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ANNUAL SEMINAR ON MUNICIPAL LAW

Harassment:

A New Era in Colorado

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Who We Are

- Nathan Dumm & Mayer P.C. is a civil defense firm that has been practicing insurance litigation defense since 1973.
- Our attorneys handle a diverse range of legal matters, but a portion of the firm specializes in the representation of governmental entities.
- We have extensive experience in defending employment related claims, including pre litigation, during the administrative process and in litigation.
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Today's Topics

- Harassment Claims under Federal Law
  - Applicable Law
  - EEOC Claims Process
  - Examples
- Harassment Claims under Colorado Law
  - Senate Bill and Change in Severe & Pervasive Component
  - CCRD Claims Process
  - Examples
- Personnel Policies
- Responses to Employee Complaints
- Questions

Administrative Agencies

- The Equal Employment Opportunity Commission ("EEOC") handles the processing, mediating, and/or investigating of violations of federal harassment laws
- The Colorado Civil Rights Division ("CCRD") handles the processing, mediating, and/or investigating of violations of the Colorado Anti-Discrimination Act ("CADA")
- Typically, a party has 300 days from the date of the alleged adverse employment action in which to file a charge with either the EEOC or CCRD
  - Usually, the agency the party talks to first takes charge of the complaint
  - Sometimes a complaint is transferred between agencies, due to availability of resources or for jurisdictional reasons

Federal Harassment: Definitions

- "Harassment is unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (40+), disability, or general information (including family medical history)"

- Harassment becomes unlawful where:

  1. Enduring the offensive conduct becomes a condition of continued employment, or

  2. The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Information & Definitions from: https://www.eeoc.gov/harassment

Federal Harassment: Definitions

- Harassment may also be alleged to include retaliation for:
  - Filing a discrimination charge
  - Testifying in an investigation, proceeding, or lawsuit under various federal laws, such as Title VII, ADEA, or ADA
  - Participating in any way in an investigation, proceeding, or lawsuit brought under various federal laws, such as Title VII, ADEA, or ADA

Information & Definitions from: https://www.eeoc.gov/harassment

Federal Harassment: Examples

- Includes, but is not limited to:
  - Offensive jokes, slurs, epithets, name calling, physical assaults and threats, intimidation, ridicule and mockery, insults and put-downs, offensive objects or pictures, and interference with work performance
- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee
- The victim does not have to be the person to whom the harassment is directed, but can be anyone affected by the offensive conduct

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Federal non-Harassment Examples

Not Included:

- Petty slights
- Annoyances
- Isolated incidents (unless extremely serious)
- Proper discipline

Information from https://www.eeoc.gov/harassment

Federal Harassment: Recap

Federally, harassment is severe or pervasive conduct in violation of Title VII, ADEA, & ADA, including but not limited to:

- Offensive jokes
- Slurs
- Epithets & name calling
- Physical assaults or threats
- Intimidation
- Ridicule or mockery
- Insults or put-downs
- Offensive objects or pictures
- Interference with work performance

Federally protected classes in employment:

- Race
- Color
- Religion
- Sex, including:
  - Sexual Orientation
  - Gender Identity
  - Pregnancy
- National Origin
- Older Age (40+)
- Disability
- Genetic Information
  - Including family medical history

Information from: https://www.eeoc.gov/harassment

Federal Law: EEOC Initial Process

- Employee has 300 days to file from notice of the act of alleged discrimination (extended by Colorado from the 180 days otherwise provided for under federal law)
- Typically, only after a charge is perfected, meaning the allegations are finalized and signed by the complaining individual, does the EEOC advise the employer
- Sometimes employers are notified after a filing, but before a perfected charge is obtained

Federal Law: EEOC Mediation Process

- EEOC has some in-house mediators who are available free of charge for mediations, if deemed available by the EEOC and requested by one or both parties
- Information provided to the EEOC mediators and the information discussed during the mediation are supposed to be kept separate from the investigations unit
- The EEOC typically stays the deadline for a substantive response to the charge until the mediation occurs and is unsuccessful

Federal Law: EEOC Investigation

- EEOC typically only requests the employer's position statement regarding the charge
- EEOC occasionally sends out requests for information/documentation and/or asks for interviews

Federal Law: EEOC Jurisdictional Time Limits

- No specific deadline for EEOC to issue a decision or right to sue notice, but employer may have later laches argument.

