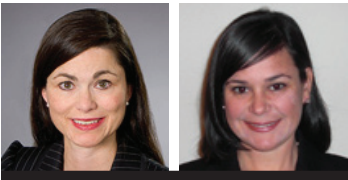


Know what not to ask

In a job interview, a seemingly innocent question may land the prospective employer in hot water



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Imagine a panel of attorneys interviewing a prospective colleague. After the preliminaries, they ask her: "What makes you think you can leave those kids after all these years and fit in here in our super stressful environment?"

Consider another panel interviewing a different attorney, this time seeking entry in a training program: "What did you think of the such-and-such department at your university?" Answer: "I didn't actually go there. Did you?" Interview panel member: "Are you kidding? I was barely in junior high when you were a law student."

Another interviewee, a pregnant woman, was told the interview would be a formality, based on her knowledge of the company and her skills, she was a shoo-in. That is, until she showed up six months pregnant.

These scenarios all happened here in California within the last decade. Biased comments in job interviews and hiring decisions made for improper reasons are actionable.

For example, in August, the Equal Employment Opportunity Commission filed a case on behalf of a woman who applied for a job with Crime Scene Cleaners, an

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Oakland-based company specializing in cleaning up trauma scenes. During the interview, Kristi Nunez was not asked about her educational background in chemistry or her experiences with crime scenes, but rather whether she was mar-

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ried, if her husband was jealous, and whether she could work with all men. These personal questions posed to Nunez during the interview suggested that gender was an important factor in the company's hiring decision. Despite the fact that Nunez was qualified for the position, Crime Scene Cleaners hired a man for the job.

EXPANSION AND COVERAGE OF LAW

For years, federal and state laws have protected against discrimination in hiring based on a number of characteristics including gender, race, disability, religion, national origin and sexual orientation. These protected categories are expanding. California Gov. Jerry Brown recently signed two transgender non-discrimination laws. The Gender Non-discrimination Act, 2011 Cal. Stats. ch. 719, makes it illegal to discriminate on

the basis of gender identity or expression in the workplace, school, housing and other public settings, while the Vital Statistics Modernization Act, 2011 Cal. Stats. ch. 718, makes it easier for Californians to obtain birth certificates based on their current gender.

This legislation was overdue, as exemplified by a recent lawsuit between a transgender woman and the Department of Motor Vehicles for violation of privacy and civil rights. In October 2010, Amber Yust went to the DMV in San Francisco to change her name and update the gender on her license. Later, the DMV employee who assisted Yust used her confidential personal information to send her a letter warning of eternal damnation because she is transgender. In August, the DMV settled its case with Yust and has agreed to work with the Transgender Law Center on staff training.

Further extending protections afforded to job seekers in California, Brown recently signed a bill into law that restricts credit checks by most employers. Assembly Bill 22, 2011 Cal. Stats. ch. 724, prohibits prospective employers, with the exception of certain financial institutions, from using consumer credit reports in the hiring process. The new law does not, however, apply to investigative consumer reports, which employers may still lawfully obtain in performing criminal background checks.

The expansion of protected categories is not limited to California law. For example, the EEOC is considering including the lack of a job as another protected class. In a public meeting held earlier this year, the EEOC addressed whether excluding unemployed applicants from job vacancies might be illegal because it disproportionately affects groups with higher levels of unemployment such as older women, minorities and those with disabilities.

A review of current online job vacancy

postings, in fields ranging from engineering to retail, reveals that some employers will only consider currently employed applicants. In an effort to combat this perceived bias against the unemployed, President Obama's proposed American Jobs Act includes a provision that bans employers with 15 or more employees from discriminating against unemployed applicants. If joblessness becomes a protected category, employers will need to stop asking why the candidate is looking for a job. The EEOC's new category, if adopted, would also prevent employers from inquiring why a person's previous employment ended or possibly even what they have been doing since they left.

While caretaking is not a protected class at this time, the EEOC also has focused its attention on caregivers, as more women and mothers have entered the workforce over the years, and are forced to juggle work and family obligations. UC-Hastings law professor Joan C. Williams' research on discrimination against caregivers energized this area of law, leading to the development of the EEOC's Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007).

This guidance provides an overview of discrimination against caregivers based on sex, disability or other characteristics protected by federal laws. In addition, the EEOC has drafted examples of best practices that employers may adopt to avoid discrimination against caregivers. Some examples include: (1) "[e]nsure that managers at all levels are aware of, and comply with, the organization's work-life policies," (2) "[f]ocus on the applicant's qualifications for the job in question" and (3) "[d]o not ask questions about the applicant's or employee's children, plans to start a family, pregnancy, or other caregiving-related issues during interviews or performance reviews." See EEOC's Employer Best Practices for Workers with Caregiving Responsibilities.

THE JOB INTERVIEW

In this time of economic turmoil and re-

cord unemployment levels, the interview may be regarded as both an opportunity and a trap for the unwary. The interview can demonstrate to a candidate that the company or organization is fair and worthy of respect regardless of the outcome. On the other hand, biased interview comments will leave a bad taste in the candidate's mouth and possibly lead to liability. While much has been written about using online research, such as Facebook, in considering new hires, comments made in an interview are far more likely to produce charges and litigation. It is difficult to prove that a candidate did not obtain a job because of personal information she shared on the Internet. Remarks made in an interview, however, are generally admissible and go a long way toward a plaintiff's meeting her summary judgment burden. And while it is true that lawsuits based on failure to hire for discriminatory reasons are rare, EEOC statistics indicate such claims are increasing.

BEST PRACTICES IN CONDUCTING AN INTERVIEW

With all these pitfalls, employers need to be sure that they undertake adequate training of those involved in the interview process. This training should extend to the general office atmosphere, and in particular, commentary around the water cooler. At the end of the day, each job interview should focus on the skill set needed to perform the work. Conversation about the applicant's personal views, family situation or personal life must remain off limits.

If the interview does, however, elicit information about a candidate's protected status, job applicants should be aware that they are not under any obligation to answer questions about prohibited information. While it may be uncomfortable if an inappropriate question is posed during the interview, the candidate may politely refuse or gently inquire about the relevance of a question and address the underlying issue.

On the other hand, applicants should avoid opening the door to questions that are not related to the job. Candidates

should refrain from asking personal questions of the interviewer or veering into topics not directly relevant to the position sought. If a prospective employee volunteers prohibited information such as how much longer an individual plans to work before he or she retires, then he or she cannot complain if these comments may factor into the employer's evaluation of the candidate.

PRACTICE TIPS

While this is not meant to be an exhaustive list, here is a brief overview of what is and is not proper when conducting an interview.

Do:

- Train all employees who interact with job applicants during the interview process about acceptable inquiries.
- Pose the same questions to all candidates to ensure the selection process is fair and consistent.
- Ask for feedback about the interview from both the interviewers and the candidates.
- Require that all decision makers document a legitimate nondiscriminatory reason for their hiring decision.

Do not:

- Ask inappropriate or unlawful questions. Avoid any questions about a candidate's race, color, sex, religion, national origin, birthplace, age, disability, marital/family/caretaker status or gender identity.
- Provide information regarding other candidates.
- Make any promises about employment or promotion.
- Ask questions that are not related to the job (rather, focus questions on how the candidate's education, skills and qualifications fit the job).

During difficult economic times, job interviews are more important than ever. Following the guidelines we suggest here will ensure a fair hiring process, which will help develop a merit-based, highly skilled workforce, avoid litigation, and create a positive reputation for your company, organization or government entity.