LABOR PERSPECTIVES

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THE COMPUTER FRAUD AND ABUSE ACT MAY ALLOW REDRESS FOR DAMAGES CAUSED BY ROGUE EMPLOYEES

The Computer Fraud and Abuse Act of 1984 ("CFAA"), 18 U.S.C. 1030, has become an alternative way for employers to hold rogue employees accountable for their wrongdoings. The CFAA was originally enacted as a criminal statute to prosecute hackers who infiltrated government-secured computers to obtain classified information or to corrupt government data. However, it has been amended throughout the years and its scope now covers private, civil claims. Nowadays, the CFAA allows an individual or entity to seek civil remedies if it can show that its "protected computer" was "intentionally" and "fraudulently" "access(ed) without authorization" or in "excess of authorization;" and that said unauthorized access and/or use caused damages and/or "losses" from "an interruption of service," in excess of $5,000. The CFAA is therefore a technical statute full of definitions that an employer must be able to satisfy in order to bring forth a claim. For example, a "protected computer" includes one that is used in interstate or foreign commerce or communication.

Under the CFAA, for a change, it is the employer who files suit against its employee or former employee in federal court. One common employment scenario is that of a professional or executive employee who, by the nature of his or her job with the company, uses his employer's computer to access the company's database or server containing confidential and proprietary information. Shortly before or after moving on to another employment, or to start a new business, or in case of an impending lay off, this employee accesses the employer's servers to copy and use confidential business data, client lists, trade secrets and other proprietary information stored in his employer's computer system, so as to gain a competitive edge as he/she re-enters the marketplace. Under this scenario, the employer may be able to seek redress under the CFAA.

Another common example occurs when the employee plans to leave his employ and, on his way out, he/she accesses the employer's information systems to delete and destroy company proprietary/confidential information that is securely maintained in the system. In these examples, even if the employer failed to secure a restrictive covenant or a confidentiality agreement to protect the use and integrity of its business information; or if its non-compete

(continues on page 2)

In this Issue...

(continued from page 1)

agreement proves legally ineffective, the employer may still be able to hold the employee accountable for malfeasance under the CFAA.

But the CFAA has its pitfalls for employers. These arise due to the number of technical criteria that must be fulfilled to bring a claim. Courts have interpreted many of these terms in differing, conflicting ways through the years. In the earlier court decision of EF Cultural Travel BV v. Zafer Corp., 318 F3d. 58 (1st Cir. 2003), the Court interpreted the CFAA liberally to grant an employer ample relief. The Court issued an injunction and allowed a damages claim for loss of business. In addition, the Court granted the expenses which the employer incurred to diagnose and repair the harm done to its company's information systems. It also granted costs to hire an expert to ascertain the extent of the unauthorized access, among others. In Zafer, the main facts related to an employee who resigned his job at a travel agency to open his own agency. After he left the job, he accessed his former employer's secured site, in part by deciphering a password and accessing certain codes he had learned to use while employed. By accessing the former employer's computer server, Zafer obtained the travel promotions and packages that his former employer would be promoting in the next season's printed brochures. In turn, Zafer used this information to undercut the former employer's prices and get the business. Zafer was held fully accountable by means of a broad interpretation of the CFAA's terms.

Another illustrative case is International Airport Centers, LLC v. Citrin, 440 F3d. 418 (7th Cir. 2006). Here, the Court affirmed a summary judgment for the employer and allowed ample remedies under the CFAA. Citrin worked for a real estate company, where his job included identifying properties that his employer could have an interest in acquiring. Citrin eventually decided to open his own real estate business and planned to resign from International Airport Centers. Before resigning and returning the company-provided laptop, Citrin deleted a number of files from the employer's server and installed a secure-erasure program to also destroy the data and make its retrieval impossible. In addition, Citrin erased e-mails and documents which would have left traces of his misconduct. The Court found that this "inside attack" had caused a CFAA "damage" because it harmed the integrity of the system and caused an interruption, as required under the CFAA. But more expansively, the Court also interpreted that the employee had acted "without authorization" and "exceeding authorization" under the CFAA. This was regardless of the fact that his access to the computer and ensuing destruction of data had occurred when he was still an employee and enjoyed open access and use of his employer's computer systems. The Court reasoned that Citrin had violated his "duty of loyalty" to his employer and caused harm to the computer and to the business. Thus, a violation of the CFAA was established against the employee.