Federal Law: EEOC Most Common Results

- In most cases, the EEOC ends up issuing a form notice, entitled "Dismissal and Notice of Rights," which most often states:

  "The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.“

- The employee is thereafter given 90 days from the receipt of the EEOC's letter (not the date that it was issued or mailed) to file suit in Federal Court asserting federal claims

Federal Law: EEOC Other Potential Result

- The EEOC can also issue a reasonable cause finding and request the parties to engage in conciliation.
  - If conciliation is successful, the matter should be resolved.
  - If conciliation is unsuccessful, the matter is sent to the Department of Justice (if the matter involves certain claims, such as those under Title VII, against governmental employers) to determine whether to prosecute a lawsuit against the employer or issue a right to sue notice
- The Employee may also request a right to sue notice after 180 days have elapsed if they have not received a result from the EEOC and wish to forgo the administrative process

Federal Law: Harassment Quiz 1

Facts:

- Black, male employee aged 62, hired as an account executive, which involved locating potential customers and getting them to use the employer.
- Supervisor commented to Employee: "You know, you are the first black cowboy I have ever met."
- Employee alleged two coworkers reported that they each had heard the supervisor use the derogatory "n-word" epithet, but not in front of the plaintiff.

Claim:

- Employee raised a Title VII claim alleging race based hostile work environment among other claims.

Result?

Federal Law: Harassment Quiz 1

Result:

- Found not to constitute an actionable racially-hostile work environment

Court Reasoned:

- Regardless of the unnecessary nature of the remark, the "black cowboy" comment, in context, did not amount to "intimidation, ridicule, or insult“. The exchange where the comment was made was an otherwise pleasant discussion.
- The Court acknowledged that Supervisor's use of a racial epithet is inherently insulting and offensive, and has no non-discriminatory use in the workplace, but found that two instances over a three-year period were insufficient to rise to the level of an objectively-severe hostile environment because:
  - The second-hand nature of the Employee hearing them
  - Their infrequent use (twice over three years)
  - The remarks were not physically threatening
  - The remarks did not directly interfere with Employee's ability to perform his job.

Foreman v. Western Freightways, LLC., 958 F.Supp.2d 1270 (D.Colo. Aug. 1, 2013).

Federal Law: Harassment Quiz 2

Facts:

- Supervisor alleged to have held a vodka bottle horizontally in his pelvic region and thrusted at the employee while telling her to “get on her knees”.
- Assertions that there was frequent sexual banter about female clothing and female figures.

- Claim:
  - Sex based harassment.

Result?

Federal Law: Harassment Quiz 2

Result:

- Trial court initially dismissed plaintiff's claims on summary judgment. As part of an appeal, the appellate court reversed the dismissal with respect to the hostile work environment, retaliation and constructive discharge claims.

Ford v. Jackson National Life Insurance Company, 45 F4th 1202(10th Cir. 2022).

Colorado Law: Senate Bill 172

- Colorado passed Senate Bill 172 during the 2023 regular session
  - "Protecting Opportunities and Workers' Rights Act" aka POWR Act
- Became effective on August 7, 2023
- Applies to employment practices occurring on or after the effective date

Colorado Law: Senate Bill 172 - Removals

- Repealed the previous definition of "harass," which required the creation of a hostile work environment. C.R.S. § 24-34-402(1)(a)(II)
- Removed the "severe or pervasive" requirement for conduct to constitute discriminatory and/or unfair employment practices C.R.S. § 24-34-400.2(2)
- Removes the ability for an employer to assert that an employee's disability has a significant impact on the job as a rationale for allegedly discriminatory employment practice C.R.S. § 24-34-402(1)(a)(II)
  - Specifies that this exception is now limited to situations in which there is *no* reasonable accommodation that would allow the individual to satisfy the essential functions of the job. C.R.S. § 24-34-402(1)(a)(II)

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Colorado Law: Senate Bill 172 - Additions

- Directs the CCRD to include "harassment" as a basis for and type of discrimination for charges. C.R.S. § 24-34-306(1)(a)(II).
- Redefined "harass" and "harassment" as unwelcome conduct directed at an individual or group of individuals in, or perceived to be in, a protected class. C.R.S. § 24-34-402(1.3)(a).
  - The conduct needs to be subjectively offensive to the individual alleging harassment.
  - The conduct needs to be objectively offensive to members of the same protected class as the individual alleging harassment.
- Adds protections from discriminatory or unfair employment practices based on an employee's marital status. C.R.S. §§ 24-34-402(1)(a)(I) et seq.
- Requires employers to maintain personnel and employment records for at least 5 years. C.R.S. § 24-34-408(1).
- Requires employers to maintain records of complaints of discrimination and/or unfair employment practices in a designated repository. C.R.S. § 24-34-408(2).

