blog or message board policies
- 15% disciplined employees for violating multimedia sharing/posting policies
- 13% investigated an incident involving mobile or web-based short message services
- 8% discharged employees for behavior on social networking sites

Social Networking

31

□ What is a Blog?

- An online journal
- Can contain anything the author wishes to publish
- Potential Risks/Downside:
 - Invasion of Privacy
 - Defamation
 - Sexual Harassment
 - Productivity Drains & Economic Damage

Social Networking

32

□ **Blog Risks to Employers**

- May be held accountable for employee posts about products/services if misleading
- Knowledge of discriminatory or harassing content may expose employer to liability
- Employers have not yet been held liable for employee blog content
 - However, liability has been imposed for employee email & internet conduct.

Social Networking

33

□ Blog Risks for Employers

- FTC endorsement guidelines require that bloggers discussing or reviewing products & services must disclose any connection between blogger and maker of the product
- Employers can be held liable for permitting a hostile work environment based on what employees say online. *Blakely v. Continental Airlines*, 164 N.J. 38 (2000).

Social Networking

34

- **Disciplinary Actions for Employee Blogging**
 - National Labor Relations Act (NLRA)
 - Does not seem to prohibit employees' termination/discipline for “acts of disloyalty” such as blog postings criticizing an employer's products

Social Networking

35

□ **Disciplinary Actions for Employee Blogging**

□ National Labor Relations Act (NLRA)

- Employees have been terminated for the content of their personal, “home-based” blogs . . .
- . . . however, NLRA prohibits disciplinary action for “concerted protected activity”
- Criticism of terms/conditions of employment, including management personnel, is being interpreted as “protected activity”

Social Networking

36

□ What is Twitter?

- A free blogging service that lets users post short answers, known as “tweets,” to the question: What are you doing?
- Risks
 - Tweets create the same risk issues that blogs in general create
 - Because they are instantaneous messages, they are generally not well thought-out, creating more potential for poor judgment.

Social Networking

37

- **Disciplinary Actions for “Tweets”**
 - ▣ **Lee Enterprises, Inc. d/b/a Arizona Daily Star, 28-CA-23267 (4/21/2011).**
 - Reporter lawfully discharged for inappropriate remarks on Twitter linked to Daily Star’s website
 - Reporter tweeted: “No overnight homicide? WTF?” and “Hope everyone’s having a good Homicide Friday.”
 - Tweets were not “protected and concerted” under the NLRA because statements did not relate to “terms and conditions of employment.”

Social Networking

38

- **What is “pure” Social Networking?**
 - Sites purely for allowing users to stay in touch with people whom they know.
 - Best examples are Facebook and MySpace
 - Potential Risks
 - NLRA Violations
 - Defamation
 - Invasion of Privacy
 - Sexual Harassment

Social Networking

39

- **Disciplinary Actions for Facebook Posts**
 - **NLRB v. American Medical Response (AMR)**
 - A Paramedic was terminated after posting disparaging remarks about his supervisor on his Facebook page. Other employees responded in kind.
 - The NLRB filed suit on behalf of the employee alleging AMR's actions interfered with an employee's right to discuss employment conditions with coworkers.

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40

□ Defamation

- A false statement
- Publication
- To a third party
- That causes damages to the person defamed
- Defense: Truth

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41

□ Invasion of Privacy

- Appropriation of name or likeness
- Publicity given to private life
 - Matter publicized would be highly offensive to a reasonable person AND
 - Is not of a legitimate concern to the public
- Publicity placing a person in a false light

Social Networking

42

- **Sexual Harassment – Examples:**
 - Sending explicit pictures
 - Having explicit pictures on social network site
 - “Sexting”

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43

- **Urban Dictionary:** Dooched – to lose one's job because of one's website

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44

- **Examples quoted in the media of people who lost their jobs because of Social Networking Posts**

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45



OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do shit stuff just to piss me off!! WANKER!

Yesterday at 18:03 · Comment · Like



Hi [redacted], i guess you forgot about adding me on here?

Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to f---up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious.

Yesterday at 22:53

Write a comment...

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46

- **Philadelphia Eagles Gate Keeper**
 - Upset that Eagles let free agent Brian Dawkins sign with Denver Broncos
 - Fired after 6 years on job for Facebook post: “Damn Eagles R Retarded!!”

