

Live Action Role Playing – A Day in the Life of HR

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Attendees at Ward and Smith’s 2019 Employment Law Symposium got a taste of the legal twists and turns that any human resources professional could face: Employee vs. independent contractor questions, social media policies, harassment, and issues involving sexual

orientation and transgender employees.

The moderators — attorneys Ken Gray and Hayley Wells — focused on labor and employment law. The fictional scenario they led attendees through included several all-too-real surprises.

Gray and Wells invited participants to play the part of the new and first head of human resources for a company called Red Flag Security LLC., a cybersecurity firm. As they moved through the scenario, individuals at each table played the role of other employees, based on information contained in envelopes left on the table in this live-action role-playing exercise, also known as LARPing.

“Red Flag Security does not have an employee handbook or any personnel policies,” Wells explained. It’s staffed with 25 employees and 30 independent contractors, and “all employees are paid on a salary basis so as to avoid punching a clock and having to keep up with time.”

Adding to the challenge, the company’s president, “Buster Williams,” wants the new head of HR to “keep him out of trouble,” Wells said. But the one-person HR department has a shoestring budget and just one staffer.

Gray and Wells asked symposium attendees to identify issues they spotted. They cited the lack of an employee manual and personnel policies, concerns over whether some contractors might actually be misclassified employees, and questions about whether all employees should really be paid on a salary basis without any provision for overtime wages or keeping track of hours worked.

“Misclassification, independent contractors — the government is really cracking down on this issue,” Gray said. “In North Carolina, the presumption is that an individual who is doing work for a company is an employee.”

As the next chapter of the scenario unfolded, participants learned that there were more “red flags” with the fictitious cybersecurity company. At a meeting on Monday morning — the first day of work for the new HR officer — Buster announces he wants to fire an employee for bad-mouthing him and the company on social

media. He also reveals that the employee used a company credit card to buy a \$200 dress.

“The government has taken the position that you cannot do anything to chill or to thwart employees’ ability to discuss the terms and conditions of employment with each other,” Gray said. And that prohibition applies to social media posts that could be seen by other employees.

Gray noted the laws and regulations enforced by the National Labor Relations Board apply to all private employers — not just unionized workplaces.

In this kind of situation, Wells remarked, employers need more information before firing someone. “So far, there’s been no investigation. We don’t know the other side of the story yet,” she said. “We need to have more information before we simply move forward.”

Each tableful of attendees proceeded to “interview” the employee criticizing Williams, a company receptionist named “Sally Sayre.”

Her story introduced some new issues into the fictional HR professional's already stressful first day.

Sally reveals that during a company Christmas party, Buster got intoxicated and made sexual comments toward her — knowing that she was a lesbian and had a partner. She says he also made disparaging remarks about Hispanics, which struck close to home for her because she and her partner had adopted a young child from Mexico.

Finally, Sally says Buster told her to use the company credit card to buy a new dress because she was the company’s receptionist and it was important for her to look professional.

“There’s a lot going on here,” Gray said. “We have potential bullying. Drunkenness leads to inappropriate comments at a holiday party.”

Wells noted that some of the harassing comments Sally alleges Buster made fall into a legal gray area.

“You’re probably thinking Buster seems to be harassing his employee based on her sexual orientation — surely that’s unlawful,” Wells said, noting that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex.

“It’s an unsettled issue at this point,” she said. “However, it’s one that employers should proceed with caution on because you do not want to be one of those test cases that makes its way to the Supreme Court.”

At this point, it was clear to symposium attendees that they needed more information for their mock investigation. Fortunately, there was one more witness: another employee, Steve Strongman, who witnessed the Sally and Buster’s exchange at the party.

Steve, it turns out, has known Sally since high school and has a poor opinion of her. He’s also one of Buster’s golfing buddies.

He tells a very different story, saying that Sally egged Buster on during the interaction, which suggests Buster’s inappropriate comments might not rising to the level of sexual harassment. But then Steve opens up a whole new can of worms.

He’s in the process of transitioning to female, he says, and he asks if it’s going to be a problem to use the women’s bathrooms and women’s locker room at the company.

“We see a new issue — transgender issues,” Gray said.

Like harassment based on sexual orientation, Gray said, transgender issues also fall into a legal gray area, with federal appeals courts having issued conflicting decisions.

“That has been taken up to the Supreme Court,” Gray said. “We most likely will have a decision in 2020 on that. We just don't know what is going to be, how broad it will be.”

But, he added, right now the Equal Employment Opportunity Commission considers it discriminatory to treat transgender or transitioning employees differently based on gender identity.

One participant raised the possibility of having a third gender-neutral locker to accommodate Steve.

“Employers cannot require someone who is either transgender or transitioning only to use a gender-neutral facility,” Wells said. “While it may be a good idea to generally have that in the workplace, we cannot mandate that someone use that particular facility just because it makes us or someone else feel more comfortable.”

Although a well-trained HR professional could handle many of the issues raised by the mock scenario, Wells and Gray noted, some of them might require help from an outside lawyer.

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