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So Much for '9 to 5': Employers' Consideration of Employees' and Applicants' Conduct Outside of Work

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'And the sign said, 'Long-haired freaky people ... need not apply." – Signs, Five Man Electrical Band, Good-byes and Butterflies (1970)

Arbitrary judgments are as old as humanity itself. Law evolved in part to try to spare us all from some of them and provide order and predictability in their place. That evolution, and occasional revolution, eventually gave rise to notions of "due process," which in the United States presume that citizens know, or have an opportunity to know, what their laws require so that they may govern their conduct accordingly and avoid liability or, worse, prosecution, for having violated them.

Such laws, as experienced employers know, have a great deal to say about the employment relationship, which is among the most regulated in society. Federal and myriad state laws tell employers, for example, what questions they may and may not ask of job-applicants; how employers may and may not compensate employees for hours worked; when employees may and may not be entitled to leaves of absence; and, perhaps most important, what factors employers may and may not *properly consider* when deciding whom to hire, discipline and fire.

The Role of Motivation

That last category should give employers pause because it hinges on an abstract concept that can be difficult if not impossible to prove: *subjective motivation*. Many legal issues in other contexts turn on *objective fact*, meaning concrete events or conditions in the physical world that can be shown by testimony, the content of a document, or the "thing itself" – such as testimony about whether a driver was careless; evidence of what a written contract says; or the remnant of a limb that was mangled in the defendant's machine.

Many issues implicated by employment laws, however, *revolve around what a decision-maker was thinking when he or she made a decision*, because so many of them are designed – appropriately and, to some, surprisingly – to *discourage employers from thinking the wrong thing*. Our country determined long ago that we don't want employers to make employment-related decisions based on factors such as race, color, religion, sex, age, disability, or in some cases on whether an employee has merely done what she has a right to do or what society wants her to do (such as report unsafe working conditions, or testify honestly in court).

It's hard to argue with the merit of such laws – who wants to lose a job due to the application of arbitrary or

discriminatory criteria – but employers need to understand that such laws can require them to defend themselves by *proving something that exists in the mind – what motivated them to do what they did*, such as whether to reject an applicant or discipline or discharge an employee. That can be a tall order.

Employment-at-will in North Carolina

There are of course many factors that employers may *lawfully* consider when making such decisions. In fact, despite the vast array of criteria made *verboten* by federal and state laws, regulations, and judicial decisions too numerous to count, employers are typically free to hire and fire whom they wish, as indicated in part by the long-standing doctrine of "employment at will" that persists throughout the United States.

In North Carolina, for example, that doctrine means that "[g]enerally, either party to an employment-at-will contract" (as opposed to a contract in which the employer has *promised* to employ someone for a definite term) "can terminate the contract for no reason at all, or for an arbitrary or irrational reason," but not "if the contract is terminated for an unlawful reason or a purpose that contravenes public policy."

That liberal policy gives employers ample freedom (with many exceptions) to do what they want. Many employers in these turbulent and interconnected times, when anyone's illegal or controversial behavior and statements can become instant news, therefore wonder whether they may lawfully consider applicants' and employees' *conduct (meaning what they do or say) outside of the workplace* when deciding whether to hire, criticize or fire an employee.

The answer – generally – is 'Yes.'

The answer in North Carolina (and probably in the vast majority of other states) in most cases is "Yes." Private (meaning non-governmental) employers in North Carolina may typically consider an applicant's or employee's conduct outside of the workplace when deciding whether to hire, discipline and fire. Why? Because there is no federal or North Carolina law that *categorically* prohibits such employers from considering the conduct of applicants in their private lives when deciding whether to hire them or from considering the conduct of employees when they are not at work (*i.e.*, on their "own time") when deciding whether to discipline or fire them. (The laws of other states may of course differ. If you are not in North Carolina, then you'll want to investigate the laws of your state.)

