Love Comes in Many Shapes and Sizes

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Question

- Is an employer obligated to pay unused vacation, paid time off, or sick leave to an employee upon termination?

Vacation Days

Nebraska Wage Payment and Collection Act

Neb.Rev.Stat §§48-1228-48-1232

- Addresses: Fringe benefits and wages
- Definition of "Wages:"

". . . compensation for labor or services rendered by an employee, *including fringe benefits*, when previously agreed to and stipulated conditions have been met by the employer . . ." Neb.Rev.Stat § 48-1229

Vacation & Sick Leave

Nebraska Wage Payment and Collection Act

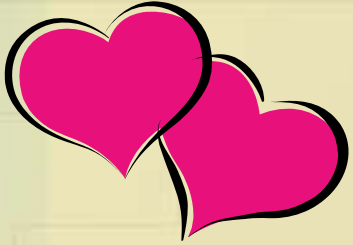
- Definition of "Fringe Benefits:"

  ". . . includes *sick and vacation leave plans*, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans or benefit programs regardless of whether the employee participates in such plans or programs." Neb.Rev.Stat. §48-1229(3).

2006
Nebraska Supreme Court Decision

- In October 2006 the Nebraska Supreme Court definitively decided at least one open issue regarding payment for unused vacation.
- *Roseland v. Strategic Staff Management,* 272 Neb. 434 (2006), the Court determined that accrued unused vacation time is due and payable to an employee as wages upon termination of employment.

Roseland:



- Employee handbook provided for no payout of unused, but accrued vacation upon termination.
- Four employees voluntarily resigned from their employment.
  - President, VP and high ranking execs
- At the time of their resignation, the employees had accrued unused vacation ranging from 1 to 3 weeks, totaling $8,788.29.
- The employees filed a lawsuit under the Nebraska Wage Payment and Collection Act demanding payment for their unused accrued vacation.
  - Employer refused, relying upon the handbook language

Roseland holding:

Employees are entitled to payment for their unused accrued vacation, because vacation is an earned "wage" that cannot be forfeited by an employer's policy.

Unanswered Questions from the *Roseland* Case

- *What other items must be paid to an employee upon termination?*
- The Court did not address the other requirements. However, it is possible that this decision may have profound implications for the payment of a wide variety of “fringe benefits.”

Unanswered Questions from the *Roseland* Case

- *Should an employer pay for accrued sick leave?*
- Maybe. The Nebraska Department of Labor opines that sick leave and vacation leave are the same types of leave.

Unanswered Questions from the *Roseland* case

- *What about "use it or lose it" PTO policies?*
- The *Roseland* case most likely makes PTO policies invalid or in need of change.
- Employers should consider establishing definitive caps on the amount of vacation, unpaid time, and sick leave that an employee may accumulate.

Response of the Nebraska Legislature

- The *Roseland* decision represents an interpretation of Nebraska statutory law.

- The Nebraska Legislature can consider amending the Act to address the unanswered questions left by *Roseland*, as well as issues relating to the payment of commissions to departed employees.

Introduced *Roseland* Bills

- LB 255: Employer and employee may stipulate by agreement that paid leave plans may contain conditions for the use and payment for accrued unused leave.
- LB 271: Employer may determine by agreement: 1) the terms under which fringe benefits are administered, earned and accrued;

  2) under what conditions, fringe benefits may be payable to the employee upon termination.

SEXUAL HARASSMENT

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Sexual Harassment

- Includes actions ranging from direct requests for sexual favors to work place conditions that create a hostile environment for persons of either gender.
- Not everything involving “sex” is sexual harassment.
- The harassment must be “because of” gender. If it equally applies to men and women, then it is *probably* not sexual harassment.

Two Types of Sexual Harassment:

- Quid Pro Quo
- Hostile Work Environment

Quid Pro Quo

- Unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature when submission to sexual conduct is *made a condition of the employment* or submission to the conduct or rejection of the conduct is *used as the basis* for an employment decision.

