# DISCRIMINATION CLAIMS AGAINST LAW FIRMS: MANAGING ATTORNEY-EMPLOYEES FROM HIRING TO FIRING

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## I. INTRODUCTION

When it comes to anti-discrimination law, law firms and other legal employers are, on the one hand, just like all employers; they must be aware of the scope of federal and state anti-discrimination law. On the other hand, because of the particular nature of law firm culture, legal employers may find the proscriptions of anti-discrimination law conflict with "the way it has always been done" in terms of assessing associate performance and other aspects of attorney-employee management. Legal employers must, therefore, make careful assessment of their practices and procedures in order to avoid liability for their personnel practices.

Starting with the Civil Rights Act of 1964 through to more contemporary legislation such as the Americans with Disabilities Act and the Family and Medical Leave Act, the scope of federal anti-discrimination law has expanded.[1] State law in Texas largely mirrors federal law, potentially subjecting legal employers to both state and federal liability.[2] This article will address some of the major issues legal employers may encounter when hiring, managing, and terminating attorney-employees, and provide some tips on how to avoid liability.

## II. A FEW BASICS ABOUT ANTI-DISCRIMINATION LAWS

Title VII of the Civil Rights Act of 1964 prohibits discrimination because of "race, color, religion, sex, or national origin."[3] Employers engaged in an industry affecting commerce who have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" are covered under this Act.[4] Law

1. *See* Civil Rights Act of 1964: Equal Employment Opportunities, 42 U.S.C. §§ 2000e to -17 (2006); Americans with Disabilities Act, 42 U.S.C. §§ 2101–12113 (2006); Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006).

2. Specialty Retailers, Inc. v. DeMoranville, 933 S.W.2d 490, 492 (Tex. 1996) (noting the purpose of Texas discrimination laws is to bring Texas "in line with federal laws addressing discrimination" and "federal case law may be cited as authority").

3. 42 U.S.C. § 2000e-2(a)(1).

4. 42 U.S.C. § 2000e(b).

firm partnerships are employers under this definition.[5] Title VII makes it unlawful to hire, fire, set the terms of employment of, segregate, or classify applicants or employees on the basis of one of the protected characteristics.[6]

The Supreme Court has held that Title VII prohibits both intentional acts of discrimination and acts that are neutral on their face but which have a disparate effect or impact on a particular group because of a protected characteristic.[7] The statute specifically exempts criteria that discriminate on the basis of a protected class if those criteria are a bona fide occupational qualification (BFOQ) for the position in question.[8] This exemption is, however, construed extremely narrowly, and customer preference is not generally a legitimate basis for invoking it.[9]

The Age Discrimination Act of 1967 (ADEA) prohibits discrimination on the basis of age, which includes individuals who are at least forty years old.[10] Like Title VII, the ADEA applies to employers engaged in interstate commerce, but the threshold number of employees is raised to twenty.[11] The basic substantive prohibitions under the ADEA are similar to Title VII, although the Act also includes a specific exemption for decisions "based on reasonable factors other than age" (RFOA).[12] The Supreme Court has interpreted the ADEA to permit liability for disparate impact as well as intentional disparate treatment claims, although disparate impact liability is narrower because of the RFOA defense.[13]

The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals based on disability.[14] The ADA has a similar definition of "employer" as Title VII, requiring a minimum of fifteen employees for coverage.[15] As is discussed in more detail in Part II, the ADA was recently amended to clarify and expand the definition of "disability," which will likely result in more individuals qualifying for coverage under that statute.

While not an anti-discrimination law per se, the Family and Medical Leave Act (FMLA) requires covered employers to provide leave for the

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5. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) (concluding that a law firm "is plainly an employer for Title VII purposes").

6. 42 U.S.C. § 2000e-2(a)(2).

7. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

8. 42 U.S.C. § 2000e-2(e).

9. *See* Dothard v. Robinson, 433 U.S. 321, 334 (1977) (agreeing with EEOC that the BFOQ is "an extremely narrow exception to the" proscriptions on intentional discrimination); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981) (rejecting employer's "sex appeal" BFOQ argument for hiring only female flight attendants because such appeal was not the essence of the airline's transportation business).

10. 29 U.S.C. § 631(a) (2006).

11. *Id.* § 630(b).

12. 29 U.S.C. § 623(f)(1); *see also* § 623(a) (setting out ADEA's basic substantive prohibitions).

13. *See* Smith v. City of Jackson, 544 U.S. 228, 239-40 (2005).

14. 42 U.S.C. § 12112(a) (Supp. 2008).

15. *Id.* § 12111(5)(A) (2006).

birth, adoption, or foster care placement of a child with the employee, or for the serious medical condition of an individual or that individual's immediate family.[16] The Act also prohibits interfering with or retaliating against individuals for exercising their right to that leave.[17] The FMLA applies to employers who have fifty or more employees at one or more facilities within a seventy-five mile radius, and to employees who have been employed by that employer for at least twelve months and worked at least 1,250 hours during the previous twelve months.[18]

As noted above, Texas state law largely mirrors federal anti-discrimination law.[19] The Texas Supreme Court has indicated that the purpose of Chapter 21 is to "bring Texas law in line with federal laws addressing discrimination" and to confirm that federal case law may be used as authoritative guidance.[20] The protected classifications under Chapter 21 are race, color, gender, religion, national origin, disability, and age.[21] The threshold for coverage is fifteen employees, which means state law protects more employees from age discrimination in Texas than federal law does.[22]

Under each of these statutes, by definition, only employees (or applicants) are covered.[23] Independent contractors are not.[24] Partners are also not employees, although the mere fact an individual is deemed a "partner" in a firm is not, in itself, sufficient to conclude the individual is not an employee.[25] In a high profile case, the Equal Employment Opportunity Commission (EEOC) settled with Sidley & Austin (now Sidley Austin Brown & Wood) for $27.5 million after the firm demoted thirty-two equity partners because of their age.[26] The ousted partners shared in the firm's profits, losses, and liabilities, but not in the actual governance of the firm, which was conducted through two committees comprising less than ten percent of the total partners in the firm.[27]

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16. 29 U.S.C. § 2612(a).

17. *Id.* § 2615.

18. *Id.* §§ 2611(2) (defining "eligible employee"), 2611(4)(A) (defining "employer").

19. *See* TEX. LAB. CODE ANN. § 21 (West 2006 & Supp. 2009).

20. Specialty Retailers, Inc. v. DeMoranville, 933 S.W.2d 490 (Tex. 1996).

21. TEX. LAB. CODE ANN. § 21.051.

22. *See id.* § 21.002.

23. *See* 42 U.S.C. § 2000e-2(a) (2006); *see, e.g.*, TEX. LAB. CODE ANN. § 21.051 (similar). Title VII, for example, establishes certain practices by an "employer" as "unlawful employment practices," and specifically delineates actions taken against "employees or applicants." 42 U.S.C. § 2000e-2(a).

24. *See* Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996) (observing that "bona fide independent contractors . . . are employers, not employees" and not covered under federal antidiscrimination statutes).

25. *See* Hishon v. King & Spalding, 467 U.S. 69, 79 n.2 (1984) (Powell, J., concurring) (noting that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners'").

26. *See* RONALD S. COOPER, EEOC, OFFICE OF GENERAL COUNSEL FISCAL YEAR 2008 ANNUAL REPORT II(B)(3)(a), 24, *available at* http://www.eeoc.gov/eeoc/litigation/reports/upload/08annrpt.pdf.

27. *See id.*

The Supreme Court has addressed the related issue of whether shareholders in a professional corporation were employers or employees for purposes of determining whether the corporation met the threshold number of employees to be covered under the ADA.[28] The Court agreed with the EEOC that the common law "touchstone" of control was appropriate and noted the six factors used by the EEOC:

> Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work[;] Whether and, if so, to what extent the organization supervises the individual's work[;] Whether the individual reports to someone higher in the organization[;] Whether and, if so, to what extent the individual is able to influence the organization[;] Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts[; and] Whether the individual shares in the profits, losses, and liabilities of the organization.[29]

At the same time, the Court also agreed with the EEOC that this list was not exhaustive and that no "shorthand formula or magic phrase" could be used to make the determination.[30] Other federal courts have taken a case-by-case approach to determine whether, as a matter of economic reality, the individual's status is more akin to one of employment by the firm or more truly amounts to that of partner in the professional entity.[31] For example, the Sixth Circuit articulated the following relevant factors:

> the right and duty to participate in management; the right and duty to act as an agent of other partners; exposure to liability; the fiduciary relationship among partners; use of the term "co-owners" to indicate each partner's "power of ultimate control;" participation in profits and losses; investment in the firm; partial ownership of firm assets; voting rights; the aggrieved individual's ability to control and operate the business; the extent to which the aggrieved individual's compensation was calculated as a percentage of the firm's profits; the extent of that individual's employment security; and other similar indicia of ownership.[32]

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28. *See* Clackamas Gastro. Assoc., P. C. v. Wells, 538 U.S. 440, 447-55 (2003).

29. *Id.* at 449-50 (citing EEOC COMPLIANCE MANUAL § 605:0009).

30. *Id.* at 450 n.10 (quotation citations omitted).

31. *See* Serapion v. Martinez, 119 F.3d 982, 987-88 (1st Cir. 1997) (reasoning that partnerships cannot exclude individuals from protection of discrimination laws by merely draping titles which convey little or no substance.); Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996) (concluding that whether individual was partner or employee was a fact specific determination).

32. *Simpson*, 100 F.3d at 443-44 (footnotes deleted); *see generally* Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L.J. 781, 789-99 (2003) (discussing the development of how courts determine if a partner is considered an employee).

Even if the individual is a partner at the time litigation is commenced, if the alleged acts occurred before the individual was made partner, the legal employer may face liability under these statutes.[33] In *Ballen-Stier v. Hahn & Hessen, L.L.P.*, the court, applying New York law, allowed a now-partner in a law firm to proceed with a sexual harassment claim for acts that took place while she was still an associate with the firm.[34] The court dismissed a retaliation claim, however, because those acts occurred after she became a partner.[35] A similar result seems likely under federal law.

## III. DISCRIMINATION ISSUES IN RECRUITING, HIRING, AND MANAGING ATTORNEY-EMPLOYEES

A legal employer's obligation to avoid discriminatory actions begins with the process of identifying candidates to be employed as attorneys by the firm and continues through the day-to-day management of those attorneys. Job advertisements must be non-discriminatory, and interview questions must avoid delving into areas that are legally irrelevant. Even if an employer does not actually use the unlawful criteria spelled out in the advertisement or obtained in an interview, the employer may nonetheless be presumed to have done so.[36] Legal employers, like all employers, must also provide a workplace that is free from unlawful discrimination, which includes a duty to avoid creating a hostile working environment based on sex, race, religion, age, disability, and other protected characteristics.[37] The implications of each of these duties as they relate to law firm hiring and attorney-employees will be discussed below.

### *A. Job Advertisements and Position Descriptions—In General*

Both federal law, under Title VII and the ADEA, and Texas state law prohibit job advertisements that indicate a preference or limitation, or otherwise discriminate, on the basis of a characteristic protected under those statutes (race, sex, religion, color, national origin, and age under federal and state law and also disability under Texas law), unless such characteristic is a

33. Ballen-Stier v. Hahn & Hessen, L.L.P., 727 N.Y.S.2d 421, 422 (N.Y. App. Div. 2001).

34. *Id.*

35. *Id.* at 422-23.

36. *See* King v. N.H. Dep't of Res. & Econ. Dev., 562 F.2d 80, 83 (1st Cir. 1977) (reasoning that discriminatory animus could be evidenced by asking meter maid applicant "whether she could wield a sledgehammer, whether she had any construction industry experience, and whether she could 'run someone in,'" when none of the questions related to a bona fide occupational qualification); Catlett v. Mo. Highway & Transp. Comm'n, 589 F. Supp. 929, 944 (W.D. Mo. 1983) (concluding that discriminatory intent may be shown prima facie by interview questions which do not relate to a bona fide occupational qualification).

37. 42 U.S.C. § 2000e-2(e) (2006) (Title VII); 29 U.S.C. § 623(f)(1) (2006) (ADEA); TEX. LAB. CODE ANN. § 21.059(b) (West 2006).

BFOQ.[38] In the context of sex discrimination, for example, the EEOC regulations provide that language indicating use of sex specific language "will be considered an expression of a preference, limitation, specification, or discrimination based on sex."[39] Employers should take care not to use language when advertising for specific jobs that may indicate a preference for individuals outside of a protected group, such as terms like "recent graduate," which raises age discrimination concerns.[40] Discriminatory job advertisements may in and of themselves lead to a finding of a recruitment violation, as well as be evidence of discriminatory hiring.[41]

For example, the EEOC brought suit against a New York recruiting business that accepted job postings from law firms and other companies that specified, among other things, that applicants be under the age of forty or have a certain range of years of experience (such as one to five years).[42] The EEOC pointed to its ADEA regulations, which provide that: "[n]otices or advertisements that contain terms such as *age 25 to 35*, *young*, *college student*, *recent college graduate*, *boy*, *girl*, or others of a similar nature violate the Act unless one of the exceptions applies."[43] Drawing from this, the EEOC's Compliance Manual suggests that a job advertisement indicating a preference for "two to four years of experience" or describing the position as an "excellent first job" might deter older workers from applying and could be found to be a discriminatory recruitment practice as well as evidence of discriminatory hiring.[44] The Federal District for the Northern District of Illinois found a fact question existed as to age discrimination when the employer advertised that it was looking for someone "with 'high energy' who has between 5 and 10 years experience."[45] The court noted that although the advertisement itself was not sufficient proof of intent to discriminate, when considered in context of other age-related comments made by the company president, "it add[ed] to

38. 42 U.S.C. § 2000e-2(e); 29 U.S.C. § 623(f)(1); TEX. LAB. CODE ANN. § 21.059(b).