But more frequently, the courts are interpreting the CFAA narrowly. In so doing, they are disallowing recovery to employers harmed by computer practices of their employees. In the most recent case of LVRC Holdings, LLC v. Brekka, No. 07-17116 (9th Cir. 2009), the Court affirmed a summary judgment in favor of a former employee; and dismissed the employer's CFAA claim upon finding that it failed to show "unauthorized access" to its computer systems. The main reasoning of the Court was that, when the employee used his company-provided computer to access key company documents and send them to his personal email account, Brekka was still an employee and he enjoyed open access to the company's restricted site. The Court also took notice that there was no evidence that Brekka had agreed to keep the company documents confidential or to return or destroy them if he left employment. Therefore, the requirement of "unauthorized access" was not satisfied by the employer under the CFAA. The Court concluded that the CFAA was not designed for such insider attacks as may occur in an employment relationship context; but rather, it covers only outsider attacks by unrelated individuals who surreptitiously enter a protected computer to cause harm. The Court justified its reasoning, in part, on the criminal origin and elements of the CFAA; which necessarily require a narrower interpretation of its terms.

The CFAA is one of many legal options available to employers who are harmed by employees' unauthorized access and misuse of computers and information systems. However, it is still crucial to secure confidentiality agreements and restrictive covenants to cover situations that may prove inappropriate for litigation under the CFAA. Employers must remain vigilant of their employees' computer practices. Policies should be in place and periodic audits of company-provided computers and employee access to employer sites should also be performed.

Finally, at the end of employment, it is critical to cut off access immediately, and to inspect and re-format laptops and computers which a quitting employee formerly used. MCV

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NEW FLEXITIME BILL AIMS TO PROMOTE A BALANCE BETWEEN WORK AND PERSONAL LIFE

In recent years, the Puerto Rico Legislature has proposed legislation aimed at allowing employers and workers in the private sector the alternative of negotiating a compressed work week. The latest of these is House Bill 2218 ("HB 2218"), which House Rep. Carlos Johnny Méndez presented on October 22, 2009.

HB 2218 would permit employers in the private sector to create a more flexible work week schedule and promote what the bill refers to as the "balance between work and personal life." The proposed measure came about as a result of the efforts of employers throughout many industries in the private sector, as well as professional and trade organizations, to legalize flexitime and boost the competitiveness of businesses in Puerto Rico.

In essence, the bill would amend Puerto Rico Act No. 379 of 1948 and Act No. 289 of 1946, to authorize and regulate flexible work schedules for non-exempt workers. The proposed alternatives of compressed work weeks would be as follows:

(1) **"4-10"**: Four-day week, ten-hours a day. This arrangement is the most popular in other jurisdictions, since its implementation is relatively simple. Employees would enjoy 52 additional days off during the year.
(2) **"5-4-9"**: Bi-weekly itinerary. This consists of a first week with five, nine-hour workdays, and a second four-day week of approximately eight hours and 45 minutes a day, for a total of 80 hours over a two week period. Alternatively, employees may work four, nine-hour workdays and one, eight-hour workday during the first week, and four, nine-hour days during the second week.
(3) **"4½-40"**: Four-and-a-half day weeks. Employees work nine hours a day during the first four days, and four hours the last day, for a total of 40 hours. This schedule permits employees to leave work early on the last day of the week.
(4) **"3-12"**: Three-day week, twelve hours a day. This schedule requires employees to work only 36 hours a week. Although this arrangement can be quite strenuous, workers can enjoy four-day weekends.

According to the introduction of HB 2218, research has shown that the proposed balance between work and personal life increases employee productivity and morale in the workplace. In addition, a compressed work week provides the following benefits to employers and workers:

(1) employees have more free time to spend with their families and to take care of personal affairs;
(2) attractive work schedules increase employee satisfaction and productivity levels, which in turn reduces the turnover rate;
(3) reduced rate of absenteeism since employees are less prone to take time off from work to attend medical appointments or other obligations;
(4) employees can save on expenses such as uniforms, gasoline, tolls, day care, parking, and food, among others;
(5) reduced contamination because of less traffic in large, densely populated areas; and
(6) more and better employment opportunities, among others.