Hostile Work Environment

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that has the effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Bishop v. Inacom, Inc. (D. N.J)

- A supervisor warned a female employee not to share company secrets in “pillow talk” with her co-worker.
- Holding?
  - In dismissing the sexual harassment and sex discrimination claims, the court found the comments “crude,” but gender neutral.

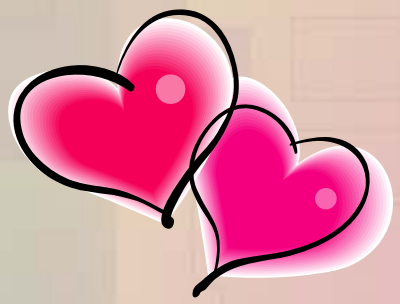
Van Horn v. Specialized Support Services (S.D. Iowa)

- Female employee was terminated for striking a mentally disabled client who continually harassed her, including grabbing the woman's breast.
- The company ignored the employee's repeated complaints regarding the client's sexual behavior.

Van Horn v. Specialized Support Services, Inc. (con't)

- Holding?
- When an employer's failure to act forces an employee to act in self-defense, the employee's conduct is reasonable and the employee cannot be terminated.
- Damages: Jury verdict of $78,000.00






SMILE
PARTNERS FOREVER
NICE BOY
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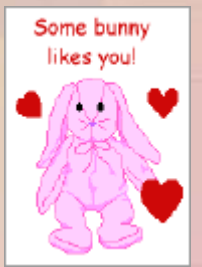
Tomczyk v. Jocks & Jills Restaurant

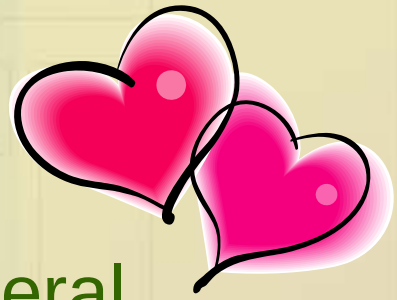
- Employee was a white female.
- Chairman made continuing hostile comments to employee to describe her physical appearance and to characterize her as attractive to black men.
- Holding
  - Harassment based on interracial relationships is forbidden under Title VII.
  - Award: A federal jury awarded $2.25 million to a former employee based on sexual harassment by the firm's chairman.

EEOC v. Custom Cos., Inc. (N.D. Ill. 2006)

- Three female saleswomen were regularly subjected to groping, lewd sexual banter, sexual propositioning, and pornography.
- Holding?
  - Company is liable for maintaining sexually hostile work environment because employer turned its back to a "hyper sexualized work environment."
  - Award: $2.05 million in punitive damages and $245,000 in compensatory damages.



EEOC v. Horseshoe Lake Golf Course Inc.



- Five former employees and three job applicants alleged that golf course general manager made lewd remarks, demeaning comments, and unwelcome sexual overtures.
- General manager ordered female employees to wear revealing attire and made constant comments about sex.
- Settlement: $267,000.00

Transgender Discrimination

Oiler v. Winn Dixie Stores, Inc. (E.D. La. 2002)

- A transgender male truck driver claimed he was fired after disclosing to a supervisor that he sometimes dressed and acted like a woman in public.

- Holding?
  - Employee has no claim for sex discrimination under Title VII because federal law does not prohibit employment discrimination based on an individual's gender identity issues.

Sexual Stereotyping

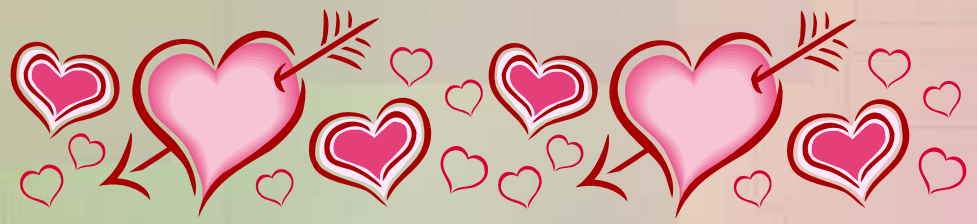
Dawson v. Bumble & Bumble *(2d Cir. 2005)*

- Female employee worked for employer as a hair stylist and was simultaneously enrolled in the salon's training program.
- Employee dressed very masculine.
- The salon was known for being eccentric.
- Employee testified that she sometimes referred to herself as a "dyke" and did not object to lesbian jokes.
- The training program had a 10-15% successful completion rate.
- Employee was discharged from the program for poor performance.
- Employee alleged that her discharge was the result of discrimination regarding her appearance and sexual orientation.