39. *See* 29 C.F.R. § 1604.5 (2009).

40. *See* 29 C.F.R. § 1625.4; *see also* Hodgson v. Approved Pers. Serv., Inc., 529 F.2d 760, 765-66 (4th Cir. 1975) (distinguishing between general advertising that might be targeted at certain groups and advertising for a particular job; the former would not necessarily discourage older workers from applying to the company, whereas the latter indicates a preference that might discourage applications for that job).

41. *See* 29 C.F.R. § 1604.5 (providing that it is a violation of Title VII to place a discriminatory ad).

42. *See* Patricia R. Ambrose & Katherine Y.K. Cheung, *Recruitment Advertisements Under the ADEA*, 121 WEST EDUC. L. RPTR. 871, 871 (1997) (discussing EEOC v. Barrister's Referrals, Ltd., Docket No. 94-CV-4833 (S.D.N.Y.)).

43. 29 C.F.R. § 1625.4(a) (emphasis added).

44. Violations Involving Advertising, Recordkeeping, or Posting of Notice, EEOC COMPLIANCE MANUAL Vol. II § 632.2 (1990), *available at* http://laborandemploymentlaw.bna.com/lelw/2422/split_display.adp?fedfid=6398511&vname=leeeofed&fcn=1&wsn=500694000&fn=6398511&split=0.

45. Debuhr v. Olds Prods. Co., No. 95 C 1462, 1996 W.L. 277644, at *3 (N.D. Ill. May 22, 1996).

the circumstantial evidence from which discriminatory intent might be inferred."[46]

Legal employers should, therefore, be wary of using language in job advertisements that suggest a preference for recent law school graduates or that suggest applicants have "no more than" a certain number of years experience. Coded language like "youthful" and "aggressive" should also be avoided, although other descriptive terms like "junior associate" may be acceptable if they legitimately describe the nature of a position.[47] Employers also will not necessarily face liability if they reject "overqualified" candidates.[48] Courts have recognized that employers may have legitimate concerns about job satisfaction, commitment, and other performance related issues, if a person is placed into a position that is far beneath their level of skill and experience.[49] "Overqualified," however, should not be used as a euphemism for "too old."[50]

Good practical advice is to include EEOC language in job advertisements themselves, to counter any arguments that the employer was intending to discourage individuals in protected groups from applying. For example, Texas Tech University's online job website contains the following statement on its main page:

> TEXAS TECH IS AN AFFIRMATIVE ACTION/EQUAL OPPORTUNITY EMPLOYER COMMITTED TO EXCELLENCE THROUGH DIVERSITY. TEXAS TECH WELCOMES APPLICATIONS FROM MINORITIES, WOMEN, VETERANS AND PERSONS WITH DISABILITIES.[51]

### *B. Job Advertisements and Position Descriptions—Disability Discrimination*

Disability discrimination statutes raise an additional set of issues to consider when advertising open positions. While most of the statutes

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46. *Id.* at *3. The company president's statements included telling the plaintiff when the plaintiff was 58 years old that "people should quit doing what they are doing when they are 58 years old," instructing the general manager to tell an employee aged 64 that it was time to leave the company when he turned 65, and telling an employee terminated at age 52 that "it was a good age to do something different" and that he might not be able to get a new job in a few years. *Id.* at *3 n.4.

47. *See* Hodgson v. Approved Pers. Serv., Inc., 529 F.2d 760, 765 (4th Cir. 1975) (finding that "junior executive" aptly described the scope of the position's duties and responsibilities within the organization).

48. *See, e.g.*, EEOC v. Ins. Co. of N. Am., 49 F.3d 1418, 1421 (9th Cir. 1995) (concluding that while "overqualified" is often a euphemism for "too old," if the employer can identify an objective, neutral criterion for its concern about the extent of the applicant's experience, the employer's rejection of that applicant is not age discrimination).

49. *See id.*

50. *See id.*

51. *Texas Tech Employment Site*, TEXAS TECH UNIVERSITY, https://jobs.texastech.edu/ (last visited Jan. 10, 2011).

governing discrimination in the workplace proscribe certain behaviors, the Americans with Disabilities Act (ADA) (and to a lesser degree, the religious accommodation provisions of Title VII) and Texas state law additionally impose affirmative duties on legal employers. Employers must provide reasonable accommodations to applicants and employees with disabilities, as is explained in more detail below.

A little bit of additional background is important to understanding the scope of the ADA and how recent amendments broaden the potential reach of the statute. The ADA was initially passed in 1990 and then amended in 2008.[52] Under the original version of the ADA, applicants and employees had a difficult time getting past the threshold issue of whether they had a covered disability.[53] For this reason, the circumstances under which legal employers had to provide accommodations to their attorney-employees were limited. Congress passed the ADA Amendment Act (ADAAA) in 2008 specifically to reverse the narrow judicial interpretation of the definition of disability.[54] With the 2008 amendment, more individuals should qualify for the protection of the statute, which will likely, in turn, result in more frequent requests for accommodation.[55] It is now therefore even more imperative that legal employers understand the scope of their obligations under this statute, starting with their job advertisements.

Title I of the ADA protects both individuals with disabilities who are already employed as well as those seeking employment with a particular employer.[56] "Disability" is defined to include individuals who have "(A) a physical or mental impairment that substantially limits one or more a major life activities of [that] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[57] The ADAAA added a new rule of construction, indicating this definition "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[58] Texas law, again, mirrors federal law.[59]

The ADA prohibits employers from using qualification standards or other selection criteria that screen out, or tend to screen out, individuals

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52. Americans with Disabilities Act of 1990, Public L. No. 101-336 (July 26, 1990); ADA Amendments Act of 2008, Pub. L. No. 110-325 (Sept. 25, 2008).

53. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999). Professor Colker, in a seminal empirical study of ADA outcomes, found that 94 percent of all ADA cases were resolved against the plaintiff at the trial level and 84 percent of plaintiffs' appeals of adverse judgments were resolved against the plaintiff. *Id.*

54. *See* 42 U.S.C.A. § 12101(b) (2006) (articulating the purposes of the ADAAA).

55. ADA Amendments Act of 2008, Pub. L. No. 110-325.

56. 42 U.S.C. § 12112(a) (prohibiting employers from discriminating "in regard to job application procedures" as well as hiring, advancement, discharge or other terms and conditions of employment).

57. *Id.* § 12102(1) (Supp. 2008).

58. § 12102(4)(A).

59. *See* TEX. LAB. CODE ANN. § 21.002(6) (West Supp. 2009) (defining disability in line with original ADA and recent ADAAA amendments).

with disabilities who are otherwise qualified to perform the essential functions of the job in question, unless those standards or criteria are shown to be job-related and consistent with business necessity.[60] This requires employers to carefully identify the essential functions of the job in question. The EEOC defines "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position."[61] The EEOC regulation then sets out several factors that can be considered to determine if a function is essential, such as whether the position exists to perform that function, whether there are employees available to perform that function, and whether the function is highly specialized such that the incumbent is hired for his or her expertise or ability to perform that function.[62] The regulations also list evidence that is relevant for determining whether a function is essential, such as the employer's judgment, written job descriptions, the amount of time spent performing a function, the consequences of not requiring the incumbent to perform the function, and the work experience of individuals who have held that position or similar positions in the past.[63]

In determining whether an individual with a disability can perform the essential functions of a job, the employer must also consider whether the individual could perform those functions if given a reasonable accommodation.[64] "Reasonable accommodation" is defined in the statute by a non-inclusive list of examples, which include:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[65]

Read together, these provisions require legal employers to determine the essential functions of an attorney position and to do so in a way that takes into account that some modification of the manner in which the job is performed may be required as a reasonable accommodation.[66] Position descriptions and job advertisements should be drafted consistent with the

60. 42 U.S.C. § 12112(b)(6) (2006).
61. 29 C.F.R. § 1630.2(n)(1) (2009).
62. § 1630.2(n)(2).
63. § 1630.2(n)(3).
64. *See* 42 U.S.C. § 12111(8) (Supp. 2008). The statute defines a "qualified individual" as able to perform the essential functions of the job in question "with or without reasonable accommodation." *Id.*
65. 42 U.S.C. § 12111(9) (2006).
66. *See supra* notes 58-63 and accompanying text.

essential functions of the job. Marginal functions should not be listed as required, or even preferred, because they may tend to screen out individuals with disabilities.[67]

Because each position is different, a comprehensive list of the essential functions of an attorney position is not possible. When identifying the essential functions, however, the legal employer should take into account the core skills needed for the position.[68] For example, Wisconsin Court of Appeals Judge Richard S. Brown, speaking at the ABA's National Conference on the Employment of Lawyers with Disabilities in 2006, suggested that "[a] competent lawyer must possess good problem solving [skills], good communication, and good task organization and management skills."[69] The *EEOC Fact Sheet on Reasonable Accommodation for Attorneys with Disabilities* suggests that, depending on the particular legal job, essential functions might include such things as "[c]onducting legal research, writing motions and briefs, counseling clients . . . drafting . . . opinion letters, presenting an argument before an appellate court, . . . and conducting depositions and trials . . . ."[70] Somewhat more specifically, a template created by the faculty at Boston University's Legal Clinic for students in their in-house civil law clinic spells out the essential functions of client representation in these terms:

1. Planning:
   - A. Case Planning-
     ability to organize and structure fact and theory to develop a strategy for proceeding with a given case; ability to implement a case plan in a timely manner
   - B. Fact Investigation-
     ability to conduct formal and informal discovery so as to maximize efficient information gathering
2. Client Contact:
   - A. Interviewing-
     skill at information gathering; ability to develop constructive, professional, honest relationships with client
   - B. Counseling-
     ability to identify, communicate, and help clients evaluate alternative options and likely outcomes

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67. *See* 42 U.S.C. § 12112(b)(6) (prohibiting "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability").

68. *See, e.g.*, ABA Commission on Mental and Physical Disability Law, THE NATIONAL CONFERENCE ON EMPLOYMENT OF LAWYERS WITH DISABILITIES: A REPORT FROM THE AMERICAN BAR ASSOCIATION FOR THE LEGAL PROFESSION, *available at* http://www.abanet.org/disability/docs/conf_report_final.pdf.

69. *Id.*

70. *Reasonable Accommodations for Attorneys with Disabilities*, EEOC, part H (modified on July 27, 2006), http://eeoc.gov/facts/accommodations-attorneys.html (hereinafter EEOC, *Attorney Accommodation Fact Sheet*).

3. Research and Writing:
   A. Legal Research-
      ability to conduct and analyze research competently and efficiently
   B. Legal Analysis and Writing-
      ability to communicate legal analysis in a variety of written legal documents in a persuasive manner
4. Advocacy:
   A. Negotiation-
      ability to bargain persuasively, zealously and ethically
   B. Oral Advocacy-
      ability to prepare and deliver arguments and conduct hearings
5. Professional Responsibility:
   A. Ethics-
      ability to lawyer in accordance with ethical and professional standards;
      ability to maintain adequate, well-organized records, including case files
   B. Diligence-
      use of requisite effort, responsibility and professional standards in a timely fashion.[71]

What those examples have in common is that they focus on outcomes rather than methodologies. A firm may, for example, require that associate attorneys be able to communicate with clients on a regular basis. How that communication is accomplished (by phone, email, or in person) may not be as important as the fact that the communication takes place. As noted above, job descriptions should avoid criteria that impose limitations related to disability unless those limitations are essential and cannot be performed in a reasonable alternative manner.[72] For example, a job requirement that an attorney be able to "drive" to client meetings would likely not be lawful. A reasonable accommodation might be to provide the vision-impaired attorney with a driver because the actual act of driving to another location is not the essential function—the ability to meet with and counsel the client is.[73]

Because the issue of accommodation may arise some time after an individual is hired and written position descriptions prepared before an individual is hired are given significant weight in determining the essential

71. Alexis Anderson & Norah Wylie, *Beyond the ADA: How Clinics Can Assist Law Students with "Non-Visible" Disabilities to Bridge the Accommodations Gap Between Classroom and Practice*, 15 CLINICAL L. REV. 1, 49 (2008).

72. *See supra* notes 60-61 and accompanying text.

73. *Cf.* Harrell v. U.S. Postal Serv., 445 F.3d 913, 926 (7th Cir. 2006) (using example of essential function of attorney's job as not involving the use of two legs).

functions of a job, legal employers would be well advised to create written position descriptions stating the essential functions of attorney-employee positions within their firm or organization and use them when crafting job advertisements as well as when reviewing applications and interviewing applicants.[74]

### C. Application Materials

Legal employers should also scrutinize their application materials to ensure that there are no components that may violate anti-discrimination laws. For example, the ADA requires that application materials be accessible to individuals with disabilities.[75] The EEOC Attorney Accommodation Fact Sheet suggests that:

> [c]ommon forms of reasonable accommodation needed may include using sign language interpreters and providing written materials in alternative formats, such as Braille or large print. Employers may find it helpful to note on applications that applicants may request reasonable accommodation for the hiring process and to specify a contact person.[76]

### D. Interviews

Legal employers may face claims that their interview process is discriminatory. Unlawful inquiries might include, among other things, questions about familial obligations, age-related inquiries, and questions related to disability.[77] Unlike with job advertisements, there is no direct prohibition in either Title VII or the ADEA of discriminatory interview questions. Such questions may, however, be found persuasive as to discriminatory intent not to hire the applicant because of a protected characteristic, if asked without a legitimate business purpose.[78] The ADA,

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74. *See* 42 U.S.C. § 12111(8) (Supp. 2008) (stating that written job descriptions prepared "before advertising or interviewing applicants for the job" shall be considered evidence of the essential functions of the job); *see also* Riel v. Elect. Data Sys. Corp., 99 F.3d 678, 682-83 (5th Cir. 1996) (finding plaintiff stated issue of fact regarding function employer asserted was essential but was not included in written job description).