Social Networking

47

□ **Creating a Policy that Works**

□ A good policy

- Protects trade secrets
- Addresses customer, employer & employee privacy
- Addresses harassment issues

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48

□ **Creating a Policy that Works**

□ **Topics covered:**

- Use of company resources for personal business
- Company policies apply online
- Unauthorized use of Company name and trademarks, logos, etc.
- Inappropriate disclosures
- Inappropriate comments not otherwise legally protected

Social Networking

49

□ **Creating a Policy that Works**

- Should comply with Section 7 of the NLRA
- Avoiding an “overly broad” policy:
 - Remember that employees have a right to share information regarding working conditions
 - Employees can be prohibited from using company logos or trademarks and from posting disparaging information about company products and services
 - Employees should be prohibited from violating EEO/harassment laws.
 - Employees should provide a disclaimer that the opinions are their own and not those of the company.

COPING WITH EMPLOYEE DRUG USE



Recreational and Prescription Drugs

Coping with Employee Drug Use

51

- **Direct Cost of Drug Abuse to U.S. Industry**
 - \$85 billion per year
 - Including lost time, reduced productivity, lost employment, injuries and crime

Source: Metropolitan Life Insurance Company

Coping with Employee Drug Use

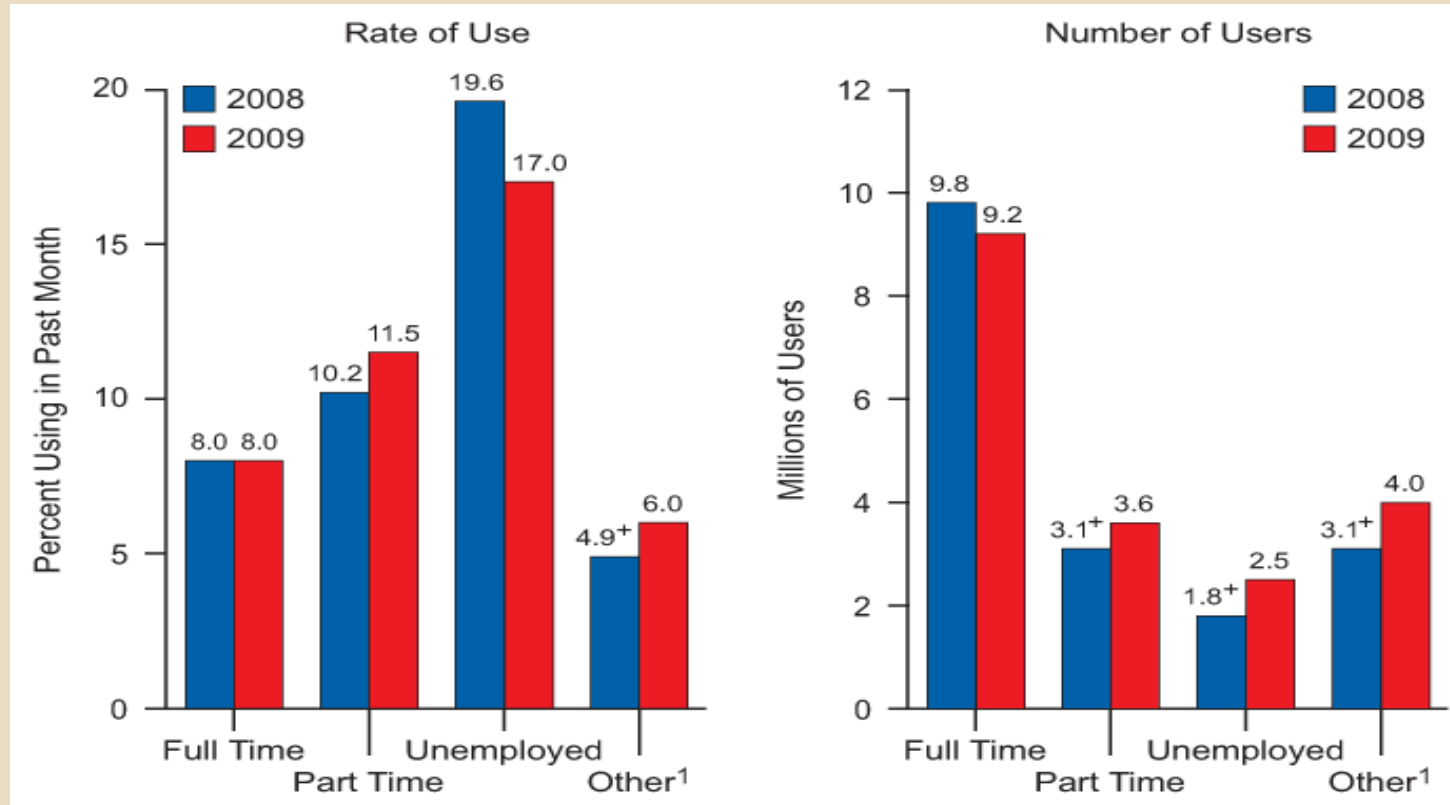
52

- **According to the National Survey on Drug Use & Health...**
 - ▣ Of the estimated 19.3 million illicit drug users aged 18 or older in 2009, 12.9 million (66.6 %) were employed either full or part time.

