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## EMPLOYMENT LAW

### Be Careful What You Ask: Rules of the Road For Employers Conducting Job Interviews

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In view of the recently well-publicized admission by Miami Dolphins' General Manager Jeff Ireland that, in a pre-NFL draft interview, he asked Oklahoma State wide receiver Dez Bryant whether Bryant's mother was a prostitute, employers are well-advised to re-visit the "do's and don'ts" of employment interview questions.

The following hypothetical case study and analysis illustrates the applicable rules, as well as the potential liability facing an unwitting prospective employer. Hopefully, most employers already knew that it would be unlawful to ask a job applicant the question put to Bryant or, indeed, whether the applicant has a mother at all.

Forty-two year old Karen Gold, formerly Manager of Marketing at Troj-X Industries for 10 years, has responded to a newspaper advertisement for a position as Director of Marketing and Product Development with the International Condom Company ("ICONCO"). David Burtack, ICONCO's President, was highly impressed

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with Gold's résumé qualifications and invited her to ICONCO's offices for an interview.

At the beginning of the interview, Burtack reviewed Gold's educational background, prior employment and professional achievements. When Burtack inquired about Gold's reason for leaving her last position at Troj-X, Gold explained to Burtack that she had resigned because she is the mother of a newborn child and the 90-minute, one-way commute between her home and Troj-X's offices created a hardship. By contrast, the five minute walk to ICONCO's offices would be much more convenient. Burtack asked whether Gold's husband would be available to watch their child after work, due to the frequent evening marketing and client meetings Gold would be required to attend. Gold told Burtack that she is not married, but is raising the child — who is adopted — with her lesbian lover. She stated that the after-work meetings do not pose a problem, but that, after she is hired, she would like to take a four-week unpaid leave of absence because she has learned that her daughter will require heart surgery prior to her first birthday. Burtack expressed concern about the impact these medical expenses would impose on ICONCO's medical plan, as

well as the effect of Gold's extended absence.

Later in the interview, Burtack informed Gold of ICONCO's stringent anti-drug policy. In response, Gold stated that she first smoked marijuana while attending a Grateful Dead concert as a student at Cornell University. She no longer uses illegal drugs of any kind, but smokes cigarettes on weekends. Burtack responded that, too, would be a problem, as ICONCO's founder was an avid nonsmoker, so that ICONCO not only prohibited smoking in its offices, but it was a strict ICONCO policy not to hire individuals who used tobacco products. In any event, Burtack explained that, as a matter of company policy, it would be necessary for Gold to submit to and pass a physical examination before any offer of employment could be extended to her.

Several days after their initial meeting, Burtack telephoned Gold. He informed her that, although he was impressed with her industry experience and the marketing ideas she had outlined, he was concerned that she would have trouble "fitting in" with the ICONCO "family" and, as a result, he had decided to offer the position to another candidate — a recent college graduate.

When Gold asked him to be more specific, Burtack stated that ICONCO prided itself on the high moral integrity of its employees and that Gold's prior drug use, personal habits and unusual lifestyle were inconsistent with that image.

Norine Sunshine, Burtack's executive secretary, who overheard part of the interview, told Burtack she believed some of his statements and questions violated employment discrimination laws. He told Sunshine to mind her business and that, if she complained about this again, she would be fired. Concerned that his secretary might have a point, Burtack immediately contacted the company's labor attorney for his opinion.

Federal and state laws prohibit employment decisions, including hiring, to be based on an individual's race, age, sex, religion, national origin, marital status or disability. Because employment decisions must be premised on bona fide job-related factors such as qualifications, experience and ability to perform the position, pre-employment inquiries into those "protected" areas are generally forbidden and are ill-advised. Indeed, most state fair employment practice agencies have made available charts or other publications regarding the types of pre-employment inquiries which must be avoided.

The Burtack-Gold exchange underscores the potential liability an employer faces when it permits its pre-employment inquiries to include subjects unrelated to the particular job which the applicant seeks.

Here, Burtack acknowledged Gold's educational background and prior experience presented prima facie qualifications for the position. His failure to hire Gold based upon their meeting suggests that his decision that she would not "fit in" the ICONCO family was based on other unlawful factors which may provide the basis for one or more discrimi-

nation claims by Gold.

Burtack's inquiries about Gold's spouse or children are problematic. They are unrelated to her job qualifications. It would have been preferable simply to inquire whether working late would pose a problem if overtime or unusual hours are required.

If Burtack's employment decision was based on Gold's lesbianism, there is probably no violation of federal law. The protections of Title VII do not yet extend to sexual preference or orientation. However, an increasing number of states and municipalities have enacted statutes and executive orders which prohibit discrimination for this reason.

The Americans with Disabilities Act ("ADA") prohibits denial of employment on the basis that the employee or an employee's dependent has a medical condition which would impose a financial burden on the employer's medical plan. However, it may be permissible for an employer to abide by the provisions of a medical plan which, for example, exclude pre-existing conditions or impose limitations on coverage amounts. The ADA also prohibits Burtack from basing an employment decision on an employee's prior — as opposed to current — drug use. Here, ICONCO's decision not to hire Gold due to Gold's use of marijuana 20 years earlier would likely grant her protection under the ADA as an individual "having a record of disability" or as one "regarded as having a disability." In any event, it should not provide the legitimate basis of a current employment decision.

In addition, the ADA would make it illegal to require Gold to pass a physical examination before extending a job offer to her. By contrast, an employer may make a job offer conditional on a medical exam provided that certain procedural requirements are met and the exam results are not used in a discriminatory manner. A drug test, stand-

ing alone, does not fall within the ADA's definition of a medical exam.

Under the Family and Medical Leave Act, an employee may request up to 12 weeks leave for the serious medical condition of a natural or adopted child. Here, however, Gold would not be eligible for FMLA leave until she had been employed by ICONCO for one year.

It is plainly permissible for ICONCO to prohibit smoking in its offices. However, a number of jurisdictions, including New York and New Jersey, now expressly prohibit an employer from discriminating on the basis of an individual's lawful, off-duty activities. Gold's use of tobacco on weekends would clearly be so protected.

Gold could also claim that, based upon Burtack's admissions to her, she possessed the minimum qualifications and experience for the Director of Marketing position and that the decision to hire a "recent college graduate" with evidently inferior credentials must have been based upon that fact that Gold is over 40 years of age. Should Gold file a claim of age discrimination, she would state a prima facie case. ICONCO would then have to articulate a legitimate business reason other than Gold's age to justify its decision not to hire her.

Finally, Burtack's threatening comments to his secretary may constitute unlawful retaliation. Generally, federal and state law protects employees who "oppose discrimination" against termination, demotion, or other retaliatory actions, on account of their actions.

To ensure that hiring decisions are not made based on illegal or discriminatory factors, it is essential that the job interview focus on the applicant's job-related qualifications, experience and ability, rather than extraneous factors which touch upon an individual's protected status. ■