A North Carolina private employer, as a rule, is therefore free to avoid or end relationships with applicants and employees whose conduct, *regardless of where or when it occurred*, is objectionable to the employer. Such conduct, among the infinite possibilities of what an employer may find scandalous or embarrassing, may include: (1) conviction of a crime; (2) being charged or arrested on suspicion of commitment of a crime (but see the caveat below); (3) accusation of behavior that, if it happened, would be criminal or scandalous; (4) threats of violence; (5) publication of incendiary or offensive statements, in "social media" or otherwise; (6) public intoxication (actual or apparent); or (7) participation in a public insurrection.

That, however, is hardly the end of the matter.

The rule may be clear, but it has many exceptions.

Since employers may be required to defend their decisions – whether to reject an applicant, or discipline or discharge an employee – *by proving something as subjective as motivation*, they had better know the **exceptions to the rule**, in case they need to prove that they considered *only* conduct that was fair game rather than a kind that was not, because the *persuasiveness of the proof may depend on what is apparently*

true rather than on what actually is.

An aside about governmental employers

Governmental employers must consider rights prescribed by the U.S. Constitution in ways that private employers don't.

The "Bill of Rights," for example, which applies to the states and their local governments, protects First Amendment guarantees such as those pertaining to religion, speech, and freedom of assembly from infringement by governmental and "state action." That vast subject is beyond the scope of this article, but such employers must be careful to avoid decisions that actually or apparently undermine their employees' Constitutional rights – such as the right to engage in *speech* on matters of public concern. States and local governments "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression," or for that matter in any other Constitutional right. Governmental employers must therefore keep such rights in mind.

Private employers and exceptions that protect applicants and/or employees

As to *private employers*, here is a very brief summary of some of the most important exceptions that protect applicants and employees from unlawful treatment based on what they have done or said outside of work:

Private employer exceptions under federal law:

Title VII of the Civil Rights Act of 1964 : Prohibits discrimination based on race, color, religion, sex, and national origin, which includes the prohibition of discrimination based on *religious practices*.

As to "arrests": Title VII doesn't expressly prohibit employers from asking applicants and employees about "criminal history", but the U.S. Equal Employment Opportunity Commission (which enforces Title VII) takes the understandable position that the "fact that an individual was arrested is not proof that he engaged in criminal conduct" and asserts, less persuasively, that "an individual's arrest record standing alone may [therefore] not be used by an employer to take a negative employment action (e.g., not hiring, firing or suspending an applicant or employee)." The underlying idea is that the use of records of arrests may inflict a "disparate impact" based on applicants' and employees' race and/or national origin.

Americans with Disabilities Act of 1990 ("ADA"): Applies not only to individuals who have disabling conditions but also to those who *merely associate or have a relationship* with individuals who do. The statute says in part that "No covered entity shall discriminate against a qualified individual" in employment "on the basis of disability" and that "'discriminate against a qualified individual on the basis of disability' includes … excluding or otherwise denying equal jobs or benefits to a qualified individual *because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.*"

Rehabilitation Act of 1973: Prohibits discrimination on the basis of disability by employers with federal contracts/subcontracts that exceed $10,000; and, as is true under the ADA, it's widely held that non-disabled individuals may bring claims when they are injured *because of association* with a disabled person.

Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"): Prohibits discrimination based on past, current, or prospective military services, such as membership or application for membership in a uniformed service, performance of such service, or a mere

statement made in connection with a USERRA proceeding.

Immigration Reform and Control Act of 1986: Prohibits discrimination based on citizenship and national origin by almost all employers, such as intentional discrimination in hiring and termination based on an applicant's or employee's accent or merely appearing "foreign."

National Labor Relations Act of 1935: Covers virtually all private-sector employers, and protects the rights of their employees to engage in "concerted activity" for the purpose of self-organizing, forming, joining, or assisting labor organizations, and to engage in "mutual aid or protection" – whether a union is involved or not – for the purpose of trying to improve wages, hours, and other working conditions. Employers that interfere with, restrain, or coerce employees in the exercise of such rights commit an "unfair labor practice".

U.S. Bankruptcy Code, 11 U.S.C. §525, "Protection against discriminatory treatment": Provides in part that "No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt -- (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act; (2) has been insolvent before the commencement of a case … or during the case …; or (3) has not paid a debt that is dischargeable … or that was discharged under the Bankruptcy Act."