SEXUAL STEREOTYPING

Dawson v. Bumble & Bumble, con't

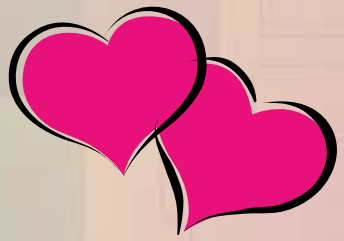
- Holding?
  - Sexual orientation is not actionable under Title VII, but "gender stereotyping" exists under Title VII. Gender stereotyping is common with individuals who fail or refuse to comply with socially accepted gender roles.
  - Gender stereotyping should not be used to bootstrap protection for sexual orientation.
  - Employee was not subjected to discrimination for not conforming to sexual stereotypes in her behavior or appearance.



Sexual Orientation

MGM Grand Hotel v. Rene (9th Cir.)

- Holding
  - A homosexual butler can assert a sexual harassment claim against his male supervisor and co-workers.
- Rationale
  - Sexual orientation is irrelevant for the purposes of Title VII. It is the fact that the discrimination is sexual in nature that determines the right to a claim.



Walker v. National Revenue Corp. (6th Cir. 2002)

- A female supervisor touched and sexually propositioned a gay male employee.
- Holding
  - The employee did not have a sexual harassment claim under Title VII.
- Rationale
  - The employee showed no evidence that the supervisor's actions were motivated by gender, because the supervisor treated every employee badly, male and female alike.

Appearance Discrimination

- A growing number of state and local governments have legislated against appearance discrimination.
  - District of Columbia
  - Santa Cruz, California
  - Michigan

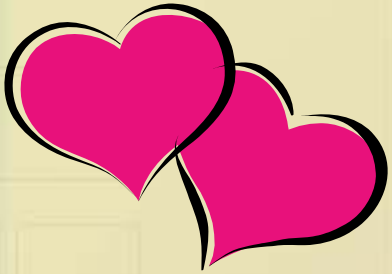
Jespersen v. Harrah's (9th Cir. 2006)

- Female bartender was terminated for refusing to comply with casino's appearance policy.
  - Policy generally applied to males and females
  - Some gender-specific requirements
    - Women required to wear makeup; men were barred from wearing makeup
- Employee sued under Title VII
- Holding
  - Policy was not more burdensome for women than men
  - Not sexual stereotyping as policy generally applies to men and women.

Shramban v. Aetna, (3d Cir. 2004)

- Court held that being a blonde is not a protected group under Title VII.
- Even though being a blonde may pose its own set of issues, it does not reach the level of a protected category under Title VII.

Weight Discrimination



- Adverse employment actions based on weight may violate the Americans with Disabilities Act (ADA).
- ADA prohibits employers from discriminating against “qualified individuals with disabilities” in terms and conditions of employment.

ADA Definitions

- Qualified individual with a disability:

  "An individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position."
- Disability:
  - "A physical or mental impairment that substantially limits one or more of the major life activities of an individual."
  - Regarded as
  - Record of

ADA Definitions

- Major Life Activities: Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
- Substantial Limitation: Unable to perform . . . or . . .is significantly restricted as to the condition, manner, or duration in which the individual can perform a particular major life activity as compared to . . . an average person in the general population.

Cook v. State of Rhode Island, Dept. of Mental Health (1st Cir.)