Coping with Employee Drug Use

53

Past Month Illicit Drug Use among Persons Aged 18 or Older, by Employment Status: 2008 and 2009



Coping with Employee Drug Use

54

- In 2009, an estimated 21.8 million Americans aged 12 or older were current illicit drug users, meaning they had used an illicit drug during the month prior to the survey interview.
- The rate of current illicit drug use among persons aged 12 or older in 2009 (8.7%) was higher than the rate in 2008 (8%).
- Marijuana was the most commonly used illicit drug. In 2009, there were 16.7 million past month users.

Coping with Employee Drug Use

55

- The number of past month methamphetamine users decreased between 2006 and 2008, but then increased in 2009.
 - ▣ 2006 - 731,000 (0.3%)
 - ▣ 2007 - 529,000 (0.2%)
 - ▣ 2008 - 314,000 (0.1%)
 - ▣ 2009 - 502,000 (0.2%)

Coping with Employee Drug Use

56

- **Prescription Drug Abuse – What is it?**
 - Use of prescription pain relievers, tranquilizers, stimulants or sedatives without a prescription simply for the feeling the drug causes.

Coping with Employee Drug Use

57

- Among persons aged 12 or older in 2008-2009 who used pain relievers non-medically in the previous 12 months:
 - 55.3% got the drug from a friend or relative for free;
 - Another 17.6% reported they got the drug from one doctor;
 - Only 4.8% got pain relievers from a drug dealer or other stranger; and
 - 0.4% bought them on the Internet.
- In 2009, 7.0 million (2.8%) persons aged 12 or older used prescription-type psychotherapeutic drugs non-medically in the previous month.

Coping with Employee Drug Use

58

□ Effect of Drug Abuse on Employees

□ Survey says...

- Nearly 75% of current illicit drug users are employed either full- or part-time
- 10%-20% of the nation's workers who die on the job test positive for drugs.

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59

- More likely to be involved in an accident and file a workers' compensation claim
- More likely to quit or get fired
- More likely to steal from workplace
- More likely to miss work
- More likely to be in a confrontation
- Less productive

Coping with Employee Drug Use

60

- **Substance abusers are:**
 - 3.6 times more likely to be involved in a workplace accident
 - 5 times more likely to file a workers' compensation claim

Coping with Employee Drug Use

61

- As many as 50% of all workers' compensation claims involve substance abuse.
- 80% of those injured in “serious” drug-related accidents at work are not the drug abusing employees, but are innocent co-workers and others.

Coping with Employee Drug Use

62

Employer Responses to Problems

Coping with Employee Drug Use

63

□ Three (3) Choices:

- Ignore it
- Discipline without drug testing
- Implement Substance Abuse program involving 1 or 2 elements:
 - Drug Testing
 - Rehabilitation

Coping with Employee Drug Use

64

Drug Testing

Coping with Employee Drug Use

65

- **Does drug testing save money?**
Shortly after beginning testing:
 - GM estimated it saved \$3 for every dollar spent
 - Pizza Hut estimated it saved \$17 for every dollar spent
 - Conrail estimated it saved \$3 for every dollar spent

Coping with Employee Drug Use

66

□ Drug Testing Industry

□ Who are the Players?

- Laboratories
- Third-party administrators (TPAs)
- Collection sites/collectors
- Medical Review Officers
- Manufacturers
- Distributors

Coping with Employee Drug Use

67

□ Who is tested?