Title III of Consumer Credit Protection Act ("CCPA"): Prohibits employers from terminating an employee because, in whole or in part, the employee's earnings have been subjected to garnishment for any one debt. An employer may not terminate an employee because the employee's wages were garnished while employed by another company. Employers that willfully violate the law can be fined up to $1,000, imprisoned for up to one year, or both.

Private employer exceptions under North Carolina law:

Retaliatory Employment Discrimination Act: Prohibits discrimination and retaliation based on an employee's having engaged in any of various actions, such as making a claim or complaint, initiating an inquiry, or testifying regarding numerous listed N.C. statutes, such as the N.C. Wage and Hour Act, Workers' Compensation Act, or Occupational Safety and Health Act.

N.C. General Statutes §95-28.2, "**Discrimination against persons for lawful use of lawful products [*such as tobacco, alcohol and "CBD" products*] during nonworking hours prohibited"**: Makes it unlawful for "private employers with three or more regularly employed employees" to

> fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the prospective employee or the employee engages in or has engaged in ***the lawful use of lawful products*** if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

N.C. General Statutes §95-28.1A, **"Discrimination against persons based on genetic testing or genetic information prohibited"**: Makes it unlawful for an employer to "deny or refuse employment to any person or discharge any person from employment on account of the person's

having requested genetic testing or counseling services".

N.C. General Statutes §9-32, **"Discharge of juror unlawful"**: "No employer may discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror".

N.C. General Statutes §95-196, regarding "Employee rights" pertaining to "Identification of Toxic or Hazardous Substances": Provides in part that "No employer shall discharge, or cause to be discharged, or otherwise discipline or … discriminate against an employee … because the employee has assisted the Commissioner of Labor … or the Fire Chief … who may make or is making an inspection under" various statutes pertaining to "on-site inspections" for the purpose of ensuring safe handling of toxic or hazardous chemicals.

N.C. General Statutes §127A-202.1, "**Discrimination against persons who serve in the National Guard and acts of reprisal prohibited"**: Prohibits discrimination in employment on the basis of "membership, application for membership, performance of service, application for service, or obligation" to perform service "in the North Carolina National Guard or the National Guard of another state". Such discrimination can be established if the applicant's or employee's involvement in such service was a mere "motivating factor" in the employer's adverse decision, unless the employer "can prove … that the same unfavorable action would have taken place in the absence of the member's membership, application for membership, performance of service, application for service, or obligation."

Common law claim for "wrongful discharge in violation of public policy" : An employer wrongfully discharges an at-will employee if the termination is done for "an *unlawful reason* or *purpose* that contravenes public policy" set forth in the North Carolina statutes or constitution. An at-will employee may not lawfully be terminated, for example, for engaging in a *legally protected activity*, such as exercising rights provided by the Workers' Compensation Act, or for *refusing to perform an act that would violate public policy* after having been asked to do so (such as refusing to commit perjury).

Conclusion: What to do …

There are infinite lawful reasons why an employer may choose not to hire an applicant or discipline or discharge an employee based on conduct outside of the workplace. But, as set forth above, there are also many reasons that might *motivate – or allegedly motivate* – an employer but are prohibited by law.

Employers that considered only *lawful* reasons can easily be accused of having considered one or more *unlawful* ones. Prudent employers that wish to consider conduct outside of the workplace when making personnel-decisions and manage the related risk should therefore do so in accordance with a few sensible rules:

1. **Be consistent:** That will help to avoid the appearance of considering such conduct in a way that could be construed as unlawfully discriminatory, such as being more critical of some than others based on race, color, national origin, or sex;
2. **Document the decision (and the reason(s) behind it) carefully and promptly:** That will help to show, if necessary, that the considered conduct was of the lawful rather than unlawful kind; and
3. **Implement and act in accordance with a clear, reasonable and lawful personnel policy that addresses non-workplace conduct:** That will tell your employees that their behavior and statements when not at work may (to the extent allowed by law) be considered when evaluating their employment,

and can help to ensure that consideration of such behavior and statements doesn’t seem arbitrary or, worse, fabricated.

The employer, after all, may later have to explain its decision to someone else – such as a governmental agency or court – and may need to show why it deserves the benefit of the doubt.

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