75. *See* 29 C.F.R. § 1630.2(o)(1)(i) (2009) (defining "reasonable accommodation" as "modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires").

76. EEOC, ATTORNEY ACCOMMODATION FACT SHEET, *supra* note 70, at Part C.

77. *See* Barbano v. Madison Cnty., 922 F.2d 139, 146 (2d Cir. 1990) (reasoning that evidence hiring committee asked female job candidate questions concerning her plans to have family and whether her husband approved of her taking the job supported finding the interview process discriminatory); Harrison v. Benchmark Elec. Huntsville, Inc., 593 F.3d 1206, 1215-16 (11th Cir. 2010) (concluding that ADA prohibits disability-related questions of all applicants at the pre-offer stage, regardless of whether the applicant has a disability).

78. *See Employment Discrimination Fact Sheet (Age Discrimination)*, TEXAS WORKFORCE COMMISSION, http://www.twc.state.tx.us/crd/facts.html#age (last visited Feb. 21, 2011). The Texas

however, directly prohibits "medical inquiries" in the pre-employment stage.[79]

Asking female applicants but not male applicants about familial care obligations may be evidence of sex stereotyping in the hiring process.[80] In the *EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, the agency gives the following example:

> UNLAWFUL STEREOTYPING DURING HIRING PROCESS
>
> Patricia, a recent business school graduate, was interviewed for a position as a marketing assistant for a public relations firm. At the interview, Bob, the manager of the department with the vacancy being filled, noticed Patricia's wedding ring and asked, "How many kids do you have?" Patricia told Bob that she had no children yet but that she planned to once she and her husband had gotten their careers underway. Bob explained that the duties of a marketing assistant are very demanding, and rather than discuss Patricia's qualifications, he asked how she would balance work and childcare responsibilities when the need arose. Patricia explained that she would share childcare responsibilities with her husband, but Bob responded that men are not reliable caregivers. Bob later told his secretary that he was concerned about hiring a young married woman[—] he thought she might have kids, and he didn't believe that being a mother was "compatible with a fast-paced business environment." A week after the interview, Patricia was notified that she was not hired.
>
> Believing that she was well qualified and that the interviewer's questions reflected gender bias, Patricia filed a sex discrimination charge with the EEOC. The investigator discovered that the employer reposted the position after rejecting Patricia. The employer said that it reposted the position because it was not satisfied with the experience level of the applicants in the first round. However, the investigation showed that Patricia easily met the requirements for the position and had as much experience as some other individuals recently hired as marketing assistants. Under the circumstances, the investigator determines that the respondent rejected Patricia from the first round of hiring because of sex-based stereotypes in violation of Title VII.[81]

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Workforce Commission specifically cautions employers that because questions relating to age "may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA." *Id.*

79. *See* 42 U.S.C. § 12112(d) (2006) (distinguishing between pre-employment, post-offer, and on-going employment stages regarding what medical exams and inquiries can be made).

80. *See Pre-Employment Inquiries and Marital Status or Number of Children*, EEOC, http://www.eeoc.gov/laws/practices/inquiries_marital_status.cfm (last visited Oct. 14, 2010). On its website, the EEOC cautions even if both men and women are asked, the questioning may still indicate intent to discriminate against women with children. *Id.*

81. EEOC ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH

Courts have reached differing outcomes on whether evidence of discriminatory questions during an interview proves discriminatory intent not to hire based on a protected characteristic.[82] The Seventh Circuit suggested that "[m]erely showing the questions were asked . . . is not sufficient to prove intentional discrimination. Questions 'based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision.'"[83] By contrast, the Second Circuit found that questions asked of a female candidate about whether she would get pregnant and quit, and what her husband thought of the fact the job would require her to "run around the country with men," supported a finding of a discriminatory interview and a discriminatory recommendation not to offer the position to the plaintiff.[84] Unless questions about sex, age, or religion can be justified as a BFOQ, they simply should be avoided because it may be difficult for an employer to rebut the appearance that unlawful considerations were taken into account in the hiring process.[85]

In regard to disability, the ADA prohibits direct inquiries about whether an individual has a disability.[86] The employer may ask an applicant about the applicant's ability to perform job-related functions.[87] The EEOC advises that applicants who either have an obvious disability or who voluntarily reveal a disability may be asked if they will need a reasonable accommodation and if so, what accommodation.[88] Employers should be careful, however, to use the information obtained in a way that is consistent with the ADA. As long as the accommodation requested would

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CAREGIVING RESPONSIBILITIES (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html.

82. *See* Bruno v. City of Crown Point, 950 F.2d 355, 362 (7th Cir. 1991) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)); Barbano v. Madison Cnty., 922 F.2d 139, 143 (2d Cir. 1990).

83. *Bruno*, 950 F.2d at 362 (quoting *Hopkins*, 490 U.S. at 251).

84. *Barbano*, 922 F.2d at 143.

85. *See generally* William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. Rev. 81 (2009). The issue of causation in discrimination law is highly complex and, as commentators have suggested, rather incoherent at this time. *Id.* Several issues would need to be litigated in any case involving discriminatory interview questions, including whether the plaintiff needs to prove that but-for the discriminatory questions, she would have been hired or whether evidence that her protected characteristic was a motivating factor is sufficient to shift a burden to the employer to prove it would have made the same decision not to hire the plaintiff notwithstanding the discriminatory questions, and whether the discriminatory questions were made by or influenced the individual who made the actual hiring decision. *See, e.g.*, Belyakov v. Leavitt, 308 F. App'x 720, 726-27 (4th Cir. 2009) (finding statements by an administrator reflected discriminatory animus, but holding that Russian-born plaintiff could not show administrator was part of the interview process nor responsible for the decision not to select plaintiff for the position at issue, thus defeating a Title VII claim of national origin discrimination); Stukey v. U.S. Air Force, 790 F. Supp. 165, 170 (S.D. Ohio 1992) (concluding that despite undisputed fact female cadet was subjected to discriminatory interview, she still must prove that gender, rather than proffered reason of demonstrated performance, was the motivating fact in hiring decision).

86. 42 U.S.C. § 12112(d)(2)(A) (2006).

87. § 12112(d)(2)(B).

88. EEOC, ATTORNEY ACCOMMODATION FACT SHEET, *supra* note 70, at Part C.

not pose an undue hardship on the employer, the employer cannot use that accommodation as a basis for rejecting the applicant.[89]

For example, if a firm is hiring a litigation attorney who will be required to make court appearances, the interviewer may ask an applicant with an obvious vision impairment if she would need an accommodation to participate in court proceedings. If the applicant indicates she would need trial materials converted into Braille, the employer cannot reject that applicant merely because of that need.[90] The question would be whether such conversion would pose a significant difficulty or expense, taking into account the overall resources of the employer and the impact on trial process, among other things.[91]

### *E. Conditions of Employment—Harassment*

Most lawyers and law firms today are likely to be aware that both federal and state laws prohibiting discrimination include harassment based on a protected characteristic.[92] While this includes any type of harassment based on a protected characteristic, the primary type of harassment that is charged against employers is sexual harassment.[93] Surveys have shown that a large percentage of women in the legal profession report experiencing some form of sexual harassment.[94] The EEOC defines unlawful sexual harassment to include:

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89. *See* Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 738-40 (D. Md. 1996) (rejecting the employer's theory that a TTY device and second call center line for hearing impaired membership coordinator would create an undue hardship due to its expense, alleged "awkward and unfamiliar" nature, or time delay for calls); *cf.* TEX. HUM. RES. CODE ANN. § 121.010 (West 2006 & Supp. 2009) (banning testing which would screen out persons with disabilities and requiring all employment tests be accommodated for individuals with disabilities).

90. *See* EEOC, ATTORNEY ACCOMMODATION FACT SHEET, *supra* note 70, at Part C.

91. *See* Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 682 (5th Cir. 1996) (finding employer's bare assertions that the plaintiff's requested accommodation would cause disruption to its working schedule and violate company policy was not sufficient without additional facts to prove the requested accommodation posed an undue hardship on the employer).

92. *See, e.g.*, Wal-Mart Stores, Inc. v. Itz, 21 S.W.3d 456, 461 n.2, 470 (Tex. App.—Austin 2000, pet. denied) (noting that Texas follows federal law regarding employer liability for sexual harassment).

93. *See Harassment Charges EEOC & FEPAs Combined: FY 1997-2009*, EEOC, http://eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Jan. 10, 2011) (setting out all harassment charges). The EEOC's enforcement and litigation statistics indicate that in 2009, approximately 41% of all harassment charges brought to the EEOC involved claims of sexual harassment. *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997-2009*, EEOC, http://eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Jan. 10, 2011) (setting out sexual harassment charges only). The agency does not break down any other protected category specific to harassment claims, which means the remaining claims would be spread over all other protected categories under the laws the EEOC is charged with enforcing (e.g., race, religion, national origin, age, disability). *See id.*

94. *See, e.g.*, David Laband & Bernard Lentz, *The Effects of Sexual Harassment on Job Satisfaction, Earnings, and Turnover Among Female Lawyers*, 51 INDUS. LAB. REL. REV. 594, 594 (1998) (reporting on the ABA's 1990 National Survey of Career Satisfaction/Dissatisfaction, which found over two-thirds of female attorneys in private practice and nearly half of those in corporate and

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[95]

Harassment claims are commonly broken down into two categories: quid pro quo ("this for that") and hostile environment.[96] Quid pro quo claims arise when the employee is subjected to sexual advances or other conduct of a sexual nature, and the employee's response to these advances is used as a basis for an employment decision.[97] Put another way, quid pro quo harassment occurs when a supervisor demands sexual favors in exchange for hiring, promoting, or acquiring other job benefits.[98] Hostile work environment harassment occurs when an employee is subjected to verbal or physical conduct of a sexual nature that is severe or pervasive enough to alter the terms and conditions of employment.[99]

As discussed below, regardless of how the harassment is categorized, when the harassment results in a tangible employment action against the employee, the employer faces strict liability for its supervisors' actions.[100] In a hostile environment claim with no tangible job action, the employer's liability will rest on whether the employer knew or should have known of the unlawful harassment and took timely and appropriate remedial actions.[101] At least in cases involving supervisors (but likely in all cases where the employer has control over the alleged harasser's behavior), the Supreme Court has refined the liability standard to focus on whether the employer adopted an appropriate policy to prevent and correct unlawful

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public agency settings reported experiencing or observing sexual harassment by male supervisors and coworkers); *cf.* Lilia M. Cortina, et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 Law & Soc. Inquiry 235, 254 (2002) (noting that in a survey of federal litigation in the Eight Circuit, nearly eight percent of female attorneys, but "virtually no male attorneys," reported experiencing "unwanted touches, sexual advances, sexually suggestive comments, and sexual coercion" in the context of that litigation alone).

95. 29 C.F.R. § 1604.11(a) (2009).

96. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998) (characterizing the distinction between the two types of harassment as helpful but not necessary to the plaintiff's stating a claim for unlawful sexual harassment). Although it is still common to refer to these two categories, it should be noted that the Supreme Court has indicated their utility is limited for determining whether employer liability attaches. *Id.* at 754.

97. *See id.* at 753-54.

98. *Id.*

99. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

100. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); *Ellerth*, 524 U.S. at 761-63 (1998).

101. *Ellerth*, 524 U.S. at 765.

harassing conduct in the workplace.[102] Professor Audrey Wolfson Latourette has observed that law firms may be particularly vulnerable to claims of sexual harassment because of firms' "structural composition of many partners, all of whom serve in some supervisory capacity over other employees, and . . . ethical responsibility to uphold the law."[103] This structural composition may result in even broader liability for law firms than for other organizations because even in cases where there has been no tangible employment action, employers may be held strictly liable for hostile environment harassment when the harasser is the proxy or alter-ego of the employer, which may be the case for partners or shareholders in a law firm.[104]

### *1. Strict Liability for Harassment Resulting in Tangible Employment Actions*

As noted, employers are strictly liable for sexual harassment that results in tangible employment action against the plaintiff.[105] "[T]angible employment action[s]" involve "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[106] The Fifth Circuit has noted that tangible job action does not require a particular economic detriment, finding that an employee's "demotion, together with the substantial diminishment of her job responsibilities, was sufficient to constitute a tangible employment action."[107] Moreover, as the EEOC has noted, the change in employment status need not be to the employee's detriment, but also includes changes in status to the employee's benefit, such as when a promotion is granted after an employee gives in to a supervisor's demands for sexual favors.[108]

The Supreme Court in *Burlington Industry, Inc. v. Ellerth* looked to agency principles to find employer liability for individuals who exercise

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102. *See id.*; *see also* Lauderdale v. Tex. Dep't of Criminal Justice, Inst. Div., 512 F.3d 157, 164 (5th Cir. 2007) (As long as the supervisor's actions do not result in "tangible employment action," employers may assert a defense that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.").

103. Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 891 (2005).

104. *See infra* Part III.E.3.

105. *See supra* note 100.

106. *Ellerth*, 524 U.S. at 761.

107. Green v. Adm'rs of the Tulane Educ. Fund, 284 F.3d 642, 654-55 (5th Cir. 2002).

108. *See* EEOC, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISOR IV(b)(3) (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html.

their supervisory authority to affect the employee's status.[109] The Court did not specifically rule on who would qualify as a supervisor, but generally described a "supervisor" as someone "with immediate (or successively higher) authority over the employee."[110] The lower courts have not adopted a consistent definition, with some requiring that the supervisor have direct authority to affect the terms and conditions of the employee's employment and others requiring only that the supervisor have the authority to direct the employee's daily work activities.[111] The Federal District Court for the Eastern District of Texas, after surveying the split of authority, adopted something of a middle-ground definition:

> "[a]n employee does not qualify as a 'supervisor' for purposes of Title VII employer vicarious liability unless he or she is placed by the employer, formally or informally, in a position of superior authority and possesses some significant degree of control over the hiring, firing, demotion, promotion, transfer, or discipline of subordinates. Supervisory status is not a formulaic question of title, but a particularized inquiry into the nature and extent of the authority bestowed upon an employee by an employer. The authority entrusted in a supervisory employee need not be plenary or absolute, but it must encompass, in some significant way, the power to initiate, recommend, or effect tangible employment actions affecting the economic livelihood of the supervisor's subordinates." This definition requires more than just daily supervision of daily work activities and work assignments. However, it acknowledges that the authority entrusted to the supervisory employee need not be absolute; it can encompass the power to initiate, recommend, or effect tangible employment actions.[112]

The "power to initiate, recommend, or effect" aspect of this definition may be significant in a firm setting, in that even if a group or committee makes actual determinations as to promotion or discharge, the fact that a

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109. *Ellerth*, 524 U.S. at 764-65.

110. *Id.* at 765.

111. *Compare* Hall v. Bodine Elec. Co., 276 F.3d 345, 355 (7th Cir. 2002) (asserting that an individual must have the authority to directly affect the terms and conditions of the plaintiff's employment in order to qualify as a supervisor), *with* Mack v. Otis Elevator Co., 326 F.3d 116, 126 (2d Cir. 2003) ("The question in such cases is not whether the employer gave the employee the authority to make economic decisions concerning his or her subordinates . . . [rather the question is] whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates."). The Second Circuit in *Mack* also looked to the EEOC for guidance, which defines a supervisor as someone who "has authority to undertake or recommend tangible employment decisions affecting the employee[,] *or* . . . has authority to direct the employee's daily work activities." *Id.* at 127 (quoting EEOC, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS III(A), 8 FEP Manual (BNA) 405:7654 (1999)).

112. Hayes v. Laroy Thomas, Inc., No. 5:05CV195, 2007 WL 128287 at *16 (E.D. Tex. Jan. 11, 2007) (quoting in part Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 918 (E.D. Tenn. 2003)) (citation omitted).

more senior attorney provided input as to a junior attorney's performance and made recommendations about retention that were given substantial weight may be sufficient supervisory authority to impose strict liability on the firm if that senior attorney engaged in acts of unlawful harassment directed toward the junior attorney.[113] Even under the narrower Seventh Circuit standard, that court has recognized that an individual may be a Title VII supervisor despite the fact there may be an additional administrative step required to change an employee's status.[114]

*2. Hostile Environment Harassment with No Tangible Employment Action*

Outside of cases involving exercise of supervisory authority to effect tangible employment actions, firms may additionally face liability for sexual harassment if they fail to take appropriate steps to prevent and correct conduct of a sexual nature that is sufficiently severe as to alter the working environment.[115] The Supreme Court in *Faragher v. City of Boca Raton* established a two-part affirmative defense for employers in cases where no tangible employment action was taken: (a) the employer must have "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (b) the plaintiff-employee must have "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise."[116] As discussed in subsection (c) below, however, courts have refused to apply this defense when the harasser is the proxy or alter-ego for the company, instead finding strict liability.

Following the *Faragher* and *Ellerth* decisions, employers have been well advised to adopt written policies and procedures for dealing with sexual harassment issues, because courts were willing to impose rather strict requirements on employee-plaintiffs to utilize such policies within a short time after the alleged harassment occurred—at least where the employer acted swiftly to investigate and respond to the situation.[117] For example, the Fifth Circuit in *Thompson v. Naphcare, Inc.* found that the employer acted reasonably when it had promulgated a policy against harassment in its employee handbook that included a complaint procedure, and once it received the plaintiff's complaint, it acted immediately to send investigators to the worksite and forbid the alleged harasser from having

113. *Id.*

114. *See* Phelan v. Cook Cnty, 463 F.3d 773, 784 (7th Cir. 2006) (indicating an employer may be strictly liable when the supervisor is not the direct actor but influences the actual decision-maker to carry out the unlawful action (i.e, the "cat's paw" scenario)).

115. *See Ellerth*, 524 U.S. at 754, 765; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (finding employer liability exists when the harassment is severe enough to alter the plaintiff's working conditions).

116. Faragher v. City of Boca Raton, 524 U.S. at 807-08 (1998).

117. *See infra* text accompanying notes 119-21.

any further contact with the plaintiff.[118] The court further suggested that the plaintiff herself failed to act reasonably when she "wait[ed] almost two months to register her complaints and then resign[ed] almost immediately after [the company's] prompt investigation and remedial actions[.]"[119] The Fifth Circuit has also applied the affirmative defense to other harassment claims, including racial harassment.[120]

A first step to avoiding harassment claims, therefore, is to promulgate an effective anti-harassment policy. In *Sex-Based Harassment: Workplace Policies for the Legal Profession*, the American Bar Association Commission on Women in the Profession suggests the following essential elements of an effective anti-harassment policy:

- A strong statement of the organization's unwillingness to tolerate sex-based harassment;
- A statement specifying that employees who complain of sex-based harassment will be protected from retaliation;
- A clearly articulated definition of sex-based harassment, with examples of inappropriate behavior;
- Identification of individuals covered under the policy;
- Multiple avenues for complaint;
- Procedures to be followed in response to sex-based harassment complaints that afford the maximum feasible confidentiality and protection from retaliation and unwarranted accusations;
- A commitment to respond promptly to known harassment whether or not a formal complaint is made;
- A specification of possible sanctions;
- Explanation of the appeals process, if any;
- A mechanism for implementing and monitoring the policy; and
- Educational and training programs, including refresher training.[121]

While adopting a policy is a good first step toward obtaining the protection of the *Faragher–Ellerth* defense, employers must also take appropriate action after learning of the harassing behavior.[122] That action must be both prompt and appropriate to the severity of the harassing behavior.[123] In *Casiano v. AT&T Corp.*, the Fifth Circuit found an employer not vicariously liable for sexual harassment of a male employee

118. Thompson v. Naphcare, Inc., 117 F. App'x 317, 323-24 (5th Cir. 2004).

119. *Id.* at 324.

120. *E.g.*, Walker v. Thompson, 214 F.3d 615, 626-28 (5th Cir. 2000).

121. American Bar Association Commission on Women in the Profession, SEX-BASED HARASSMENT: WORKPLACE POLICIES FOR THE LEGAL PROFESSION 19 (2d ed. 2007).

122. *See* Casas v. Southwest Staffing, Inc., No. EP-04-CV-0424-FM, 2006 WL 504226, at *5 (W.D. Tex. Jan. 26, 2010) (citing Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1999)).

123. *See id.*

by a female supervisor where the employer responded immediately by suspending the supervisor and conducting an in-depth investigation of the plaintiff's charges.[124] By contrast, in *Hollis v. City of Buffalo* the court found the employer failed to respond appropriately.[125] The employer in that case delayed investigating the alleged conduct for several months, gave the harasser only a three-day suspension, which ended up imposing no financial penalty on him, and although the employer changed the harasser's work station and job assignment, allowed him to remain "in the same department, on the same floor, [] and . . . location" as the plaintiff, and with some supervisory control over her.[126]

This duty to take prompt and effective remedial action may extend not only to harassment committed by individuals in a supervisory capacity but to co-workers and even third parties, if the firm has notice of the harassing behavior and fails to take appropriate remedial action.[127] The EEOC regulations provide that:

> [a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.[128]

The standard applied to third-party cases is similar to that applied to co-worker (non-supervisor) harassment cases, with the key issues being notice to management of the harassing behavior and the promptness and appropriateness with which the employer responded.[129]

### *3. Harassment Committed by Proxy or Alter Ego of Employer*

Even a policy following all the recommendations discussed above may not, however, protect the firm from harassment claims when the harasser is a high-level member of the firm, such as a partner or shareholder. The Fifth Circuit has held that employers are "automatically liable for [their] proxies' harassment of employees."[130] In that case, the alleged harasser was the former general manager of a television station and owned two percent of the

124. Casiano v. AT&T Corp., 213 F.3d 278, 286-87 (5th Cir. 2000).
125. Hollis v. City of Buffalo, 28 F. Supp. 2d 812, 821-22 (W.D.N.Y. 1998).
126. *Id.*
127. *See infra* notes 129-30 and accompanying text.
128. 29 C.F.R. § 1604.11(e) (2009).
129. *See* EEOC v. Cromer Food Servs., Inc., 691 F. Supp. 2d 646, 652-53 (D.S.C. 2010).
130. Ackel v. Nat'l Commc'ns, Inc., 339 F.3d 376, 383 (5th Cir. 2003).

company's stock.[131] The court found an issue of fact as to whether he had sufficient authority to qualify as the defendant corporation's proxy, rendering the company strictly liable for his actions creating a hostile work environment.[132] In other cases, courts have found sufficient authority where the alleged harasser was a major shareholder or had ultimate authority to hire or fire employees.[133] Courts are likely to apply similar analysis to claims against law firm partners who exercise substantial authority over the operation of the firm.

### *F. Conditions of Employment—Reasonable Accommodations*

Both Title VII and the ADA contain provisions that make failure to provide reasonable accommodations to otherwise qualified employees a form of unlawful discrimination.[134] The legal standard for each of these is different, with the ADA imposing a greater obligation on employers.[135] Legal employers should understand the requirement to provide accommodations under both Acts, especially after the recent passage of the ADA Amendments Act.[136] Because the courts construed the previous definition of disability extremely narrowly, the body of law interpreting the requirement under the ADA that employers provide reasonable accommodations for employees' disabilities has been slower to develop.[137] That trend is likely to change soon.

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131. *See id.* at 384.

132. *See id.*

133. *See* Mallinson-Montague v. Pocnick, 224 F.3d 1224, 1233 (10th Cir. 2000) (holding that "Senior Vice President" was alter ego of bank for purposes of the non-applicability of the *Faragher-Ellerth* defense because he had ultimate supervisory authority over employees in his department, served on committees exercising policy-making functions, and answered only to bank president and board of directors); EEOC v. Reeves, No. CV0010515DTRZX, 2003 WL 22999369, at *1 (C.D. Cal. Dec. 8, 2003) (alleged harasser was company founder, president, and major shareholder).

134. *See* 42 U.S.C. § 2000e(j) (2006) (defining "religion" as including "all aspects of religious observance and practice . . . unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business"); 42 U.S.C. § 12112(b)(5)(A) (2006) (defining "discriminate against a qualified individual on the basis of a disability" as to "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate the accommodation would pose an undue hardship on the operation of [its] business").

135. *See* H.R. REP. NO. 101-485, pt. 2, at 68 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 350 (noting that Congress was creating "a significantly higher standard" for the employer's duty to accommodate under the ADA, which was "necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities").

136. *See* 42 U.S.C. § 12101-12.

137. *See id.*

### *1. Religious Accommodations*

Title VII makes an employer's conduct unlawful when the employer discharges or otherwise affects the status of an employee by refusing to provide reasonable accommodation of that employee's religion, unless providing such accommodation would be an undue hardship on the employer.[138] "Religion" is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[139] Undue hardship in the religious-accommodation context means anything that imposes more than a *de minimis* burden on the employer, either in terms of efficiency or cost.[140] What is reasonable requires a case-by-case determination.[141]

In cases involving employee appearance standards, courts have denied private employers summary judgment on such claims absent specific proof of disruption of the employer's operations. For example, in *EEOC v. Alamo Rent-A-Car L.L.C.*, the court rejected the employer's claim that allowing the plaintiff to wear her headscarf was an undue burden because it would deviate from Alamo Rent-A-Car's "carefully cultivated image."[142] Similarly, the court in *Brown v. F.L. Roberts & Co., Inc.* rejected Jiffy Lube service station's argument that allowing a Rastafarian employee an exemption from the company's grooming policy for customer contact employees would be an undue burden as a matter of law.[143] Courts have been more willing to find a greater than *de minimis* burden when the employee seeks to change a functional aspect of the job, such as schedule changes for religious observation.[144] In *Brener v. Diagnostic Center Hospital*, the Fifth Circuit found sufficient proof of undue hardship when the employer presented evidence of other employees' discontent at being directed to trade days-off with the plaintiff in order to permit the plaintiff time off for his religious observances.[145] Similarly, in *Favero v. Huntsville Independent School District* the court found it would have been an undue burden on a school district to have to hire additional bus drivers to cover the

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138. *See* 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1).