□ Employees

- All employees
- Safety-sensitive employees
- All employees under certain circumstances
- Temps, contract workers, seasonal hires

Coping with Employee Drug Use

68

- **When to test?**
 - **Traditionally...**
 - Pre-employment
 - Post-accident
 - Reasonable suspicion
 - Random
 - Return-to-duty
 - Follow-up
 - Periodic

Coping with Employee Drug Use

69

□ Pre-Employment

- Prospective employees cannot be forced to submit to a drug test, but employment can be conditioned upon passing one
- Some states specifically require pre-employment testing only be conducted after an offer has been made (e.g. Alabama, Massachusetts, Minnesota, Rhode Island, and Vermont)

Coping with Employee Drug Use

70

□ Random Testing

- Safety-sensitive positions only
- Location-specific only
- Government-mandated
- Universal company-wide
- Universal location-specific
- 100% same day

Coping with Employee Drug Use

71

- **Random Testing**
 - Powerful deterrent
 - Sampling Size

Coping with Employee Drug Use

72

□ Types of Specimen

□ Urine

(lab and rapid result analysis)

□ Hair

(on-site collection; lab analysis required)

□ Oral Fluids

(rapid result and lab analysis)

Coping with Employee Drug Use

73

□ Urine

- Legally sound
- Federally endorsed (e.g. DOT)
- Most common
- Invasive
- Subject to adulteration

Coping with Employee Drug Use

74

□ Hair

- Window of 90 days minus recent 4-7 days
- Legally still being tested
- Lacks federal endorsement
- About 1-2% usage
- Invasive

Coping with Employee Drug Use

75

□ Oral Fluid

- Window 4 - 24+ hours
- Least invasive
- Comparable to blood
- Adulteration resistant
- “Under the influence” indicator

Coping with Employee Drug Use

76

□ Legal Challenges Employers Face

□ Validity of Tests and Procedures

- Errors

- Chain of Custody Problems

□ Invasion of Privacy

□ Defamation

□ Wrongful Termination

Note: Certain states disallow certain types of tests – e.g., hair or oral fluids.

Coping with Employee Drug Use

77

□ Americans with Disabilities Act (ADA) Concerns

- The EEOC has taken the position that employers and their designees—physicians, clinics, third-party administrators—may not require individuals being tested to indicate, prior to testing, if the individual is taking any medications, even if that medication may produce a positive test result.

Coping with Employee Drug Use

78

□ Americans with Disabilities Act (ADA) Concerns

- If an individual tests positive, the employer, either by one of its employees or a third-party, must determine whether the individual had a legitimate reason for testing positive.
- The ADA excludes users of illicit drugs and those who take prescription drugs unlawfully from its protection.

Coping with Employee Drug Use

79

□ Recommendations:

- Establish a policy in compliance with the law.
- Notify employees of said policy.
- Keep confidentiality, to the extent possible, and notify employees of the same.
- Require that employees acknowledge receipt of said policy in writing.

Regulating Employee Appearance



Weight, Dress, Tattoos & Body Piercings

Tattoos & Body Piercings

81

- **Recent Survey:**
 - ▣ 42 % of workers have permanent body art other than pierced ears

http://www.shrm.org/Publications/HRNews/Pages/CMS_022571.aspx

Tattoos & Body Piercings

82

□ The “Norm”

- 30 years ago, 1 in 100 people in the US had tattoos.
- Now, 1 in 10 Americans have them, and 1/3 of those aged 25-30 have tattoos.
- While society is becoming more liberated and expressive, some employers are having a hard time accepting body art and piercings in the workplace.

Tattoos & Body Piercings

83

□ Legal Issues

- Can private sector employers regulate tattoos differently than the public sector?
- Are tattoos protected speech?
- Are some tattoos a form of religious expression?

Tattoos & Body Piercings

- **Private vs. Public Sector Employers**
 - Public sector employers must carefully balance if the employee's "speech" is a matter of public concern or pursuant to official duties
 - "Speech" that is not a matter of public concern or that is made pursuant to an official duty is not insulated from employer discipline.
 - Private sector employers' right to enforce a legitimate dress code typically trumps the employee's right to free speech.
 - Both public and private employers must not discriminate against speech on the basis of protected status, e.g., Title VII protects religious expression.

Tattoos & Body Piercings

85

□ Protected Speech

□ *Roberts v. Ward*, 468 F.3d 963 (6th Cir. 2006)

- KY State Parks Dept. employee filed suit alleging that his First Amendment rights were violated after he was terminated for refusing to follow the Department's "Professional Appearance Policy," which prohibited any visible tattoos and body piercings—with the exception of ear lobes for women only.
- The employee was terminated for displaying a U.S. Navy tattoo.

Tattoos & Body Piercings

86

□ Protected Speech

□ *Roberts v. Ward*

- The court identified two situations when a state employer's limitation upon the speech of its employees can violate the First Amendment:
 - Instances where a public employee speaks out about some functioning branch of government for which he works—a matter on which he is “uniquely qualified to comment” by virtue of his job status **AND**
 - Instances where the speech is unrelated to the job of the employee and involves matters of public concern.

