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Nonprofit *Alert*®

Alerting nonprofit leaders to key legal developments and responsive risk management steps.

Inside This Issue:

Lack of Clear Promotion Policy May Evidence Discrimination, 8th Circuit Rules

A university's lack of formal procedures for promoting and hiring personnel constitutes direct evidence of discriminatory employment practices, the 8th Circuit Court of Appeals has ruled.

The ruling is significant because it effectively expands what courts have previously recognized as prohibited practices under Title VII, the federal law that restricts workplace discrimination.

Previously, direct evidence of discrimination included only conduct or statements. This ruling now expands such evidence to include unclear policy manuals or procedures that are too subjective.

No Application

The case began when Howard Lockridge, an African American who held a department chair position at Phillips Community College (a branch of the University of Arkansas), sued for race discrimination after he was allegedly denied a promotion to the position of dean. The college widely advertised the position and received applications from three candidates.

Lockridge, however, did not submit an application. When his supervisor asked if he was interested, he said he would not be applying for the job.

A white male was eventually hired, and Lockridge filed an EEOC complaint, alleging that he was denied the opportunity to apply for the job. The EEOC found no evidence to substantiate his allegations and dismissed his complaint. Lockridge then filed suit in federal court, where his claims were upheld because the court ruled that sufficient questions of fact existed regarding the college's policy and practices on promotions and whether vacancies were properly announced.

No Consistency

A college administrator testified that he used different hiring and promotion policies over the years, sometimes promoting from within and sometimes hiring outside the college's own talent pool.

The court described this approach as "seemingly random and subjective," faulting the college for not having clear procedures or definitive guide-

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White House Seminars on Fed Aid

Beginning this month, the White House is sponsoring five free informational seminars for religious groups interested in obtaining federal grants. The seminars are one-day conferences offered in various locations around the country.

The seminars will teach small religious and secular nonprofit groups how to apply for federal grants from the five major governmental agencies tasked with offering federal funds: the Departments of Education, Health & Human Services, Housing & Urban Development, Justice, and Labor.

Some 1,000 to 1,500 participants are expected to attend. The first seminar is scheduled for Oct. 10. A second seminar is planned for November, followed by three others in 2003.

⇒ **For more information, go to the White House Office of Faith Based and Community Initiatives web site at www.whitehouse.gov/infocus/faith-based**

Study Measures Drop Outs in Church-Run Social Services

The Hudson Institute has released results from a 15-state study showing 9% of welfare recipients left social service programs operated by religious groups because they objected to their religious nature. The study covered nearly 400 churches. It is available online at www.hudsonfaithincommunities.org.

Liability & Risk Management

Parent's Waiver for Child Doesn't Release Nonprofit

A signed parental release form doesn't waive an organization's liability for injuries a child receives while participating in activities run by the organization, the Colorado Supreme Court has ruled. The agreement also could not be used to indemnify the organization against damages arising from the child's injuries, the court continued. The reason: a parent can't release a child's cause of action after an injury occurs; therefore, the court ruled it was not legally consistent to allow parental release before a claim even arose. The case involved a 17-year old boy who was injured in a ski accident during an event sponsored by the Aspen Valley Ski Club. He and his mother had signed a broadly worded "Acknowledgment and Assumption of Risk and Release" prior to the event, relieving the ski club of all potential liability, "whether known or unknown." Lower courts dismissed the boy's claims, citing the release as valid. But the state supreme court reversed, saying a parental release for a child's future claims caused by negligence "may, as a practical matter, leave the minor in an unacceptably precarious position with no recourse, no parental support, and no method to support himself or care for his injury." *Cooper v. Aspen Skiing Co.,* No. 00SC885 (CO Sup.Ct., 6/24/02).

Emerging trend among state courts rejecting parental waivers . . .

A similar ruling in Utah last year produced the same outcome, signaling what may be an emerging trend among state courts. In the Utah case, the state supreme court held an adventure camp liable for an 11-year old's severe facial injuries despite a parental waiver. (*NPA*, Dec.'01). Organizations that rely on parental release forms in the operation of their youth programs should consult legal counsel to determine whether current forms can be made legally adequate in light of these rulings.