139. 42 U.S.C. § 2000e(j).

140. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84-86 (1977).

141. *See* 29 C.F.R. § 1605.2 (2010) (outlining factors to be evaluated to determine if a religious accommodation is reasonable).

142. EEOC v. Alamo Rent-A-Car L.L.C., 432 F. Supp. 2d 1006, 1015 (D. Ariz. 2006).

143. *See* Brown v. F.L. Roberts & Co., Inc., 896 N.E.2d 1279, 1287 (Mass. 2008). *But see* Webb v. Philadelphia, 562 F.3d 256, 263 (3d Cir. 2009) (holding that it was an undue burden to public employer to allow police officer to wear religious symbols on her uniform).

144. *See* Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146-47 (5th Cir. 1982); Favero v. Huntsville Ind. Sch. Dist., 939 F. Supp. 1281, 1294 (S.D. Tex. 1996).

145. *Brener*, 671 F.2d at 146-47.

routes driven by the plaintiffs who requested leave for a period of religious observance.[146] The Fifth Circuit in *Brener* also observed, however, that the process of determining whether reasonable accommodation can be made requires "bilateral cooperation" of both the employer and employee.[147]

In the law firm context, an attorney might have a religious conflict with working on Saturdays or after sundown, or a firm might have an expectation regarding "professional appearance" that conflicts with the attorney's religious beliefs. The cases suggest that firms will need to provide more than speculative assertions about the impact on efficiency or cost of accommodating the attorney.[148] In particular, firms should demonstrate that they made a good faith effort to determine if any accommodation can be made that meets the attorney's religious objectives, before rejecting the request.[149] If the accommodation imposes upon reasonable expectations of others in the firm, such as requiring other attorneys to take additional court dates or otherwise shift their schedules, the accommodation might impose more than a *de minimis* burden.[150]

### *2. Disability Accommodations*

While the standard for accommodations under the ADA is more demanding than religious accommodations under Title VII, the same standard for making a good faith effort to determine the availability of such accommodations applies. The EEOC advises employers to engage in an interactive process with employees who have a disability to determine whether the employees will require reasonable accommodation of their known physical or mental limitations.[151] Such accommodations include not only changes to the physical attributes of the workplace but also to policies and practices of the employer:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities, and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training

146. *See Favero*, 939 F. Supp. at 1294.

147. *Brener*, 671 F.2d at 145-46.

148. *See* EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219, 222 (6th Cir. 1991); EEOC v. Tex. Hydraulics, Inc., 583 F. Supp. 2d 904, 910 (E.D. Tenn. 2008).

149. *See Tex. Hydraulics, Inc.*, 583 F. Supp. 2d at 910 (indicating that to meet its burden on summary judgment in Title VII religious accommodation case, an employer must demonstrate it at least considered possible options that would have accommodated an employee and that such options were rejected because of undue hardship); *see also* 29 C.F.R. § 1605.2 (d)(1) (2009) (suggesting alternatives that employers should consider for accommodating employee religious practices).

150. *Cf. Brener*, 671 F.2d at 146-47 (finding burden imposed on other employees by trading days-off warranted rejecting the accommodation as unreasonable).

151. *See* 29 C.F.R. § 1630.2(o)(3).

> materials, or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[152]

Employers are not required to provide accommodations that pose an undue hardship on their business, which is defined, in general, as "an action requiring significant difficulty or expense."[153] The EEOC points out, however, that "most [requested] accommodations can be provided at little or no cost."[154]

Specific to law firms, Professor Donald Stone reported in a 2009 article that "[d]isabled lawyers are seeking architectural accessibility, job restructuring, leave time for counseling sessions, accessible technology, and modifications of their work schedule . . . . Law firms are also beginning to see requests for additional administrative support, scheduling adjustments, and assignment of less stressful and less time sensitive work."[155] Whether these or any other accommodations sought are reasonable or pose an undue hardship requires careful consideration of the facts in the given case.[156]

For example, the EEOC has suggested that it may be reasonable to allow an attorney to begin work at 10:00 a.m., instead of the firm's usual 8:30 a.m. start time, when the attorney has a condition such as low blood pressure associated with chronic fatigue syndrome, which causes lightheadedness and difficulty concentrating in the early morning hours.[157] If the attorney is able to schedule meetings at a later hour, but otherwise work a full day and not miss important work, the employer may be required to accommodate her with the later starting time.[158] By contrast, in *Riley v. Fry*, the court found that a public defender who had significant on-going pain that made it difficult for her to walk, talk, and concentrate, and necessitated frequent, extended absences, could not perform the essential functions of her job, and that none of the accommodations she sought were reasonable because they required transfer to other departments where there were no openings.[159] The court in *Riley* emphasized that the employer had engaged in the interactive process, including previously reassigning the plaintiff to a different location at her request.[160]

In *Lyons v. Legal Aid Society,* the Second Circuit found the plaintiff-attorney stated a claim as to whether the Legal Aid Society was required to

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152. 42 U.S.C. § 12111(9) (2006).

153. § 12111(10)(A).

154. EEOC, ATTORNEY ACCOMMODATION FACT SHEET, *supra* note 70, at Part B.

155. Donald H. Stone, *The Disabled Lawyers Have Arrived: Have They Been Welcomed with Open Arms into the Profession? An Empirical Study of the Disabled Lawyer*, 27 LAW & INEQ. 93, 95-96 (2009).

156. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002) (articulating case-specific burdens of proof for plaintiff seeking accommodation and employer asserting undue hardship).

157. *See* EEOC, ATTORNEY ACCOMMODATION FACT SHEET, *supra* note 70, at Part F.

158. *Id.*

159. Riley v. Fry, No. 98 C 7584 2000 WL 1469372, at *1, *7 (N.D. Ill. Oct. 2, 2000).

160. *Id.* at *10.

provide an attorney with a disability a paid parking space near her office and the courts where she would be appearing, after she was involved in an accident where she was struck by a car as a pedestrian and had significant difficulty walking or taking public transportation.[161] Despite arguments that the firm did not provide paid parking to any of its attorneys, the court ruled that unless the employer could show it was an undue hardship because of cost, the employer would be required to provide the parking space.[162] The court reasoned that:

> the question of whether it is reasonable to require an employer to provide parking spaces may well be susceptible to differing answers depending on, *e.g.*, the employer's geographic location and financial resources, and that the determination of the reasonableness of such a requirement will normally require some development of a factual record. Further, we have noted that while reasonableness depends upon "a common-sense balancing of the costs and benefits" to both the employer and the employee, . . . an accommodation may not be considered unreasonable merely because it requires the employer "to assume more than a *de minimis* cost," . . . or because it will cost the employer more overall to obtain the same level of performance from the disabled employee.[163]

Reasonable accommodation does not include eliminating essential functions of a job, as discussed in the Job Advertising and Recruitment section.[164] The EEOC has indicated that employers are not required under the accommodation mandate to lower production standards.[165] This means legal employers do not have to lower or eliminate billable hour requirements as long as those requirements are uniformly applied to all attorneys of similar status.[166] The firm may be required, however, to provide reasonable accommodations to assist the attorney to meet that requirement, such as technology or administrative assistance.[167] In addition, where the attorney fails to meet a billable hour requirement because of a leave of absence that was itself a reasonable accommodation, the legal employer may need to adjust how it determines whether the standard is met by pro-rating the number of hours billed during the months the attorney was not on leave or extending the measuring period forward for a period equal to the amount of leave.[168] As the EEOC points out, the legal

161. Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1517 (2d Cir. 1995).

162. *Id.*

163. *Id.* at 1516-17 (citations omitted); *see also* 42 U.S.C. § 12111(10)(B) (2006) (setting out factors for determining undue hardship, including nature and cost of the accommodation, the overall financial resources of the employer, and the type of operation of the employer).

164. *See supra* Part III.A-D.

165. 29 C.F.R. § 1630.2(n) (2009).

166. EEOC ATTORNEY ACCOMMODATION FACT SHEET, *supra* note 70, at Part H.

167. *See id.* at Part G.

168. *Id.*

employer may not make the leave less effective by, in effect, penalizing the attorney for taking it.[169]

A good resource for information and assistance in determining reasonable accommodations is the Job Accommodation Network, a service provided by the U.S. Department of Labor, Office of Disability Employment Policy.[170]

## IV. DISCRIMINATION ISSUES IN DISCHARGING AND PROMOTING EMPLOYEES

### *A. Standard of Proof*

Basic discrimination claims are generally broken into two proof categories: pretext claims and mixed-motive claims. In a pretext claim, the plaintiff provides a prima facie case that he or she was qualified for a position but suffered an adverse employment action such as being fired or not being hired, and the circumstances suggest the reason for the adverse action was based on a protected characteristic.[171] The employer must then produce evidence of a legitimate, non-discriminatory reason for its actions, at which point the plaintiff bears the ultimate burden of proving that reason was a pretext for intentional discrimination.[172] In a mixed-motive case, the plaintiff presents sufficient evidence for a court to find that a protected characteristic motivated the employer's actions, at which point the burden of proof shifts to the employer to prove it would have made the same decision otherwise.[173] The distinction between these two proof models was clouded by the Civil Rights Act (CRA) of 1991, which codified for Title VII claims that discrimination under that Act is established whenever a plaintiff proves that a protected characteristic is a motivating factor in the employer's adverse action.[174] The CRA of 1991's language is sufficiently broad that it could be applied to pretext as well as mixed-motive claims.[175]

The Fifth Circuit Court of Appeals in *Rachid v. Jack in the Box, Inc.*, attempted to reconcile the two proof models in a claim brought under the ADEA.[176] The court stated that:

> the plaintiff must still demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason

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169. *See id.*

170. *U.S. Dep't of Labor Office of Disability Employment Policy*, JOB ACCOMMODATION NETWORK, http://askjan.org/ (last visited Oct. 19, 2010).

171. *See* McDonnell Douglas, Corp. v. Green, 411 U.S. 792, 802-03 (1973).

172. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).

173. Price-Waterhouse v. Hopkins, 490 U.S. 228, 263 (1989).

174. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2006).

175. *See id.*

176. Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).

> for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive[s] alternative).'" . . . If a plaintiff demonstrates that age was a motivating factor in the employment decision, it then falls to the defendant to prove "that the same adverse employment decision would have been made regardless of discriminatory animus. If the employer fails to carry this burden, plaintiff prevails."[177]

Subsequent to *Rachid*, the Supreme Court in *Gross v. FBL Services* overruled the mixed-motive approach with respect to ADEA claims.[178] The Court noted that Congress had amended Title VII after *Price-Waterhouse v. Hopkins* to codify the burden of proof in mixed-motive cases but had not done so with respect to ADEA claims.[179] Therefore, the Court held that Congress did not intend for plaintiffs to be able to prevail on mixed-motive claims under the ADEA the way they now can under Title VII.[180] To establish a disparate treatment claim under the ADEA "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[181] The Court added that the burden of persuasion remains with the plaintiff and does not shift to the employer to show that it would have taken the action regardless of age, even when the plaintiff has produced some evidence that age was one motivating factor in that decision.[182]

After *Gross*, *Rachid* is no longer good law for ADEA claims.[183] It should, however, remain good law as to Title VII claims, given that the Fifth Circuit was interpreting the CRA of 1991.[184] The Supreme Court has not addressed the issue of the burden of proof under the ADA; however, the language of the ADA with respect to burden of proof is similar to that of the ADEA.[185] Because Congress has not amended the ADA the way it

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177. *Id.* at 312 (internal citations omitted).

178. *See* Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2350 (2009).

179. *See* Price-Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). *Hopkins* also held that if the employer proves it would have made the same decision without having taken the unlawful factor into account, there would be no liability under the Act. *Id.* Congress reversed this aspect of *Hopkins*, adopting instead a standard that employers who prove the same-decision defense would still be liable for injunctive and declarative relief as well as attorneys' fees. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

180. *See Gross*, 129 S. Ct. at 2351.

181. *Id.* at 2350.

182. *See id.* at 2351.

183. *See id.* at 2350-51.

184. *See* Hill v. New Alenco Windows, Ltd., No. H073857, 2009 WL 6567044, at *9-10 (S.D. Tex. July 17, 2009) (continuing to apply *Rachid*).

185. *Compare* ADA, 42 U.S.C. § 12112(a) (Supp. 2008) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees . . ."), *with* ADEA, 29 U.S.C. § 623(a)(1)-(3) (Supp. 2008) ("It

amended Title VII in the CRA of 1991, the Court would likely require that plaintiffs prove but-for causation under the ADA just as they are now required to prove it under the ADEA.[186]

### *B. Discharge of Employees*

Discharging an employee in contravention of one of the anti-discrimination statutes is a sure-fire way to have a federal or state claim brought against you. Attorneys have been successful in proving prima facie evidence of discriminatory intent by legal employers.[187] The decision to terminate the associate was actually made at a meeting to establish associate salary level for the new year.[188] The meeting agenda did not include an evaluation of the associate's performance.[189]

The class of individuals who have successfully stated claims for discriminatory discharge is broad.[190] A white employee who can prove that he was replaced by a black employee for racial reasons can also recover under the civil rights laws.[191] One court has also held that discrimination motivated by the race of the employee's spouse is also actionable.[192] The court in *Rosenblatt v. Bivona & Cohen, P.C.* concluded that there was a material issue of fact as to whether the plaintiff attorney was terminated for legitimate reasons or whether they were merely pretextual.[193] Without discussing the issue further, the court concluded that if the plaintiff had been terminated because of the race of his wife, then his termination would be impermissible.[194]

A law firm may be able to avoid liability if it produces legitimate non-discriminatory reasons for the employee's discharge. Reasons can include poor work performance, inability to obtain new clients, the loss of existing clients, poor relations with staff or co-workers, or unexplained absences.[195]

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shall be unlawful for an employer to fail or refuse to hire any individual . . . because of such individual's age.").