Tattoos & Body Piercings

87

□ Protected Speech

□ *Roberts v. Ward*

- The employee argued that his tattoo involved a matter of public concern because it expressed his “support, loyalty and affection for the U.S. Navy.”
- The court held that the display of the tattoo was not a matter of public concern and some dress code limitations are permissible.

Tattoos & Body Piercings

88

□ Protected Speech

▣ *Riggs v. City of Fort Worth*, 229 F.Supp.2d 572 (N.D. Tex. 2002)

- A Fort Worth police officer with numerous tattoos on his arms and legs filed suit after he was transferred from the bike unit and ordered to wear long sleeves and pants to cover his tattoos. The officer alleged that he was discriminated against because of his race (Caucasian), sex (male), and national origin (Celtic).

Tattoos & Body Piercings

89

□ Protected Speech

□ *Riggs v. City of Fort Worth*

- The Police Department had a dress code that contained no specific provisions regarding tattoos but required that “personnel ... shall wear such uniform and insignia as the Chief of Police prescribes.”
- The court held that the tattoos were not protected speech and even if they were, they were not speech addressing a “legitimate public concern.”
- The court noted the police department needed only a “rational basis” to require the officer to wear pants and long sleeves.

Tattoos & Body Piercings

90

□ Religious Expression



Tattoos & Body Piercings

91

□ Religious Expression

□ Applicable law

- Title VII of the Civil Rights Act prohibits discrimination against employees on the basis of religion.
- An employer must offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment.

Tattoos & Body Piercings

92

□ Religious Expression

□ *Swartzentruber v. Gunite Corp.*, 99 F.Supp.2d 976 (N.D. Ind. 2000)

- A Ku Klux Klan member sued his employer after he was forced to cover a tattoo of a hooded man standing next to a burning cross.
- The employee claimed to be a member of the Church of the American Knights of the Ku Klux Klan and that the tattoo depicted a sacred symbol of his religion.

Tattoos & Body Piercings

93

□ Religious Expression

□ *Swartzentruber v. Gunito Corp*

- The employee failed to present evidence that covering the tattoo at work conflicted with his religious beliefs.
- The court held that even if the employee had presented such evidence, allowing the employee to work with the tattoo covered was a reasonable accommodation because of the offensive nature of the tattoo to other employees.

Tattoos & Body Piercings

94

□ Religious Expression

□ *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)

- An employee alleged religious discrimination when she was terminated for wearing facial jewelry
- The employee claimed to be a member of the Church of Body Modification
- The employee was terminated for absenteeism because she refused to remove her facial jewelry

Tattoos & Body Piercings

95

□ Religious Expression

□ *Cloutier v. Costco Wholesale Corp*

- Costco offered to allow her to return to work if she would wear clear spacers or cover the jewelry with a bandage.
- The employee stated that her religious beliefs required her to display her jewelry at all times.
- The court found the employer had provided a reasonable accommodation
- The appellate court subsequently found the employee's desired accommodation—complete waiver of the policy—was an undue hardship on the employer

Tattoos & Body Piercings

96

□ Church of Body Modification



Tattoos & Body Piercings

97

Employer Solutions to Tattoo & Body Piercing Issues

Tattoos & Body Piercings

98

□ Policies

- Should address whether jewelry or tattoos pose a conflict with:
 - The employee's ability to perform effectively in their position; or
 - The specific work environment the employee is in.

Tattoos & Body Piercings

99

□ Policies

- Factors to determine whether jewelry and tattoos pose a conflict:
 - Safety to self and others
 - Productivity or performance of tasks
 - Perceived offense on the basis of race, sex, religion, etc.
 - Community norms
 - Customer complaints

Inturri v. City of Hartford, Conn., 365 F.Supp.2d 240 (2005)

Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (2004)

Weight

100

Employer Regulation of Employee Weight

Weight

101

□ Obesity

- Research released in 2010 by Duke University found that the yearly cost to employers of obesity among full-time employees was \$73.1 billion.
- Presenteeism, lost productivity incurred when employees try to work despite health problems, costs employers \$12.1 billion per year, nearly twice as much as their medical costs.

Weight

102

□ Obesity

- Severely obese individuals with a body mass index of 35 or higher accounted for 61% of all obese employee costs, though they represent only 37% of the overall obese population.
- Among those with a BMI of 40 or more—roughly 100 lbs. overweight—these costs amounted to \$16,900 per capita for women and \$15,500 for men in this weight class.