Employees who qualify as "Executives," "Administrators" and "Professionals," as defined by Regulation No. 13 of the Minimum Wage Board of Puerto Rico, are excluded from the provisions of the proposed bill. In addition, "Outside Salespersons," union leaders acting in their official capacity, private and public motor vehicle chauffeurs that receive commissions, domestic service workers, salaried workers exempt from overtime regulations, and U.S. or Puerto Rico government employees, among others, are also excluded.

As an employer you might be wondering, doesn't the Constitution of the Commonwealth of Puerto Rico require employers to pay overtime for the hours worked by their employees in excess of eight hours a day? If we provide our employees the alternative of negotiating a compressed work week as opposed to the traditional work week, can we be liable for failure to pay overtime?

The proposed bill establishes that employees may validly waive the right to receive payment for daily overtime in exchange for additional days off during the week. Notwithstanding, any agreement to create a compressed work schedule must be the result of a good-faith negotiation between the employer and the worker. The agreement must be completely voluntary and employees cannot be obligated to accept it. They must also be in writing and signed by the employer and the employee. As such, the Puerto Rico Department of Labor has the authority to monitor the execution of these agreements.

Finally, the measure strictly prohibits employers from imposing flexitime as a condition for employment. Should an employer fail to comply with the obligations set forth in HB 2218, it may be ordered to reinstate an affected employee, to cease from violating the law, and assessed a penalty equal to twice the damages suffered.

If passed, the legislation would take effect immediately after the Governor's signature. We will keep you informed as to any developments regarding this bill. For more information, you may contact any of the attorneys of our Labor and Employment Law Practice Group. M&V

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EEOC ISSUES GUIDANCE TO EMPLOYERS ON PANDEMIC PREPAREDNESS AND ADA COMPLIANCE

The World Health Organization ("WHO") classifies pandemic influenza into six (6) phases, with each phase describing how widely influenza is spreading around the world. On June 11, 2009, the WHO signaled that a global pandemic of novel influenza A (H1N1) was underway by raising the worldwide pandemic alert level to Phase 6, the highest phase. Without a doubt, the swine flu pandemic currently underway confronts employers with competing and complicated legal issues. In recent days, United States President Barack Obama signed a national emergency declaration to deal with the H1N1 influenza virus, commonly tagged as "swine flu."

In order to provide guidance to employers on how to manage their workforce, prior to and during an influenza pandemic, while maintaining compliance with the Americans with Disabilities Act ("ADA"), the Equal Employment Opportunity Commission ("EEOC") issued a technical assistance document titled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act."

The ADA protects applicants and employees from disability discrimination and prohibits covered employers from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances. As noted by the EEOC, the ADA is of particular relevance during a pandemic because: (i) it regulates covered employer's disability-related inquiries and medical examinations for applicants and employees; (ii) it prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat"; and (iii) it requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. §1630.2(r). With regards to the importance of this term during an influenza pandemic the EEOC guidance states that: "[w]hether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination."

The EEOC pandemic guidance addresses particular areas under the ADA that may be implicated by employer concerns about employee exposure to the H1N1 influenza virus. In this article, we will highlight some questions frequently asked by employers during an influenza pandemic.

Given the growing number of incidences of swine flu infections, many employers (and employees) have serious concerns with regard to members of the workforce who display influenza-like symptoms. The EEOC guidance states that during a pandemic, an employer may send an employee home when said employee is displaying influenza-like symptoms. Advising symptomatic employees to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. This action by an employer would also be allowed under the ADA, as long as the illness was serious enough to pose a direct threat.

The EEOC guidance also sheds light on how much information an ADA-covered employer may request from employees who report feeling ill at work or who call in sick. During a pandemic, ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. The EEOC guidance instructs that if pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, this sort of inquiry is not disability-related. However, if pandemic influenza becomes severe, these inquiries by employers, even if disability-related, would be justified by a reasonable belief that the pandemic influenza poses a direct threat.