186. *See* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961-62 (7th Cir. 2010) (applying *Gross* to bar ADA mixed-motive claims).

187. *See* Cavagnuolo v. Baker & McKenzie, 1993 WL 766865, at *2-3 (N.Y. Div. of Human Rights Dec. 17, 1993) (holding that a law firm associate established a claim under the New York Human Rights law where there was clear evidence that despite very good work, the associate was fired for being infected with Kaposi's Sarcoma, an opportunistic infection related to AIDS).

188. *See id.* at *3.

189. *Id.*

190. *See id.* at *1-2.

191. D'Ascoli v. Roura & Melamed, 2005 WL 1655073, at *1-2 (S.D.N.Y. July 13, 2005) (white male trial attorney terminated and replaced by a black attorney).

192. *See* Rosenblatt v. Bivona & Cohen, P.C., 969 F. Supp. 207, 219-20 (S.D.N.Y. 1997).

193. *See id.*

194. *Id.* at 216.

195. *See, e.g.*, Lee v. Mostyn Law Firm, 2006 WL 571859, at *4 (S.D. Tex. Mar. 6, 2006). In *Mostyn*, the law firm introduced evidence that plaintiff was discharged for poor work performance and

For example, in *Morisseau v. DLA Piper*, the court granted a law firm summary judgment against an African-American former associate who claimed that she had been dismissed for reasons of race.[196] Even though the performance reviews of the associate's work indicated that she was well regarded, the court held that there was ample evidence that the decision to terminate her was not based on race but on the fact that the associate had been insubordinate and difficult to get along with.[197]

When the employer asserts poor performance as the basis for termination, the plaintiff must show evidence that the poor performance was either not true or not the real reason for the termination. If the plaintiff fails to rebut the evidence of poor performance, the court will find for the employer.[198] For example in *Barnhart v. Pickrel, Scaheffer & Ebeling, Co.*, the court of appeals affirmed the trial court's decision granting the law firm's motion for summary judgment on an ADEA claim, finding that the plaintiff had offered no evidence to rebut the non-discriminatory reasons offered by the law firm for the plaintiff's expulsion—declining work performance caused by alcohol abuse.[199] By contrast, in *Abrams v. Millikin & Fitton Law Firm*, the district court denied summary judgment to the defendant law firm on the plaintiff's ADEA claim.[200] The plaintiff, a law firm human resource manager, had been terminated from that position because, the law firm alleged, she was not performing a sufficient number of duties to justify continuing the position full time.[201] The law firm also asserted she had been offered a lateral transfer that she refused.[202] The plaintiff presented both direct evidence of stereotyped remarks about age made in her performance reviews and indirect evidence of discrimination that her position had not been eliminated but instead its duties had been given to a younger employee.[203] The court ruled that there were facts in dispute under both theories, and a reasonable jury could conclude in the plaintiff's favor that the discharge was discriminatorily motivated.[204]

If a firm wants to rely on an employee's inadequacies in a particular area, it would be useful in defending a wrongful discharge (or failure to promote claim) if the firm had given the employee notice of the criteria that would be applied in assessing the employee's performance. For example, in *Masterson v. LaBrum & Doak*, the district court denied the defendant law

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unexplained absences. *Id.* The plaintiff was unable to demonstrate that these reasons were pretextual, so summary judgment was granted in part to the defendant. *Id.* at *5.

196. *See* Morisseau v. DLA Piper, 532 F. Supp. 2d 595, 624 (S.D.N.Y. 2008).

197. *See id.* at 611.

198. *See, e.g.*, Barnhart v. Pickrel, Scaheffer & Ebeling Co., 12 F.3d 1382, 1391-92 (6th Cir. 1993).

199. *See id.*

200. Abrams v. Millikin & Fitton Law Firm, 267 F. Supp. 2d 868, 878 (S.D. Ohio 2003).

201. *Id.* at 875.

202. *Id.* at 870.

203. *Id.* at 872-73.

204. *Id.* at 873, 876.

firm's motion for summary judgment because of a lack of notice.[205] The firm claimed that it refused to make a female associate a partner because she had not developed business.[206] The court held that there was a material issue of fact as to whether this justification was pretextual in light of the fact that, unlike her male counterparts, she was never informed that developing business was a criterion for making partner.[207] Moreover, the partners made no effort to determine what business she had in fact produced.[208]

Firms need to establish objective criteria for promoting or discharging employees. Having such criteria and applying them in a neutral, non-discriminatory fashion will help a firm avoid liability. For example, in *Quick v. Tripp, Scott, Conklin & Smith*, a paralegal with Hepatitis C brought a claim under the ADA alleging she was laid off simply for having that condition.[209] The federal district court granted summary judgment to the employer-law firm.[210] Essentially, the firm was able to defend its reduction in force by pointing out that, for business reasons, it had to eliminate two departments and the employees working in them.[211] The employee was unable to prove that the firm had established seniority as an employment criterion, such that it would have had to retain her over less-senior co-workers.[212] Furthermore, the firm introduced evidence to show that other junior paralegals had preferable qualifications and work histories.[213]

### *C. Constructive Discharge*

A law firm that does not actually fire an employee can still be liable for constructive discharge. In other words, it is not necessary that the employer actually say the words "you're fired." Taking away the employee's responsibilities, reducing her pay, and moving her office to a broom closet would likely constitute a constructive discharge, subjecting the legal employer to liability under discrimination laws.

The Supreme Court has adopted an objective standard for evaluating constructive discharge claims: "Did working conditions become so intolerable that a reasonable person in the employee's position would have

205. *See* Masterson v. LaBrum & Doak, 846 F. Supp. 1224, 1229 (E.D. Pa. 1993).
206. *Id.* at 1232.
207. *Id.* at 1233.
208. *Id.*
209. Quick v. Tripp, Scott, Conklin & Smith, P.A., 43 F. Supp. 2d 1357, 1361-63 (S.D. Fla. 1999).
210. *Id.* at 1362.
211. *Id.* at 1370-71.
212. *Id.*
213. *Id.*

felt compelled to resign?"[214] The standard focuses on the plaintiff's working conditions and not on the subjective motive of the employer to force the plaintiff to resign.[215] Courts do not, however, find the conditions intolerable on evidence of discrimination alone; plaintiffs alleging a constructive discharge must show "aggravating factors."[216] In one case, the plaintiff paralegal alleged that his firm did not assign him to a big case, that it promoted a female paralegal he had helped train to a position senior to his, that it denied him regular pay increases, and that it gave him less leeway in billing than other paralegals.[217] The court concluded that this evidence might constitute evidence of discrimination, but it was not sufficient to give rise to a complaint for constructive discharge.[218]

### *D. Retaliating Against an Employee Who Has Filed a Civil Rights Complaint*

Terminating an employee who has complained about discrimination can itself constitute a civil rights violation. Title VII, the ADA, the ADEA, and Chapter 21 of the Texas Labor Code all prohibit retaliatory discharge.[219] The Supreme Court has broadly defined the basis for a retaliation claim: "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."'"[220] The Court in *Burlington Northern & Santa Fe Railway Co. v. White*, for example, found that reassignment of job duties, even if not technically constituting a demotion, might dissuade a reasonable person from bringing a complaint if the new job duties were objectively less desirable.[221]

In *Benders v. Bellows & Bellows*, the Seventh Circuit Court of Appeals held that the defendant law firm was not entitled to summary judgment on plaintiff's claim—that she had been unlawfully fired in

214. Pa. State Police v. Suders, 542 U.S. 129, 141 (2004); *see also* Corrigan v. Labrum & Doak, 1997 WL 76524, at *5 (S.D.N.Y. Feb. 21, 1997) (reasoning that "[c]onstructive discharge occurs when an employer 'deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'" (citations and quotations omitted)).

215. Bates v. Dallas Indep. Sch. Dist., 952 S.W.2d 543, 550-51 (Tex. App.—Dallas 1997, writ denied).

216. *See* Douglas v. Weil, Gotshal & Manges, 1993 WL 364572, at *3 (S.D.N.Y. Sept. 14, 1993).

217. *Id.*

218. *Id.*

219. 42 U.S.C. § 2000e-3(a) (2006) (Title VII); 42 U.S.C. § 12203(a) (2006) (ADA); 29 U.S.C. § 623(d) (2006) (ADEA); TEX. LAB. CODE ANN. § 21.055 (West Supp. 2009); *see also* Gomez-Perez v. Potter, 553 U.S. 474 (2008) (holding that federal employee who was a victim of retaliation for filing an age discrimination complaint could assert a claim under the ADEA).

220. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (citations omitted).

221. *Id.* at 71.

retaliation for filing an EEOC charge.[222] To survive a summary judgment claim, the plaintiff has to prove that: "(1) she engaged in a statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the two."[223] The plaintiff alleged that her firing occurred just five days after one of the partners approached her and referenced the "awful EEOC charge" she had filed.[224] The law firm asserted that it fired the plaintiff because she had failed to complete her work and had been insubordinate and difficult to work with.[225] The court found, however, there were disputed facts as to whether that difficulty was because the defendant had been making it harder for the plaintiff to do her work.[226] The court concluded that when the plaintiff has presented evidence establishing a prima facie case of retaliation, summary judgment is appropriate only if there is no material evidence in dispute concerning whether the employer's explanation for the discharge is pretextual.[227]

In *Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, a female associate had complained about gender discrimination.[228] Subsequently, the firm deferred her pay increase and later terminated her.[229] The court of appeals held that there was a jury question as to whether the pay deferral and termination constituted retaliation for her having complained about gender discrimination.[230] Notifying a subsequent employer that a former employee filed a discrimination complaint can also constitute an act of retaliation in violation of Title VII.[231]

An employee is protected from discrimination even if she has not complained about discrimination or sought a benefit under a discrimination statute.[232] Even answering an employer's questions concerning another employee's discrimination complaint can suffice to place the employee within the class protected from retaliation.[233]

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222. *See* Benders v. Bellows & Bellows, 515 F.3d 757, 768 (7th Cir. 2008).

223. *Id.* at 764 (citation omitted).

224. *Id.*

225. *Id.* at 765.

226. *See id.*

227. *Id.*

228. Gallina v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 123 F. App'x 558, 561 (4th Cir. 2005).

229. *Id.*

230. *Id.* at 563; *see also* Kanhoye v. Atlanta Inc., 686 F. Supp. 2d 199, 208-09 (E.D.N.Y. 2009) (finding that negative evaluation received by an employee shortly after employee complained of gender and racial discrimination, which resulted in employee receiving less of a raise than other employees, was sufficient to defeat employer's summary judgment motion).

231. E.E.O.C. v. Metzger, 824 F. Supp. 1, 2-3 (D.D.C. 1993).

232. *See* Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn., 129 S. Ct. 846, 850-51 (2009).

233. *See id.*

### *E. Other Forms of Discrimination*

#### *1. Denial of Partnership or Promotion*

Discrimination can also be found if an employee is denied a promotion or the opportunity to become a partner in a firm in violation of the civil rights laws. In the landmark case of *Hishon v. King & Spaulding*, the Supreme Court held that a law firm could be subject to liability under Title VII for denying someone status as a partner for being a female.[234] The Court held that the right to be fairly considered for partnership fell within the "terms, conditions, or privileges of employment."[235]

In *Young v. Covington & Burling, LLP*, "[t]he plaintiff allege[d] that Covington's non-promotion policy categorically prohibit[ing] the promotion of staff attorneys" was discriminatory based on race.[236] Plaintiff alleged that there had been "an increase in the number of black staff attorneys while the number of black attorneys" throughout the rest of the firm remained the same.[237] The plaintiff claimed, and the district court agreed, that even though the policy was facially race-neutral, it could still be the basis of a "discrimination claim if the policy has a 'disparate impact on the basis of race.'"[238] The court added that:

> even where a policy or practice has a disparate impact on a protected class "[a]n employer may defend against liability by demonstrating that the practice is 'job related for the position in question and consistent with business necessity.'" And unless the plaintiff can then "show . . . that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs," the policy need not be abandoned.[239]

In *Young*, however, the court held that the statute of limitations barred the claim.[240]

#### *2. Discriminatory Work and Resource Allocation*

Discriminatory discharge, retaliation, and constructive discharge claims may involve issues related to work allocation and resources provided

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234. *See* Hishon v. King & Spaulding, 467 U.S. 69, 77-80 (1984).

235. *See id.* at 75-77; *see also* Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 127 (S.D.N.Y. 1977) (stating a cause of action under Title VII, complainant alleged that his denial of promotion to partner was because of his religion, his national origin, or both).

236. Young v. Covington & Burling, LLP, 689 F. Supp. 2d 69, 83-84 (D.D.C. 2010).

237. *Id.* at 85.

238. *See id.* at 84 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006)).

239. *Id.* (quoting Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009)).

240. *Id.*

to the former employee. The protections of anti-discrimination laws extend to the terms and conditions of employment.[241] If the former employee alleges that she did not receive the same terms, conditions, or privileges of employment and there is not a legitimate non-discriminatory explanation for the differential treatment, the law firm may have potential liability exposure.[242] In the legal context, this might include a charge that the plaintiff was not assigned work on challenging, lucrative client matters, especially the kind that might weigh heavily in evaluating a junior attorney for advancement within a firm or organization.