Wrong Insurance Leaves Nonprofit Liable for Abuse

Because an Iowa nonprofit had the wrong kind of insurance coverage at the time a claim arose, it is not covered for the legal costs of four employees who were charged with abusing a client. The state court of appeals upheld a breach of contract judgment against the Winifred Law Opportunity Center, brought by four employees who had been sued by the parents of an alleged abuse victim at the Center. The employees claimed the Center was obligated to pay their legal costs in defending the action, but the Center countered that its insurance carrier was liable for the costs. At the time the alleged abuse occurred and was reported to the insurance carrier as a possible claim, the Center was covered by a directors & officers liability policy. However, that policy only covered directors and officers but not any other employees or volunteers. The policy also did not provide coverage for legal costs. The Center presented evidence to prove that its administrators understood the coverage to be more expansive than just directors and officers when they had originally purchased the policy. The court recognized the doctrine of reasonable expectations under which such an argument would hold force, but in this case, the court said the doctrine would not apply because "an ordinary person reading the policy would not misunderstand the extent of coverage."

The lesson from this case is obvious: read your organization's insurance policies from cover to cover to understand all terms and exclusions. Seek clarification of any provision that is unclear. The type of D&O policy at issue in this case is not unusual, particularly in older versions of policies that may still be in place at many nonprofits. Ask an independent insurance broker to provide a current evaluation of your organization's insurance, or contact Stephen M. Clarke at Gammon & Grange (smc@gandglaw.com) to conduct a risk management audit.

Court Smells Trouble With Trademark Complaint

Now on the lighter side of legal liability comes Timmy Holedigger, a perfume marketed for dogs. The perfume's maker recently won a trademark infringement case against Tommy Hilfiger, the upscale clothing and accessory manufacturer. A federal district court in New York decided that Holedigger does not infringe on the Hilfiger trademark because "the joke is clear enough to result in no confusion under the statutory likelihood of confusion analysis." Holedigger is intended to parody the trendy Tommy Hilfiger cologne, sold in department stores. The court added that Hilfiger is "advised to chill." *Tommy Hilfiger Licensing v. Nature Labs*, 2002 WL 1870307 (S.D.N.Y. 2002).

Trademark law protects against infringement when a mark is likely to confuse consumers.

For a more serious overview of trademark fundamentals, email us at npa@gandglaw.com to request a free copy of the Nonprofit Alert® brochure, *What You Need to Know About Protecting Your Charity's Trademark.*

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Employees & Volunteers

Sweet Dreams: No Pay for Sleep Time, Court Says

The manager of a nonprofit residential group home cannot claim overtime compensation for the six hours of “sleep time” that were required under his work agreement, a federal district court has ruled. The manager worked a standard 40-hour week for which he was compensated. Because of the nature of the group home, he was also required to be present between 10 p.m. and 5:30 a.m., Monday through Thursday. He had no specified duties to perform during those hours, but he was not free to leave the premises without making additional arrangements. The manager claimed he was owed overtime compensation under the Fair Labor Standards Act (FLSA) for those hours. The nonprofit argued that the manager agreed to the schedule, duties, and pay scale at the time his employment began six years earlier. The court sided with the nonprofit, finding that the FLSA generally regards meal and sleep times as compensable work periods in a residential care setting unless an express or implied agreement between the parties specifies otherwise. In this case, the manager had impliedly agreed to those terms and had acquiesced to the terms over a course of years. Evidence indicated he had even supported adopting that schedule after touring other facilities with similar work hours and routines. *Ormsby v. C.O.F. Training Services, Inc.,* 194 F.Supp.2d 1177 (2002, D.Kan.).

The manager also argued that because he was an “at-will” employee, he could not enter an implied agreement, which would have relieved him of any duty to follow the agreed schedule. The court said that argument was completely meritless. “At-will” status concerns only an employee’s termination rights, not his or her ability to enter implied agreements, the court explained.

No Contract, No Duty: Volunteer Owed Nothing

A nonprofit board owes no fiduciary duty to a volunteer who is relieved of his volunteer duties because of poor conduct, says a Washington state appeals court. The case involved an instructor who volunteered at the Seattle Community Network Association, a nonprofit Internet training organization. The instructor taught computer classes and participated in listserv discussions via email. When the volunteer coordinator became concerned about the instructor’s confrontational and abrasive email messages, he removed the instructor from the training team but allowed him to remain a member of the organization. The instructor appealed his termination to the organization’s board of directors, then later sued the board for breach of fiduciary duty, breach of contract, defamation, and other negligence claims. He argued that the board violated its grievance procedure because it never investigated the complaints against him and withheld information from him. A trial court dismissed the instructor’s claims and ordered him to pay $500 in attorney fees to the nonprofit. An appeals court upheld the ruling, finding that no fiduciary duty existed and no legal authority compelled the board to formally address the instructor’s grievance because he had no contract or work agreement under which any duties were owed. *Littleton v. Guest,* No. 48402-8-I (Ct.App.WA, 2002).