In contrast, asking asymptomatic employees whether they have a medical condition that could make them especially vulnerable to influenza complications during a pandemic, is going to depend on the severity or seriousness of the influenza pandemic. The EEOC guidance clarifies that if pandemic influenza is like seasonal influenza or the 2009 spring/summer H1N1 virus, making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA. However, if an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this latter circumstance may an ADA-covered employer make disability-related inquiries or require medical examinations of asymptomatic employees.

Employers may also be concerned with employees returning from travel. As per the EEOC guidance, during a pandemic, employers do not have to wait until an employee returning from travel develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip. These would not be disability-related inquiries. Further, if the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was not business-related.

During a pandemic, employers may also require employees to adopt infection-control practices at the workplace, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal. The EEOC guidance clarifies that requiring infection control practices does not violate the ADA.

With regards to mandatory vaccination, the EEOC guidance clarifies that an ADA-covered employer may not compel all its employees to take the influenza vaccine without regard for medical conditions or religious beliefs. Employers must keep in mind that the ADA and Title VII of the Civil Rights Act of 1964 may shield certain employees from mandatory vaccination requirements. The EEOC recommends ADA-covered employers to consider simply encouraging employees to get the influenza vaccine, rather than mandating them to take it.

Lastly, the EEOC guidance instructs that, during a pandemic, an employer may ask an employee why he or she has been absent from work, if the employer suspects it is for a medical reason. The EEOC guidance clarifies that asking why an individual did not report to work is not a disability-related inquiry. Furthermore, an employer is always entitled to know why an employee has not reported to work.

While this technical assistance document issued by the EEOC serves as a useful tool for employers during this influenza pandemic, the EEOC guidance does not purport to answer every question or situation that an employer may face in connection with the swine flu pandemic. We highly recommend employers to review their policies and practices and ensure that they are compliant with this new EEOC guidance. Moreover, we recommend employers to familiarize themselves with the full technical assistance document issued by the EEOC, by visiting http://www.eeoc.gov/facts/pandemic_flu.html.

Should you have any questions regarding ADA compliance during an influenza pandemic, please contact any of the attorneys in the Labor and Employment Law Practice Group of McConnell Valdés LLC. M&V

UPCOMING KEY DATES TO REMEMBER IN THE ADMINISTRATION OF WELFARE BENEFIT PLANS

Effective for plan years beginning on or after January 1, 2009 - Plans must file all Form 5500s electronically using the EFAST2 system. (For calendar year plans, the deadline will be July 2010 since Form 5500 is generally due by the end of the seventh month following the end of the plan year.)

Effective for plan years beginning on or after May 21, 2009 (January 1, 2010 for calendar year plans)- Genetic information nondiscrimination rules apply to group health plans, pursuant to the Genetic Information Nondiscrimination Act of 2008 (GINA).

Effective for plan years beginning on or after October 3, 2009 (January 1, 2010 for calendar year plans; delay may apply for collectively bargained plans)- Effective date for group health plans and insurance to begin complying with the mental health/substance use disorder benefits parity requirements, as prescribed by the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008.

Effective for plan years beginning on or after October 9, 2009 (January 1, 2010 for calendar year plans)- Effective date for group health plans and insurance that extend coverage to dependent college students to continue that coverage if the student is on a medically necessary leave of absence; and for employers to start providing a Michelle's Law Notice.

Effective for plan years beginning on or after February 4, 2010 (January 1, 2011 for calendar year plans) - Effective date for new notice requirements for employers of availability of benefits under Medicaid or the State Children's Health Insurance Program (CHIP) and of notice to the state of coverage coordination information, pursuant to the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). CHIPRA also amended the Health Insurance Portability and Accountability Act (HIPAA) to include, beginning as of April 1, 2009, a special enrollment right to an employer-sponsored plan that takes into account loss of eligibility for coverage under a Medicaid or CHIP plan.

Generally effective February 17, 2010 - Effective date for new notice requirements upon discovery of a breach of Protected Health Information (PHI) applicable to covered entities, including group health plans, business associates and other vendors, pursuant to HIPAA, as amended by the American Recovery and Reinvestment Act of 2009.