Weight

103

Employee Wellness Programs as a Solution

Weight

104

□ Employee Wellness Programs

- Any workplace-sponsored program that attempts to help employees live healthier lifestyles.
- Two approaches:
 - Simple - includes having lunch break walks or adding a few lines in a company newsletter to remind people the company is offering flu shots
 - Extensive – employing consultants to assist with improving employee health or providing easy-to-use, inexpensive services that contribute to good health.

Weight

□ Employee Wellness Programs

□ Potential Issues

- The Health Insurance Portability and Accountability Act (HIPAA) amended ERISA, the Internal Revenue Code, and the Public Health Service Act in 1996.
- HIPAA generally prohibits group health plans from basing the entitlement to benefits or incentives on a “health factor” of an individual.

Weight

106

□ Employee Wellness Programs

- “Health Factors” generally include:
 - Health status
 - Medical condition (including physical & mental illnesses)
 - Claims experience
 - Receipt of healthcare
 - Medical history
 - Genetic information
 - Evidence of insurability
 - Disability

Weight

107

- **HIPPA Approved Programs**
- **Two types:**
 - **Reactive**
 - **Proactive**

Weight

108

□ Employee Wellness Programs

□ Compliance

- Despite this general prohibition, the regulations interpreting HIPAA include an exception for *bona fide* wellness programs.
- This allows employers to enact employee wellness plans without the burden and expense of HIPAA compliance.

Weight

109

□ Non-HIPPA Permitted Wellness Programs

□ Test for HIPAA exception:

- Available to “similarly situated individuals” **AND**
- The reward is unrelated to a health care plan **OR**
- The reward is related to the health care plan **but** it is **NOT** contingent on satisfying a standard related to a health status factor.

Weight

110

- **The American's with Disabilities Act (ADA)**
 - **Also has some potential applicability.**

Weight

111

□ Legal Constraints – ADA

- Three ways a wellness plan could violate the ADA:
 - Mandating wellness program participation;
 - Using information obtained in the program in a way that violates ADA confidentiality requirements;
 - Using information gained through the wellness program to discriminate against employees who are not as physically fit as management thinks they should be.

Weight

□ Legal Constraints – ADA

- Compliance issues also arise when wellness programs offered by the employer do not offer a reasonable accommodation for employees with known disabilities and when an employer inappropriately inquires about medical conditions.

Weight

□ Legal Constraints – ADA

- The ADA does allow employers to conduct medical examinations and inquiries that are part of its wellness program without having to show that the examination or inquiry is job-related or consistent with business necessity if such examinations and activities are voluntary.

Weight

114

□ Legal Constraints – ADA

- The EEOC has stated that wellness programs are “voluntary” as long as an employer neither requires participation nor penalizes employees who do not participate.
- An employer having a wellness program that involves medical examinations or inquiries will need to determine whether its program complies with the ADA’s voluntary requirement

DRESS CODES AT WORK

Sex Discrimination, Race
Discrimination & Religious
Discrimination

DRESS CODES AT WORK

116

Can a company dress code policy prohibit certain clothes?

DRESS CODES AT WORK

117



Dress Codes at Work

118

- **Yes, With Three Caveats:**
 - Sex Discrimination
 - Race Discrimination
 - Religious Discrimination

Dress Codes at Work

119



Sex Discrimination

Dress Codes at Work

120

□ Ms. Hopkins?



Dress Codes at Work

121

□ Sex Discrimination

□ *Price Waterhouse v. Hopkins*, 49 U.S. 229 (1989)

- Female employee received evaluations suggesting that she walk, talk, and dress more femininely to improve her chances of achieving partnership in the firm
- A plurality of the Supreme Court held that the firm had engaged in “sexual stereotyping,” which was a violation of Title VII.

Dress Codes at Work

122



Race Discrimination

Dress Codes at Work

123

□ Race Discrimination

- An employer may invite race discrimination claims if its dress code or appearance policy impacts only a particular race or group.
- Similarly, an employer may not discriminate against ethnic attire that otherwise complies with the dress code.