Courts such as the Fifth Circuit have limited exposure to terms and conditions claims in non-retaliation cases by defining "adverse employment actions [to] include only ultimate employment decisions such as hiring, granting leave, discharging, promoting, or compensating."[243] The court in *McCoy v. City of Shreveport* concluded that placing the plaintiff police officer on paid administrative leave was not an "ultimate employment decision," and she, therefore, failed to state her prima facie claim of discrimination.[244] But the court suggested the paid leave could be an adverse employment action under retaliation law, because it carried "the stigma of suspicion of wrongdoing and . . . [could] negatively affect an officer's chances for future advancement."[245] Such consequences could be sufficient to dissuade a reasonable employee from making a charge of discrimination against the employer.[246]

Therefore, it is unlikely under current Fifth Circuit law that an attorney-employee would succeed on a discrimination claim (outside of the retaliation context) that is premised solely on being denied the opportunity to handle certain client cases, unless the attorney-employee can show something more, such as his compensation was affected or that it caused him not to receive a promotion.[247] Evidence of differential work allocation and resources might, however, be prima facie evidence of discriminatory motive in a discharge case.[248] To succeed on this type of claim, the attorney-employee will have to provide comparative evidence—evidence that others outside the protected class were treated better.[249] In *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein*, a female attorney

241. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2006) (defining unlawful employment practices to include discriminating against an individual "with respect to his . . . terms, conditions, or privileges of employment").

242. *See Young*, 689 F. Supp. at 84.

243. McCoy v. City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007) (quoting Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 657 (5th Cir. 2002)).

244. *See id.*

245. *Id.* at 561.

246. *See id.* at 559.

247. *See supra* notes 236-40 and accompanying text.

248. Bilow v. Much, Shelist, Freed, Denenberg, Ament & Ruberstein, P.C., 277 F.3d 882, 893 (7th Cir. 2001).

249. *Id.*

failed to establish a prima facie case of sex discrimination with respect to the staffing of a case to which she had been assigned.[250] She was not able to point to any other similar case in which the law firm provided a male attorney with more staffing assistance.[251] Cases in which male attorneys seemingly received more assistance were more complex, not contingent fee cases, or took place in the city of the firm and did not require the same travel expenses.[252] The Seventh Circuit therefore upheld the dismissal of her sex discrimination claim.[253]

Courts have also been receptive to employer arguments that their work allocation decisions were supported by legitimate, non-discriminatory reasons. For example, in one case an African-American former associate argued that he had been hired by the firm in its D.C. office for his bankruptcy expertise but received "routine" work assignments while the firm rerouted more complex bankruptcy matters to its Chicago office.[254] In overturning the trial court verdict for the attorney-employee, the District of Columbia Circuit found that the matter was assigned to a partner and associate in the firm's Chicago office "who already had successfully handled a major, similar matter for the same client."[255] The court cautioned that "the factfinder may not second guess an employer's personnel decision absent demonstrably discriminatory motive."[256]

A difficult issue relating to work allocation arises when a client insists on not working with an attorney-employee because of that attorney's race, sex, age, or other protected class. Legal employers might argue that because of the special trust and confidence that must exist between attorney and client, following the client's wishes in this regard amounts to a BFOQ.[257] The Supreme Court has held, however, that the BFOQ defense is to be construed "extremely narrow[ly]."[258] As a general rule, customer preference cannot support a BFOQ unless it goes to the "essence of the business."[259] In *Wilson v. Southwest Airlines*, Southwest Airlines attempted to defend its policy of hiring only women for ticket agent and flight

250. *Id.* at 894.

251. *Id.*

252. *Id.*

253. *See id.* at 896.

254. Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1554-56 (D.C. Cir. 1997) (finding plaintiff, as a lateral hire, was not similarly situated to "homegrown" associates or associates located in offices in other firm locations).

255. *Id.* at 1556.

256. *Id.* (internal quotations omitted) (quoting Fischbach v. D.C. Dep't of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996)).

257. *See* Ernest F. Lidge, *Law Firm Employment Discrimination in Case Assignments at the Client's Insistence: A Bona Fide Occupational Qualification?*, 38 CONN. L. REV. 159, 169 (2005).

258. Dothard v. Robinson, 433 U.S. 321, 334 (1977).

259. Wilson v. Southwest Airlines, 517 F. Supp. 292, 299 (N.D. Tex. 1981) (quoting Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971)); *see also* 29 C.F.R. § 1604.2(a)(1)(iii) (2009) (indicating that the BFOQ exception generally does not apply to a "refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers").

attendant positions as part of its "love" campaign, which it claimed was essential to its ability to compete against other airlines.[260] The district court rejected Southwest's BFOQ defense, finding that transportation was the essence of Southwest's business and both men and women could perform the functions of jobs in question.[261] In other contexts, courts have held that employers cannot refuse to hire otherwise qualified individuals because of the attitudes of customers toward a protected characteristic.[262]

The extent to which courts would allow legal employers to use the attorney-client relationship to shield themselves from liability for discrimination is not clear. In a rather unique case, a federal district court in California allowed an attorney, who had his compensation reduced and then was told he should "plan to leave" the firm, to proceed with a tortious interference claim against the firm's client, Allstate Insurance, after it told the firm it wanted its work handled by younger attorneys.[263] The court reasoned that "[i]mportant though the attorney-client privilege may be, it should not be available to shield interference with another's civil rights."[264]

Even if the client's request is not illegal, a law firm may consider withdrawal from the representation on the ground that the lawyer considers the client's request repugnant or the lawyer has a "fundamental disagreement" with the decision.[265] If the law firm remains as counsel, the lawyer should consider explaining to the client the moral and economic consequences of the client's request.[266] Under Model Rule 2.1 and Texas Rule 2.01, comment 2, a lawyer's duty as an advisor goes beyond the narrow obligation to advise the client regarding the law but may include rendering advice about the "moral, economic, social and political factors, that may be relevant to the client's situation."[267] For example, a client request to systematically staff cases based on race or religion could be harmful from a public relations standpoint even apart from the legal risks involved.

Another related issue involves the decision to assign particular attorneys to certain cases. Attorneys commonly anticipate juror attitudes and biases when determining who should appear in court on a particular

260. *Wilson*, 517 F. Supp. at 293.

261. *Id.* at 302.

262. *See* Fernandez v. Wynn Oil, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (concluding that a company could not restrict an international marketing position to male candidates because their Latin American and Southeast Asian customers had difficulty working with a female executive).

263. *See* Plessinger v. Castleman and Haskell, 838 F. Supp. 448, 449 (N.D. Cal. 1993).

264. *Id.* at 451. *But see* Lidge, *supra* note 257, at 176-78 (suggesting that when client needs are unique, as in the case of representing someone who has been abused, BFOQ should be recognized).

265. TEX. DISCIPLINARY R. OF PROF'L CONDUCT R. 1.15 (b)(4) (1989).

266. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003); TEX. DISCIPLINARY R. PROF'L CONDUCT R. 2.01, cmt. 2 (1989).

267. *See* MODEL RULES OF PROF'L CONDUCT, *supra* note 266, at R. 2.1; *accord* TEX. DISCIPLINARY R. PROF'L CONDUCT, *supra* note 266, at R. 2.01, cmt. 2.

claim.[268] On the one hand, disqualifying otherwise qualified attorneys from such courtroom work on the basis of a protected characteristic serves to reinforce existing biases and retrench norms about who can effectively practice before that court.[269] On the other hand, as important as is the goal of protecting equal opportunity and equal protection of the law, there is a serious question whether it should come at the expense of effective representation of a client.[270] A thoughtful treatment of this issue in the *Texas Journal on Civil Liberties & Civil Rights* suggests that law firms first examine the circumstances to determine if they can avoid the dilemma through jury voir dire or the judge's policing of the courtroom.[271] A firm that repeatedly disqualifies attorney-employees out of concern regarding bias against that attorney may face a claim that the firm has not done all it can to avoid discriminatory allocation of important work for attorneys in its firm.

### *3. Caregiver Discrimination*

A growing area of discrimination claims involves what is being called "caregiver discrimination." Most often, these are claims brought by female employees who assert that employer policies bear more heavily on them as they continue to bear the disproportionate responsibility for child care and increasing care for elder family members.[272] The EEOC notes that such demands are especially felt by African-American female employees.[273] At the same time, it has become more common for male employees to take on more responsibility at home for child care.[274] All of these factors add up to another potential source of discriminatory discharge claims.

Although firms can consider billable hours in retention or promotion decisions, they must be careful that they do not violate one of the discrimination statutes when doing so. For example, under the Family and Medical Leave Act (FMLA), individuals who are unable to perform their job because of a serious medical condition (or have to care for a close relative with such a condition) can take an unpaid leave of absence for up to twelve weeks and are entitled to be restored to their former position upon their return.[275] If an associate is entitled to time off under the FMLA, the law firm could not discharge an employee or refuse to promote her for not

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268. Elina Tetelbaum, *Check Your Identity-Baggage at the Firm Door: The Ethical Difficulty of Zealous Advocacy in Bias-Ridden Courtrooms*, 14 TEX. J. ON C.L. & C.R. 261, 270-75 (2009).

269. *See id.*

270. *See id.*

271. *See id.*

272. *See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html.

273. *See id.*

274. *See id.*

275. *See* 29 U.S.C. §§ 2601, 2612 (2006 & Supp. 2009).

meeting an hours billed requirement.[276] Similarly, a firm could not refuse to make a woman partner for fear that as a young mother she might not be able to devote enough time to the firm.[277] Likewise, denying part-time status to a male employee who wants to have time to look after his children but retaining such a position for a woman employee would constitute impermissible discrimination because of sex.[278]

The employer's obligation to provide leave under statutes like FMLA is not open-ended. In *Soodman v. Wildman, Harrold, Allen & Dixon*, the federal district court held that the FMLA did not give a law firm employee the right to be restored to her former position because she was physically unable to work until long after the conclusion of her twelve-week leave under the FMLA.[279] However, the court did find there to be a material issue of fact precluding summary judgment regarding whether there was a violation of the ADA based on the firm's termination of an employee with a high-risk pregnancy.[280]

### *4. Denial of Equal Pay*

Female attorneys being paid less than their male counterparts at law firms has recently received a great deal of press. According to the United States Census Bureau, the median income from female attorneys is only 73.3% of that of male attorneys.[281] One recent study suggests that women are not receiving comparable credit with men when it comes to bringing in business.[282] Also, at many firms, women's representation on compensation committees is less than that of men.[283] More claims will likely be brought now, particularly in light of Congress' adoption of the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 (amending, 42 U.S.C. § 2000e-5(e) (2006)), overturning the Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), so that now the statute of

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276. *Cf.* Bonilla v. Electrolizing, Inc., 607 F. Supp. 2d 307, 322-23 (D.R.I. 2009) (denying employer's motion for summary judgment finding there to be a material issue of fact in dispute as to whether employee was fired for having taken time off to care for her ill children).

277. *Cf.* Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 120 (2d Cir. 2004) (stating that an opinion that female teacher could not be good mother and have demanding job that requires long hours could be evidence of gender discrimination based on stereotyping).

278. *See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EEOC, example 14 (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html,

279. Soodman v. Wildman, Harrold, Allen & Dixon, No. 95 C 3834, 1997 WL 106257, at *8 (N.D. Ill. June 22, 1997).

280. *See id.* at *7. *But see* Gambini v. Total Renal Care, Inc., 486 F.3d 1087, 1096 (9th Cir. 2007) (stating that an employer can fire an employee during a leave of absence if the employer would have fired the employee regardless of the leave).

281. Daniel H. Weinberg, U.S. Census Bureau, *Evidence from Census 2000 About Earnings by Detailed Occupation for Men and Women, Censr-15*, May 2004, at 16.

282. Joan C. Williams & Veta T. Richardson, Minority Corporate Counsel Ass'n, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women* 6 (2010).

283. *Id.*

limitations for equal-pay claims is triggered each time an employee receives a paycheck.[284]

A female employee (or a male employee in the reverse situation) could succeed in a lawsuit for equal pay under Title VII if she could establish that she was paid less than her male counterparts for the same work:

> (d) Prohibition of sex discrimination
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[285]

To recover under the Act, an employee must show that she is covered by the Act, that her position was comparable to that of a male, and that the female employee was paid less than the comparable male.[286] To show that her position was comparable to that of a male, the female must show that the jobs required comparable skill, effort, and responsibility and that they were performed under similar working conditions.[287]

In *Byrd v. Ronayne*, the First Circuit Court of Appeals held that a female attorney failed to make a prima facie showing that her law firm paid a higher salary to a male attorney for substantially equal work.[288] Although plaintiff's starting salary was less than that of her male counterparts, the attorney-employee provided insufficient evidence that her work required substantially equal skill, effort, and responsibility to that of her male counterparts practicing bankruptcy law.[289] In addition, the law firm was able to point to the substantially greater revenues male attorneys generated

284. 42 U.S.C. § 2000e-5(e) (2006); *see, e.g.*, Lipscomb v. Mabus, 699 F. Supp. 2d 171, 173 (D.D.C. 2010); Russell v. Cnty. of Nasau, 696 F. Supp. 2d 213, 227 (E.D.N.Y. 2010).

285. 29 U.S.C. § 206 (d)(1) (2006).