Employers are encouraged to revise plan documents, summary plan descriptions, notices and/or business associate agreements to address these new, compliance obligations. Should you need assistance, please contact Sandra Negrón, an attorney in the Welfare Benefits and ERISA Litigation Practice Team within our Labor and Employment Law Practice Group. M&V

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JUDICIAL CHALLENGE TO THE REGULATORY REQUIREMENTS FOR EXEMPTION FROM PAYMENT OF THE ANNUAL BONUS

Even in times of financial difficulties, employers are expected to pay the statutory annual bonus, unless the Puerto Rico Secretary of Labor exempts them from this obligation. An employer's failure to timely file and obtain the exemption may expose it to pay the total bonus obligation plus penalties, regardless of its financial constraints.

As of mid-November 2008, around 410 applications for exemption were filed with the Department of Labor, of these, 344 were accepted and 66 denied[1]. Many of those denied were on account of the employers' failure to follow the requirements of the Christmas Bonus Act, Act No. 148 of June 30, 1969, as amended, and in particular, its regulations.

Statutory vs. Regulatory Requirements

Up until 2007, the statutory and regulatory requirements for the exemptions were limited to the following:

1. The filing of a petition for exemption with the Secretary of Labor not later than the 30th day of November of each year stating that the employer was not able to pay, in total or in part, the bonus to its employees due to business losses, or because its profits were insufficient to cover the total amount of the bonus without exceeding 15% of the employer's net annual profits; and
2. accompanying the petition with a balance sheet and profit and loss statement covering the period of 12 months from October 1st of the previous year to September 30th of the current year. A certified public accountant had to certify the statements, as evidence of such financial condition.

With respect to this second requirement, a major change was introduced by Regulation No. 7418, effective on October 22, 2007. Although the statutory language requiring a certified balance sheet and profit and loss statement remains the same, a new condition was adopted: the statements also have to be audited. The difference between certified vs. audited financial statements is not just a matter of semantics. Auditing financial statements is a complex, time-consuming and, therefore, costly process. Ironically, auditing may cause more strain on the employer's already precarious financial condition. As a result, many employers have chosen to just follow the law, ignoring the regulation, and only file certified, instead of audited, financials. This served as the basis, in 2008, for the Secretary's denial of some of the petitions for exemption. In turn, this brought some employers to file for judicial review in an attempt to challenge the regulatory requirement of audited financials. Our Firm represents one of such employers.

Basis for the challenge on the validity of the regulation

The Supreme Court of Puerto Rico has long established that an administrative body such as the Department of Labor may adopt regulations to implement the terms of a statute; however, in regulating it may not substitute its criteria for that of the Legislature. If the regulation is in conflict with the terms of the statute, or if it modifies or substitutes the statutory text, such regulation is null and void. Ex Parte Irizarry, 66 D.P.R. 672 (1946); Yiyi Motors, Inc. v. Commonwealth of Puerto Rico, 2009 T.S.P.R. 159, October 14, 2009. In Yiyi Motors, Inc., a case very similar to ours, the Supreme Court of Puerto Rico annulled certain provisions of a regulation of the Puerto Rico Department of Treasury which attempted to assess an excise tax which was not contemplated in the applicable statute.

The main thrust of our argument to impeach the regulation may be summed as follows:

1. The language of the Christmas Bonus statute is very clear: it merely requires the filing of certified financials, not audited ones.
2. To the extent that the statute does not mandate any other requirement, the additional onerous requirement which the regulation establishes is null and void; it is an improper attempt to substitute the language of the statute and the criteria which the Legislature established.

We are confident that our challenge, based on the sound principles which the Supreme Court established in Yiyi Motors, Inc., will prevail. However, at least for the time being and until a court rules otherwise, employers should avoid the imposition of penalties. Thus, employers filing a petition for exemption should include certified and audited financial statements. MCV

[1] See:http://www.primerahora.com/noticia/otra/noticias/aceptan_344_solicitudes_de_exoneracion_del_bono_de_navidad/255213. [Accessed on October 26, 2009]

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SEXUAL STEREOTYPING, THE RIGHT TO PRIVACY AND YOUR POLICY ON PROHIBITED SEXUAL STEREOTYPING

Up to now, discrimination on the basis of sexual orientation is not explicitly prohibited by Title VII of the 1964 Civil Rights Act ("Title VII"), Puerto Rico Act No. 100 of June 30, 1959 ("Act 100") or Puerto Rico Act No. 69 of July 6, 1985, all of which prohibit discrimination based on sex. Although there have been many unsuccessful attempts to allege that sexual orientation is a protected class under Title VII, the courts have repeatedly held that Title VII does not prohibit sexual orientation discrimination. Meanwhile, the Supreme Court of Puerto Rico has yet to find that sexual orientation discrimination is prohibited under local law.