Tax-Exempt Issues

Car Donations Steering Clear of IRS Pitfalls

Earlier this year, the IRS released a warning to charities that accept vehicles as donations: don’t get taken for a ride. Concerns about fraud and misrepresentation in some of these aggressively marketed programs led the IRS to publish a nine-step checklist

NPA Highlight of the Month

CARE Bill Update: It’s Up to Senate Now

One of the most important pieces of charitable legislation to come before Congress in recent years is now picking up steam in the Senate, but due to looming deadlines and the Congressional break scheduled later this month, passage is not certain. The Charity Aid, Recovery and Empowerment (CARE) Act is reportedly moving out of committee onto the Senate floor for debate, but because its sponsors want passage this term, Senate Democrats and Republicans have agreed to limit floor action to no more than one amendment by each party. The House passed a similar verison of the bill last year (H.R. 7).

The bill contains a provision to allow charitable deductions for taxpayers who don’t itemize their tax returns. In addition, it includes provisions for direct charitable gifts from IRAs and deferred charitable rollovers from IRAs. These measures are important to charities because they create attractive new charitable gift opportunities for donors. The bill has received strong support from the White House, indicating President Bush expects to sign the bill into law if it passes the Senate, and the House-Senate Conference Committee quickly crafts a compromise that suits both houses.

Passage of the CARE Act in early October would enable donors to receive the tax advantages in 2002 on the new IRA options that allow direct gifts and rollovers to charitable trusts and gift annuities. Since more than 25% of all charitable gifts are made in November and December, the CARE Act—if passed in time to be effective this fall—could bring a significant year-end tax benefit.

Monitor this legislation and be prepared to quickly notify potential donors if your organization anticipates IRA contributions. It may be prudent to inform donors of the bill’s status if you know it could affect the timing of their donations. Check with your tax advisor or call the attorneys at Gammon & Grange, P.C. for more advice.

detailing appropriate procedures for charity-run car donation programs. (*NPA*, Jan.'02). It seems the checklist is working. The IRS recently approved two charity car donation programs operated by outside entities. This move gives a green light to other groups who may want to copy those programs. The charities that operated the IRS-approved programs merely contracted with commercial companies to advertise, collect, and re-sell donated vehicles. The charities received the proceeds and paid the commercial companies a fee based on the sales income. The IRS said this approach was okay because the charities entered formal contracts with the companies and exercised "the requisite degree of control and supervision" over the process. Donors were also required to furnish professional appraisals (which they paid for themselves) if they intended to claim deductions for car donations valued at $5,000 or more. The charities held title to the vehicles until they were sold. IRS LTRS 200230005 & 200230007.

Check the IRS web site at www.irs.gov for IRS News Release #IR-2001-112, which discusses proper administration for these car donation programs. See also Nonprofit Alert® Memo, *Charitable Gifts: Receiving & Receipting,* for information on how to provide proper receipts. Ordering info is at right.

Graduate-Level Tuition Reduction Counts as Income

The IRS has ruled in field service advice that tuition reduction benefits, which a university provided to its employees for the cost of graduate level courses, does not constitute fringe benefits and must, therefore, be counted as income to the employees. However, the university also provided undergraduate tuition reduction, which was excludable from employee income because it fell under the tax code exclusion of IRC Sec. 127 for employer-provided employee education. That section of the tax code grants an income exclusion for education benefits up to $5250 each year when the benefits are provided by employers for employees. But graduate-level tuition does not meet that same criteria, the IRS said, and instead must meet the rules for de minimis fringe benefits to be excluded from income. Since the amounts associated with graduate tuition are far from de minimis, the IRS concluded that the university's graduate-level tuition reduction program would count as taxable income to employees. IRS FSA 200231016.

Two Nonprofit Alert Memos address this issue in greater detail. Refer to *Scholarship & Tuition Reduction Programs* and *Employee Educational Assistance Programs* for more information. Ordering information appears in the box below. The IRS also recently revised Publication #520, "Scholarships & Fellowships," which is available for free on the IRS web site at www.irs.gov.

Lack of Policy................

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lines for administrators to follow. Despite Lockridge's failure to apply for the position (which would normally bar a claim of this kind), the court said "the failure to apply is frequently excused where the employer has no formal application process or where the employee is unaware of the opportunity."

It is also excused "where the employer has failed to establish a clear personnel procedure for promotions," the court said. "The failure to establish 'fixed or reasonably objective standards and procedures for hiring' is a discriminatory practice," the court concluded. Lockridge v. Bd. of

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