Dress Codes at Work

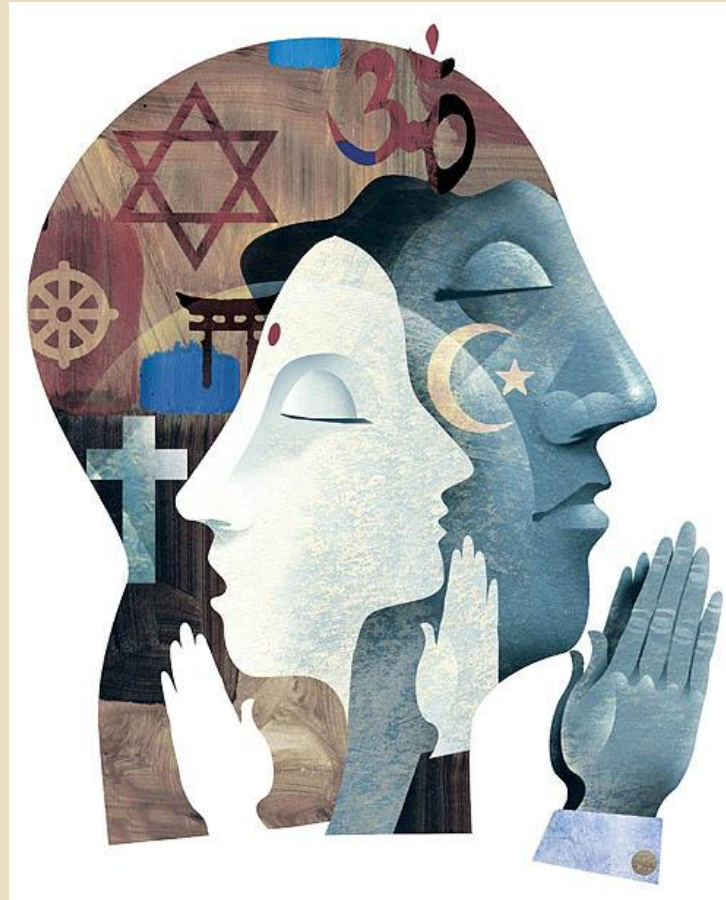
124

□ Race Discrimination

- For example, a ban on wearing a traditional sari that does not violate any of the tenets of the dress code would be discriminatory.
- A personal grooming policy preventing only African American women from wearing their hair in a certain style, while not subjecting other women to such standards, would also run afoul of Title VII.

Dress Codes at Work

125



Religious Discrimination

Dress Codes at Work

126



□ Religious Discrimination

- Employers risk being charged with religious discrimination by implementing a dress code or appearance policy requiring employees to act in a way contrary to their religious beliefs.
- In many cases, claims of religious discrimination arise from policies prohibiting head coverings or facial hair.

(*Brown v. F.L. Roberts & Co., Inc.*, 419 F.Supp.2d 7 (D. Mass. 2006))

Dress Codes at Work

127

□ Religious Discrimination

- An employee could prevail on a religious discrimination claim if the employer cannot demonstrate that accommodating the employee would create an "undue hardship"
- An "undue hardship" requirement can be met by showing that the employee's proposed accommodation imposes more than a *de minimis*—small or insignificant—financial or non-economic cost to the business.

Dress Codes at Work

128

□ Religious Discrimination

- An employer is not required to grant an employee claiming religious discrimination a blanket exemption from a "no facial jewelry" policy if the purpose of the policy is to project a professional business image.
- An employer should make reasonable accommodations, where possible, such as placing the employee in a substantially equal position, away from the customer's view, if such does not constitute an undue hardship.

Dress Codes at Work

□ Religious Discrimination

□ *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)

- The Court held that the employee's desired accommodation—complete waiver of the policy—was an undue hardship on the employer.

□ *Brown v. F.L. Roberts & Co., Inc.*, 419 F.Supp.2d 7 (D. Mass. 2006)

- A “no facial hair policy” for employees who came in contact with customers was not discriminatory and transferring Brown to a job without customer contact was a reasonable accommodation
- Court noted there is no legal basis for requiring that company dress code policies be consistent across divisions

Dress Codes at Work

130

□ Religious Discrimination

□ *E.E.O.C. v. Alamo Rent-A-Car LLC*, 432 F.Supp.2d 1006 (D. Ariz. 2006)

- The court found Alamo's termination of an employee, Nur, for refusing to remove her head scarf during Ramadan—a violation of the dress code policy—was discriminatory.
- Alamo allowing Nur to only wear the scarf while in the back, away from customers, was not a reasonable accommodation.
- Alamo's speculation that deviating from the policy would open the floodgates to other violations did not rise to the level of an undue hardship

Objectionable Music & Art

131

□ Conflicts

- Music escaping into the unwilling ears of nearby workers—there is always “spillover”
- One listener’s Nirvana is another person’s idea of hell; so if music amplifies workplace tension, it’s probably best to curtail it.
- Employees exposed to objectionable music may bring claims of discrimination.