Notwithstanding the above, some employers have policies which prohibit discrimination due to sexual stereotyping and protect the right to privacy, including privacy as to sexual orientation. Having such a policy in place for Puerto Rico employees is a means to protect a company from potential law suits based on gender stereotyping under Title VII or violations of the rights to privacy and dignity under the Constitution of the Commonwealth of Puerto Rico.

Sexual Stereotyping Under Title VII

Based on the opinion of the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), more federal courts are finding that discrimination due to perceived stereotypes of what is proper appearance or behaviour for persons of a certain gender is prohibited under Title VII.

In Price Waterhouse, a female accountant was denied promotion to partnership because she was told she was too "macho," "overcompensated for being a woman," should take "a course in charm school," was "somewhat masculine" and "a lady using foul language." She was told by her supervisors that she would improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry." A plurality of the Supreme Court found that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." The Supreme Court concluded that this type of "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."

Although it has yet to directly rule on this issue, the First Circuit Court of Appeals, which reviews the decisions of the United States District Court for the District of Puerto Rico, will probably find that sexual stereotyping is prohibited under Title VII. In Higgins v. New Balance Athletic Shoe, Inc, 194 F.3d 252, 261 (1st Cir. 1999), the First Circuit Court of Appeals mentioned that Title VII claims may exist for homosexual male employees who are discriminated against because they do not meet "stereotyped expectations of masculinity," but upheld a summary judgment for the employer, because this issue was first raised on appeal. In a footnote, the Court of Appeals stated, in part, that whether a sexual stereotyping claim may be brought under Title VII "is no longer open" and "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."

The United States District Court for the District of Massachusetts, which is also part of the First Circuit, has also held that a cause of action for sexual stereotyping may exist under Title VII. Specifically in Centola v. Potter, 183 F. Supp. 2d 403, 407 (D. Mass. 2002), the District Court found a possible violation of Title VII where the plaintiff-employee presented evidence that co-workers taped pictures of men in pink hot pants in his workplace, asked him if he had AIDS and placed cartoons mocking homosexual men in his workspace, among other acts.

The Rights to Privacy and Dignity under the Puerto Rico Constitution

In addition, Puerto Rico employers also have to consider the rights to privacy and dignity under the Constitution of the Commonwealth of Puerto Rico.

Section 2, Article II of the Bill of Rights of the Puerto Rico Constitution, provides that: "[e]very person has the right to the protection of law against abusive attacks on his honor, reputation, private or family life." The Puerto Rico Supreme Court has held in Arroyo v. Rattan Specialties, 117 D.P.R. 35 (1986), that the Puerto Rico Constitution protects a person's dignity and privacy from intrusions by the government and also from intrusions by private employers. The First Circuit Court of Appeals has agreed that a private cause of action exists for violations of the right to privacy. Therefore, constitutional privacy rights may be raised by an employee to challenge the validity of an undue invasion of privacy by an employer. Though there is no case law specifically addressing the issue, it is reasonable to conclude that this may be found to include the right to privacy with regards to with whom a person lives, although the right to privacy does not outweigh all other constitutional interests which may be in conflict with it under every conceivable premise. Vega Rodríguez v. Telefónica de Puerto Rico, 156 D.P.R. 584 (2002). A claimant must present concrete proof that the employer's actions impinged on his or her privacy. Moreover, the employee must show that the employer engaged in arbitrary, unreasonable, and capricious conduct; which was motivated by a reason outside of the interest of the Company in supervising performance.

In order to reduce the risk of discrimination claims due to sexual stereotyping or claims of violation of privacy and dignity, employers should train employees so they are aware that creating a hostile work environment or taking adverse employment actions because of a sexual stereotype is prohibited by the company. Similarly, employees should be made aware that the private lives of employees, such as whether an employee lives with someone of the same gender, should not result in treating a person in a different manner than anyone else. M&V

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