286. *See id.*

287. *See* Vasquez v. El Paso Cnty. Cmty. Coll. Dist., 177 Fed. App'x 422, 425 (5th Cir. 2006); Chance v. Rice Univ., 984 F.2d 151, 153 (5th Cir. 1993).

288. Byrd v. Ronayne, 61 F.3d 1026, 1033-34 (1st Cir. 1995).

289. *See id.*

for the firm.[290] Similarly, in *Knadler v. Furth*, the Ninth Circuit held that a male paralegal could not establish a claim based on receiving less pay than a female paralegal because he had less experience than the female paralegals.[291] In general, acceptable factors that can be considered in paying an employee less than a person of the other gender include education, experience, prior salary, and other factors relating to performance on the job.[292]

### 5. *Pregnancy Discrimination*

The Pregnancy Discrimination Act amended Title VII to include pregnancy discrimination within the definition of sex discrimination.[293] It provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[294]

"To state a claim of pregnancy discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), . . . the complaint must allege that (1) the plaintiff was pregnant at the time in question, (2) she was performing her job well, (3) she suffered an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision."[295] In one case, the plaintiff, a paralegal, alleged that she had received two adverse letters in her employment file after announcing that she was pregnant and wanted to assume part-time status.[296] The court held that the letters themselves were not sufficient to constitute an "adverse employment decision" because she could not show that the "two unsatisfactory evaluations led to her termination, demotion, probation, or loss of job opportunities within or outside of the firm."[297] In fact, she received a 3.5% raise.

In *Soodman v. Wildman, Harrold, Allen & Dixon*, the district court rejected a pregnancy discrimination claim brought by a law firm secretary who was fired after her pregnancy leave.[298] The court stated:

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290. *See id.* at 1034.

291. Knadler v. Furth, 253 F. App'x 661, 665 (9th Cir. 2007).

292. Dubowsky v. Stern, Lavinthal, Norgaard & Daly, 922 F. Supp. 985, 990 (D.N.J. 1996).

293. *See* 42 U.S.C. § 2000e(k) (2006).

294. *Id.*

295. Siko v. Kassab, Achbold & O'Brien, LLP, No CIV. A. 98-402, 2000 WL 307247, at *4 (E.D. Pa. Mar. 24, 2000).

296. *See id.* at *1.

297. *Id.* at *5.

298. Soodman v. Wildman, Harrold, Allen & Dixon, No. 95 C 3834, 1997 WL 106257, at *9 (N.D. Ill. Feb. 10, 1997).

> The PDA does not give pregnant employees absolute protection from the vagaries of the work world. There is no requirement under the PDA that employers make accommodations for pregnant workers; "employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees. Nothing in the PDA forces employers to pretend that an absent employee is present simply because her absence is caused by pregnancy. Thus, an employer must ignore an employee's pregnancy but not her absence from work, unless like absences of nonpregnant employees go unheeded.[299]

In *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, the Seventh Circuit affirmed a grant of summary judgment to the defendant law firm despite the attorney's claim that the law firm monitored her absences after she announced that she was pregnant.[300] The court stated that she was not treated differently than other employees because she was the first and only associate to take disability leave after the firm instituted a new policy.[301] Therefore, the firm's monitoring of her absences did not create an inference of pregnancy discrimination.

#### *6. ERISA Violations*

Like other employers, law firms can also be liable for violating the provisions of ERISA.[302] Section 510 of ERISA prohibits an employer from terminating an employee's employment for the purpose of preventing the vesting of rights under an employee benefit plan.[303]

## V. TIPS TO MINIMIZE YOUR FIRM'S EXPOSURE

### *A. Precautionary Measures*

The following are some additional precautions that may reduce your firm's chances of being subjected to liability for employment discrimination:

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299. *Id.* at *9 (internal citations omitted).

300. Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716, 725 (7th Cir. 1998).

301. *See id.* at 726.

302. *See, e.g.*, Millar v. The Lakin Law Firm, PC, No. 09-CV-101-JPG, 2010 WL 1325182, at *3-5 (S.D. Ill. Mar. 30, 2010) (attorney had remedy for being fired without agreed upon ninety–day notice, thereby causing attorney's son not to be able to receive needed health insurance coverage).

303. 29 U.S.C. § 1140 (2006). *See* Gabel v. Richards Spears Kibbe & Orbe LLP, 615 F. Supp. 2d 241, 244 (S.D.N.Y. 2009). *But see* Prochotsky v. Baker & McKenzie, No. 87 C. 10673, 1990 WL 16228, at *4 (N.D. Ill. 1990) (finding no evidence that law firm was influenced by employee's health insurance issues).

1. Adopt a policy prohibiting all forms of unlawful employment discrimination, communicate this policy to all employees, and (consistently) enforce it;
2. Train and retrain all managers and supervisors (including partners) about obligations under the employment discrimination laws;
3. Establish a complaint procedure that allows an employee who believes that he or she was the victim of illegal discrimination or sexual harassment to complain to someone outside of their chain of command;[304]
4. Periodically monitor employment practices for compliance with anti-discrimination laws; and
5. Document all programs relating to equal employment opportunity and non-discrimination.[305]

### *B. Give Employees Accurate Reasons for Termination or Discipline*

An employee should be given evaluations in writing and warnings in advance of termination so that an employer will be able to show that the employee was terminated for reasons having nothing to do with being a member of a protected class.[306] People who perform the evaluations should be told to take them seriously and be candid in their comments. The evaluations should set forth objective criteria by which an employee's job performance can be evaluated. Furthermore, supervisors performing the evaluations must conduct the evaluations in an impartial way. To accomplish this, all supervisors conducting the evaluations should receive the same guidance with respect to how to conduct the employee review. The attorney also should be given an opportunity to review the evaluations. Finally, the attorney should be told that regardless of performance, there is no guarantee of promotion to partnership.[307]

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304. *See* Hernandez v. Jackson, Lewis, Schnitzler & Krupman, 997 F. Supp. 412, 415-16 (S.D.N.Y. 1998). The court refused to grant a law firm summary judgment on its employee's sexual harassment claim because the court found that a material issue of fact existed with respect to whether the employer provided a reasonable avenue of complaint or knew of the harassment and did nothing about it. *Id.*

305. CHESTER ROHRLICH, MARK R. LEE, LEONARD GROSS & DARRYL L. MEYERS, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES § 9.07[1][c], 9-62 (2000).

306. *See* Austin v. Inet Techs., Inc., 118 S.W.3d 491, 499 (Tex. App.—Dallas 2003, no pet.). Texas recognizes the tort of compelled self-defamation under very limited circumstances. *Id.* Thus, if an employer were to give an employee a negative evaluation and put it in the employee's personnel file, the republication by the employee to prospective employers would not ordinarily be considered a publication. *Id.* "Self-publication does occur, however, (1) if the defamed person's communication of the defamatory statements to the third person was made without an awareness of their defamatory nature; and (2) if the circumstances indicated that communication to a third party was likely." *Id.*; *see* Calvin v. Puffer-Sweiven, Inc., No. 05-01-01915, 1998 WL 608338, at *6 (Tex. App.—Houston Aug. 27, 1998, no pet.). It is extremely unlikely that an employee would not realize that a negative evaluation was defamatory at the time he was turning it over to a prospective employer.

307. *See* Ellen M. Martin, *Discrimination Claims Against Law Firms*, N.Y.L.J. July 24, 1995, at 7.

If a law firm fails to give an employee accurate reasons for termination, it can still avoid liability if its real reasons were not a pretext for discrimination. In *Hudgens v. Wexler & Wexler*, a law firm escaped liability despite having failed to provide its manager with accurate reasons for his termination.[308] The firm had terminated an African-American manager for lack of performance, failure to give notice of absences, and insubordination.[309] The district court held that these reasons were not a pretext for race discrimination, in violation of Title VII, because there was no evidence that the firm was not honestly motivated to terminate the manager for failing to accurately follow its instructions to fire the lowest performing workers in his department.[310]

A red flag will be raised if an employee has received positive evaluations in the past and then is fired for reasons that contradict the earlier evaluations. In *Dow v. Donovan*, a gender discrimination action by an eight-year associate attorney who was terminated following denial of her partnership request, the plaintiff was able to defeat a summary judgment motion by the law firm.[311] Even though the plaintiff had received mixed reviews during her tenure, her reviews were not substantially different from the reviews of other associates who were granted partnership.[312] The federal district court held that a reasonable jury could find that the law firm's claim that she was professionally unqualified for admission to the partnership was a pretext and that the real reason was discriminatory.[313] The court also held that the comments of one partner in the litigation group, even if considered "stray remarks," could properly be considered as demonstrating discriminatory intent.[314] The plaintiff was also able to point out that the affidavits submitted by the law firm reflecting plaintiff's weaknesses as an associate were inconsistent with prior evaluations.[315]

### *C. Avoid Stereotypical Comments*

Stereotypical comments will help enable a plaintiff to show that discharges and disciplines were motivated by improper reasons.[316] At the very least, they will make it more difficult for a law firm to prevail on a

308. Hudgens v. Wexler and Wexler, 391 F. Supp. 2d 634, 645 (N.D. Ill. 2005).

309. *See id.*

310. *See id.* at 645-46.

311. Dow v. Donovan, 150 F. Supp. 2d 249, 274 (D. Mass. 2001).

312. *See id.* at 257, 262.

313. *See id.* at 264-65.

314. *See id.* at 265.

315. *See id.* at 265-66.

316. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 235, 251 (1989); *see generally* Katie J. Colopy, Sandra K. Dielman & Michelle A. Morgan, *Gender Discrimination in the Workplace: "We've Come a Long Way, Baby,"* 49 THE ADVOC. (TEXAS) 11, 16 (2009) (exploring how sexual stereotyping can be used as evidence for sex discrimination claims).

summary judgment motion.[317] Even positive stereotypical remarks can be used against a law firm.[318]

Whether such remarks will ultimately be admissible at trial will depend upon (1) the number of such remarks made, (2) the proximity in time to the employment decision, (3) whether they were related to the employment decision in question, and (4) whether they were made by an individual involved in the employment decision-making process.[319] Employees and employers alike should be trained to avoid such remarks because there is clearly a risk that such evidence will be admitted, and the impact on a jury could be devastating.

On the other hand, a single utterance of an epithet by itself is usually not enough to give rise to a claim for a hostile work environment.[320]

### *D. Insert an Arbitration Clause into the Employee's Contract*

A binding arbitration clause will reduce litigation expenses and may even reduce potential damages that a jury might otherwise award. In *Brown v. Dorsey & Whitney*, the district court, citing the Supreme Court decision in *Circuit City Stores, Inc. v. Adams,* held that the plaintiff-attorney could not maintain her civil rights lawsuit because she signed an agreement to arbitrate her employment claims, and the arbitration clause was binding.[321]

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317. *See, e.g.*, Abrams v. Millikin & Fitton Law Firm, 267 F. Supp. 2d 868, 872-73 (S.D. Ohio 2003) (denying summary judgment on claim under ADEA based in part on evidence of stereotypical comments made by defendant's firm president and director). The statements included that plaintiff was less creative than when she was younger, that she was a "pretty fragile person" and that she could not learn new things. *Id.* at 872; *see also* Hasan v. Foley & Lardner, LLP, 552 F.3d 520, 528 (7th Cir. 2008) (extreme anti-Muslim comments made by law firm partner who was not attorney's direct supervisor, when made shortly before attorney's termination, were relevant to the court's conclusion that summary judgment for the law firm should be reversed).

318. *See* Zhao v. State Univ. of New York, 472 F. Supp. 2d 289, 310 (E.D.N.Y. 2007) (noting that "[i]f an employer has crossed the line into making employment decisions based on ethnic stereotyping rather than on the merits, one could easily see how a stereotype that may benefit an employee on one day could result in an adverse employment action on another day").

319. *See* Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 36 (1st Cir. 2001); McMillan v. Mass. Soc. for Prevention of Cruelty to Animals, 140 F.3d 288, 301 (1st Cir. 1988).

320. *See* Knadler v. Furth, 253 F. App'x 661, No. 05-16962, 2007 WL 3244015, at *665 (9th Cir. 2007); *see also* Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1513 (D.C. Cir. 1995) (written evaluation of female associate which used the word "bitch" was not sufficient to give rise to a Title VII claim in conjunction with gender neutral commentary that the associate was very difficult on the support staff).

321. Brown v. Dorsey & Whitney, LLP, 267 F. Supp. 2d 61, 69 (D.D.C. 2003) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 105, 123 (2001)); *see also In re* Halliburton Co., 80 S.W.3d 566, 572 (Tex. 2002) (discussing that an employee's action for race and age discrimination subject to arbitration despite employee's claim that arbitration clause was unenforceable because of disparity in bargaining power and because contract was offered on a "take it or leave it basis"); Jones v. Halliburton Co., 625 F. Supp. 2d 339, 346 (S.D. Tex. 2008) (holding an arbitration clause enforceable despite employee's claim of unconscionability).

## VI. CONCLUSION

Legal employers today need to be cognizant of an increasing array of federal laws that prohibit discrimination based on race, sex, religion, national origin, age, disability, and potentially other protected categories. While legal employment has its own unique characteristics, for the most part, the rules governing equal employment opportunity apply with full force to attorneys. For this reason, legal employers would be well advised to familiarize themselves with these laws and develop internal systems to ensure that the firm does not find itself in a position in which it cannot defend itself against charges of employment discrimination. Especially in the case of legal employers, ignorance of the law of discrimination is no excuse.