Objectionable Music & Art

132

□ Conflicts – Racial Discrimination

▣ *EEOC v. Novellus Systems, Inc.*, C-07-4787 RS (N.D. Cal. 2008)

- Employee's co-worker liked rap music, constantly playing it and rapping along even though the songs contained the "N-word." The employee, an African American, complained several times over a year's time to his supervisors that the lyrics he was forced to listen to were offensive.
- When the supervisors failed to act, the employee contacted the EEOC.

Objectionable Music & Art

133

□ Conflicts – Racial Discrimination

□ *EEOC v. Novellus Systems, Inc.*

- The EEOC sued and stated that while it was not in the business of judging anyone's musical taste, racially offensive language does not belong in the workplace—even when disguised as popular culture.
- The suit eventually settled for \$168,000.
- The employer agreed to amend its harassment policy to refer specifically to harassment through the playing of music

Objectionable Music & Art

134

- **Conflicts – Religious & Gender Discrimination**
 - ▣ ***EEOC v. The Vail Corporation, 07-cv-02035-REB-KLM***
 - An emergency services supervisor at the Keystone Resort alleged that she was subjected to harassment based on her Christian religion and her gender, denied religious accommodation and treated less favorably than her male colleagues.

Objectionable Music & Art

135

□ Conflicts – Religious & Gender Discrimination

□ *EEOC v. The Vail Corporation*

- The employee's supervisor forbade her and other Christian employees from discussing their beliefs while at work or listening to Christian music while on duty because it might offend other employees.
- Similar restrictions were not imposed on music with profanity or lyrics promoting violence against women—two things the claimant found offensive.

Objectionable Music & Art

136

□ Conflicts – Religious & Gender Discrimination

□ *EEOC v. The Vail Corporation*

- The EEOC claimed the employer also failed to accommodate the employee's religious beliefs in some scheduling requests and sexually harassed her by letting managers tell sexual jokes and make graphic comments in the workplace.
- The Vail Corporation paid \$80,000 to settle the religious and sexual discrimination suit.

Objectionable Music & Art

137

□ Gender Discrimination

- **Slayton v. Ohio Dep't of Youth Services, 2000 WL 272263 (6th Cir.)**
 - U.S. Court of Appeals upheld a \$125,000 damages award based, in part, on a coworker's playing "misogynistic rap music" and displaying "music videos depict[ing] an array of sexually provocative conduct."

Objectionable Music & Art

138

□ Objectionable Art

- Marketing research has proven that art in the workplace has a measurable, positive influence on both clients and employees.
- The world's top companies invest in workplace art as they recognize its role as an effective form of internal branding
- However, art that is seen as politically offensive, misogynistic, or sexually themed can lead to harassment liability.

Objectionable Music & Art

139

□ Objectionable Art

▣ *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991).

- A shipyard company employed a female welder who was continually subjected to nude and partially nude pictures posted by her male co-workers.
- The conduct violated Title VII because the plaintiff belonged to a protected category and was subject to unwelcome harassment based on sex that affected a term or condition of employment, and the employer knew or should have known about the harassment and failed to take remedial action.

Objectionable Music & Art

140

□ Objectionable Art

□ *Robinson v. Jacksonville Shipyards, Inc.*

- The court issued an injunction barring the possession or display of any "sexually suggestive, sexually demeaning, or pornographic" materials in the workplace, defining "sexually suggestive" as covering anything that "depicts a person of either sex who is not fully clothed . . . and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body."

Objectionable Music & Art

141

□ Objectionable Art

□ Other Examples

- A library employee complained about a coworkers posting a New Yorker cartoon that used the word “penis” with no sexually suggestive connotation. The library ordered that it be taken down.
- A Penn State professor complained that a print of Goya's *Naked Maja* hanging in a classroom constituted sexual harassment. The school administration removed the painting, citing as one reason the risk of harassment liability.

Objectionable Music & Art

142

□ Objectionable Art

□ Other Examples

- An employee at Murfreesboro (Tenn.) City Hall complained about a painting depicting a partly naked woman, so the City Attorney took it down.
- The *Artistic Freedom Under Attack*, a People for the American Way report, lists eight instances where employees claimed nude public art constituted workplace harassment. In each instance, the art was taken down in order to avoid potential litigation.

Objectionable Music & Art

143

□ Objectionable Art

□ Other Examples

- In Dayton, OH, an artist's adaptation of Titian's *Venus* painting was removed because "employees felt they were being sexually harassed by the painting."
- In Los Angeles, county officials objected that a sculpture of a naked man displayed in the County Hall of Justice and Records "might interfere with programs on sexual harassment," and asked the county Arts Council to cover it.