
In #MeToo Era, Some Lawyers Fielding More 'Reverse Discrimination' Queries

Description

PS&H employment partner and Chair of the Labor & Employment Group, Alicia Samolis, spoke with *R/ Lawyers Weekly* on the rising incidence of reverse discrimination inquiries and matters that she is seeing.

Attributed at least in part to the #MeToo movement and increased focus on diversity and inclusion efforts, Samolis commented that, "What I have seen, at least anecdotally, is an uptick in employees who do not fall within the 'classic' protected-class designations — such as employees who are male and white — internally going to HR and complaining of discrimination."

Samolis said she is receiving more inquiries from attorneys, which she said is a potential indication that "those employees who are complaining are more likely to go out and find an attorney willing to take on such an unconventional discrimination case."

Samolis explained that while the uptick is likely partially attributable to #MeToo, it also results from employees' desire to improve their work environment. Samolis stated there will always be some employees who perceive changes in their employer's policies or practices as unfair.

"An employee's perceptions of discrimination and success in a lawsuit can also depend on what the company's demographics look like," Samolis said. "For example, in a case of the only male employee of a company being terminated, there is a greater risk of gender discrimination being raised than if one of many female employees had been terminated."

"And while a company may want to create a more diverse workforce or may feel pressure from the marketplace to do so, an employee's "reverse discrimination" complaint can be spurred by the company's incorrect assumption that it can favor traditionally oppressed minorities," Samolis said.

"There are people who feel like they can say, 'We should hire a woman' while speaking to a roomful of potential male plaintiffs," she explained. "But it's illegal to hire a woman based simply on her gender, and a company's focus should be on getting a good pool of applicants and eliminating barriers diverse candidates may face when seeking to be hired or promoted."

Samolis said there are two themes that employers would be wise to focus on.

First, they should be careful when crafting Equal Employment Opportunity/diversity policies.

"If it's an initiative where the company is doing something other than having a standard EEO policy, they should definitely call their lawyer," Samolis said. "Companies don't understand that they may not be subject to the same laws as another company."

To illustrate, she pointed out that federal contractors are required to follow affirmative action laws and to ask about race when hiring for that purpose, while certain other types of employers are prohibited from doing that. Thus, it is important not to simply copy the policies of another company.

Second, Samolis stressed that companies need to have good business reasons backing up their hiring, firing and promoting decisions. Although Massachusetts and Rhode Island are "at will" states where an employer may terminate an employee at any time and for any reason, the termination cannot be for a discriminatory reason.

“Every person is in a protected class. And most of the time in discrimination cases the employer will have the burden of proof to articulate a non-discriminatory reason for their actions. I always tell employers it’s a red flag if decisions are being made with no legitimate reason,” she said.

“Subjective factors used to justify employment decisions, such as personality or “fit,” are hard to articulate and may not make sense to a judge, a commission or a jury,” Samolis continued. “The test is whether an objective person can understand the business reason why the decision was made if it were to be written out.”

“That is also good business advice, as it results in the employer obtaining and retaining the most qualified people.”

Finally, Samolis recommended that companies be particularly careful that managers do not create emails, interview notes, or the like that could contain direct evidence of discrimination, an element which is not often seen in the “classic” employment discrimination cases. [Click here to read the full article](#). (subscription required)

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