- Job candidate applied for the position of an institutional attendant with a state-run residential facility for mentally handicapped.
- Plaintiff was 5'2" and weighed over 320 pounds.
  - During her pre-hire physical, she was diagnosed as morbidly obese.
- There were no limitations that affected her ability to perform the job.
- Despite the fact that Plaintiff passed the physical, the facility declined to hire her claiming that her "morbid obesity compromised her ability to evacuate patients in case of emergency and put her at greater risk of developing weight-related ailments."

Cook v. State of Rhode Island, Dept. of Mental Health

- HOLDING
  - The court found that the Plaintiff established she had a physical impairment and was regarded as having one.
  - The court noted that while weight is changeable, the Plaintiff's underlying metabolic condition may linger even after the weight loss.
  - The court noted that the facility treated the Plaintiff's condition as permanent.
  - While morbid obesity may qualify as a disability, simply "being overweight" does not qualify as a disability.

Dress Code as Gender Discrimination

- Employers may adopt dress codes that impose different standards for men and women as long as they:
- 1) do not impose an unequal burden on one of the sexes;
- 2) have some justification in social norms; and
- 3) are reasonably related to the employer's business needs.

Examples of Permissible Dress Code Rules:

- Shorter hair length requirements for men than women
- Policies prohibiting men from wearing earrings

Examples of Unlawful Dress Code Rules:

- Requiring only one gender to wear a uniform
- Forcing only one gender to cover a tattoo on their arm.
- Forcing an employee to wear a revealing uniform at work knowing that doing so will subject her to sexual harassment.

Top 6 Ways to Increase Your Odds of Being Sued for Employment Discrimination

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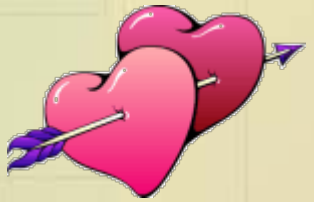
#1 Tolerate unsatisfactory job performance until its becomes intolerable



- Tips:
  - Allowing poor performance to slide does not do anyone any favors in the long run.
  - Employees who are not told about their performance problems until they are subject to negative employment actions typically resent being denied the opportunity to correct their deficiencies.

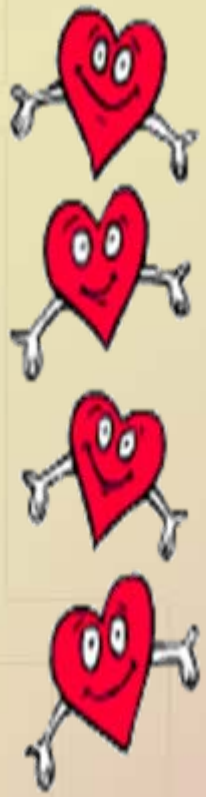
#2 Fail to timely and fully explain the basis for the employment action

- Employees do not assume that “no news is good news.”
- Employees usually view silence as a sign that their job performance was exemplary and there was no legitimate explanation for an employment action.

#3 Disregard stated company policies

- When an employer unjustifiably deviates from its own procedures, the employer risks that at least some of its employees may end up feeling cheated or wronged.

#4 Be excessively rule-bound



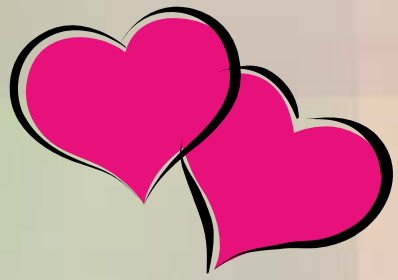
- Companies sometimes get into trouble by slavishly following procedures without considering the rationale behind the rule.
- As long as the exceptions are justified, well-documented, consistently applied in similar situations, and explained to the employees affected by the decision, the employer has gone a long way toward making its employment decision defensible.

#5 Fail to take internal complaints seriously

- Internal complaints present an opportunity to promptly address employee concerns and resolve work place issues without undergoing costly litigation.
- Employers should take seriously even baseless complaints and complaints that are phrased as requests or suggestions more than demands.

#6 Failing to consider what a jury would think

- In every employment situation ask: How would a jury of 12 employees view what we are about to do?
- If there is *any* doubt, then you should reconsider your decision.



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