Human Resource Risks and the Forest of Fog

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If you have read (or read to your kids) the latest in the Harry Potter series by J.K. Rowling, at times you may find yourself identifying with the young Mr. Potter. Raised in a world of ordinary humans, at the age of eleven, he finds himself in an enchanted and mysterious world that he often struggles to understand. In the fourth book in the series, *Harry Potter and the Goblet of Fire*, the fledgling wizard Harry Potter has to make his way through a bewildering labyrinth. Around each corner waits a challenge or a trap to snare him. Dragons, monsters, and other creepy things pop up when he least expects it. But of course, as frightening as it can be to face the various hazards of the natural (even magical) world, Harry's greatest moment of terror comes when he must confront one of his own kind, the dreaded dark lord, "He Who Must Not Be Named."

You may sometimes feel this way about the challenge of managing employment practices risk: bewildered, lost, and confused. Yet the risks that your organization can face through its employment practices are too significant to just cross your fingers and hope they will go away or to rely upon magic to solve your problems. Yet how are we mere *muggles* (non-magical types) to keep up with these issues that seem to change shape more often than a *boggart* and whose rules are more complex than a fast paced game of *Quidditch*.

Just as you experience the relief and satisfaction of dodging evil charm or sorting out a complicated or messy situation involving staff, you read about a new development in federal or state law, or perhaps an innovative interpretation of employer responsibility handed down by a court. And you know better than to dismiss court rulings in even in a far off jurisdiction. Like the movie version of one of the best-selling books of all time, that verdict could be coming to a theater near you in no time.

The purpose of this article is to provide a brief overview of a number of evolving human resource risks and alert you to emerging issues that may cross your desk in the months ahead. In this article, I have attempted to discuss several emerging concerns in the employment practices arena. These issues represent some of the latest twists in the maze and are not meant to be all-inclusive. Having said that, let's gaze into the crystal.

The Law of Unexpected Consequences

Last year the Americans with Disabilities Act turned ten. This landmark federal law has increased awareness of and opportunities for people with disabilities in this country. However, because the legislation was drafted to make it as inclusive as possible, it has been applied by the courts in some ways that perhaps the Congress did not expect.

In a recent Pennsylvania ruling, a federal judge found that a worker whose depression makes her belligerent and hypersensitive to criticism has the right under the ADA to a reasonable accommodation — additional feedback and guidance from her superiors.

In *Bennett v. Unisys Corp*, the plaintiff, who suffered from depression, was fired from a management position at Unisys for belligerence, poor interpersonal skills, and after facing conflicts with her boss and other managers. The plaintiff's legal team argued that Bennett's depression limited four "major life" activities: sleeping, thinking, concentrating, and interacting with others. In his ruling, U.S. District Judge Franklin S. Van Antwerpen agreed that the plaintiff was a "qualified individual" under the ADA with a disability that affected major life activities. To evaluate whether the plaintiff was entitled to an accommodation, Judge Van Antwerpen turned to the EEOC's guidelines, noting that the guidelines "suggest that by adjusting the level of supervision or structure, an otherwise qualified individual with a disability can perform essential job functions." In the case of this particular plaintiff, the judge wrote that "more detailed, day-to-day guidance, feedback or structure could have allowed her to perform her job."

Bending Over Backwards

The Occupational Health and Safety Administration (OSHA) recently issued its *Final Ergonomics Program Standard* (see www.osha.gov). A coalition of business groups that includes the U.S. Chamber of Commerce, the National Association of Manufacturers**,** the Society for Human Resource Management and others filed a lawsuit in mid-November seeking to stop OSHA from implementing the new regulations. The groups contend that the Standard is overly broad and too costly. The Standard, which is detailed in a 608-page document, applies to all employers covered by OSHA and will take effect on January 16, 2001. OSHA has estimated that the new requirements will cost employers a total of $4.2 billion annually. Under the *Standard*, employers are required to provide employees with:

(1) basic information about musculoskeletal disorders ("MSDs") caused by workplace exposure to "risk factors,"

(2) a summary of the Standard's requirements, and

(3) the process for reporting MSDs in the organization.

These new regulations require employers to be knowledgeable about the risks of injury due to various workplace activities, be prepared to respond and determine whether an "MSD incident" covered by the regulations has occurred, and understand the options and responses allowable. For example, if an employer determines that an MSD incident has occurred, the employer may be able to reduce the hazards facing that employee by providing time-off or changing aspects of the employee's job. In other cases, this "quick fix" remedy applied to a single staff member may not be available and the employer will be required to implement an ergonomics program for its entire workplace.

It is hard to say at this time whether the Standard will go into effect as planned by OSHA. Congress could block the implementation of the Standard through the appropriations process. In any event, the regulation of workplace safety is clearly reaching a new level and all employers, including nonprofits, should be prepared to respond in the months and years to come.

Vicarious Liability Could Impede Travel on the Information Superhighway

The trial court opinion in *A&M Records Inc. v. Napster Inc*. offers a look into a potentially frightening future and new area of employment risk for employers. Napster is a company whose software enables users to exchange music files (called mp3s) with other users. The Napster Internet-based server acts as a traffic cop, telling users where to find the files they seek, though the actual files do not pass through the Napster server.

At the trial court level, Napster argued that it was not responsible for any illegal acts committed by its users because the content was transferred directly by users over the Internet. The court found that the plaintiff had established a reasonable likelihood of success in proving the vicarious liability of Napster for its users? illegal activity (infringing the copyright of A&M Records), because the company had the right and ability to supervise the infringing activity and it has benefited financially from the activity.

This case is a warning that when an organization provides high tech equipment for its employees' use, it may have an affirmative duty to supervise use of that equipment, prevent misuse, and take action when it has knowledge of misuse. Otherwise, the employer could be found vicariously liable for the wrongdoing committed by employees. The Napster case is undergoing review by the 9th Circuit.

Beware of Retaliation Claims

Retaliation claims are an increasingly common occurrence in the world of employment-related litigation. Like other complaints, they can be costly to an employer. Retaliation is prohibited under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA) and various state anti-whistle blowing statutes.

If an employee your nonprofit intends to terminate has complained of sexual or other illegal harassment, or has filed a workers compensation claim, or has blown the whistle on the organization, be aware that termination of that employee may result in a retaliation claim. And the employee could prevail in his or her retaliation claim *even if the original complaint is found to be without merit*. Always consult legal counsel in these situations. In the case of a poor performer, document all performance failings, and address the performance concerns while resolving the harassment complaint or the workers compensation claim issues. In such cases it is usually best to delay discipline for poor performance until after the resolution of the harassment complaint, but consult with legal counsel for the most prudent way to proceed.

These are just a few of the strange phenomena making their way through society and the courts and straight into the workplace. The law is complex and continuously changing. There is no magic wand, but armed with some basic knowledge about these developments, a commitment to keep abreast of changes, and the telephone number of an employment attorney programmed on your speed dial, you can stay on your broomstick and avoid being dragged down by the dark side.