Colorado Law: Employer's Affirmative Defenses

If an employee proves a supervisor's harassment, the employer may assert an affirmative defense only if it establishes that the employer has a program reasonably designed to prevent harassment, deter future harassers, and protect employees from harassment. This can be shown by demonstrating

- Prompt, reasonable remedial actions in response to complaints; AND
- Employer communicates the existence and details of the anti-discrimination program to supervisors and non-supervisor employees; AND
- The employee has unreasonably failed to take advantage of the employer's anti-discrimination program

C.R.S. § 24-34-402(1.5).

Colorado Law: Non-Disclosure Agreements

Provisions of an employee-employer agreement which limit the ability of an employee to disclose or discuss any alleged discriminatory or unfair employment practice is void, unless: C.R.S. § 24-34-407(1).

- The NDA provisions apply equally to all parties to the agreement; C.R.S. § 24-34-407(1)(a).
- The NDA expressly states it does not restrain the employee from discussing the underlying facts of any alleged discriminatory or unfair employment practices; C.R.S. § 24-34-407(1)(b).
  - Including existence and terms of settlement agreements to the employee's immediate family, religious advisor, medical or mental health providers, legal counsel, financial advisor, and tax preparer
  - Including to any governmental agency without first notifying the employer
  - Including in response to the legal process, e.g., subpoenas or any other purposes required by law
- The NDA expressly states disclosure of the facts and allegedly unfair practices/discrimination does not constitute disparagement; C.R.S. § 24-34-407(1)(c).
- If the NDA contains a non-disparagement provision, the Employer may not seek enforcement of the NDA against the Employee if the Employer disparages the Employee to a third party. C.R.S. § 24-34-407(1)(d).
- Any liquidated damages clause may not constitute a penalty or punishment, must be reasonable and proportional. C.R.S. § 24-34-407(1)(e).

Colorado Law: Non-Disclosure Agreements

Violation of the POWR Act's NDA provisions hold the employer liable for:

- Actual damages of the Employee
- Reasonable Costs incurred by the Employee
- Attorney Fees incurred by the Employee in pursuing a private action
- An additional penalty of $5,000 per violation

C.R.S. § 24-34-407(2).

The Intersection Between NDAs under the POWR Act and C.R.S. § 29-1-1601

- Per Section 29-1-1601(1)(a)(I)-(XI) (also effective on Aug. 7, 2023) a local government cannot make it a condition of employment that an employee execute an NDA unless certain limited circumstances/criteria exist.
- Any provision of this nature will be deemed against public policy and is unenforceable unless certain limited circumstances/criteria exist. C.R.S. § 29-1-1601(1)(b)(I)-(XI).
- No materially adverse employment action against the employee can be taken when an employee does not enter into an NDA for these reasons. C.R.S. § 29-1-1601(2)(a).
- If an employer attempts to enforce a provision prohibited by this statute, it will be liable for the employee's reasonably attorney fees and costs in defending an action. C.R.S. § 29-1-1601(2)(b).
- Settlement agreements must be signed by both employer and employee. C.R.S. § 29-1-1601(2)(c)(3).

New Signature Requirement

Senate Bill 23-053 became effective on August 7, 2023.

- It requires that all settlement agreements between an employer that is a local government, or the department/agency/institution of a local government, and an employee (prospective, current, or past employee) must be signed by both the employee and the employer. C.R.S. § 29-1-1601(3)

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Colorado Harassment: Recap

In Colorado, it is a discriminatory or unfair employment practice to do any of the following based on an employee's protected class or in retaliation:

- Refuse to hire
- Discharge
- Refuse to promote
- Demote
- Harass during employment
- Discriminate in matters of compensation
- Discriminate in the terms, conditions, or privileges of employment

Colorado protected classes in employment:

- Disability (mental or physical), Race (including hair texture, type, and styles), Creed, Color, Sex, Sexual Orientation, Gender Identity & Expression, Religion, Age (40+), National Origin and Ancestry
- Also, do not forget the 2023 changes and additions to state law discussed herein.

Colorado Law: CCRD Initial Process

- Coverage: Any employee working in the State of Colorado is covered by CADA
- Deadline: Employee must file complaint with CCRD within 300 days of notice that the alleged discriminatory or unfair employment practice occurred
- CCRD informs employer of the charge

Colorado Law: CCRD Mediation

- Similar to the EEOC mediation option and process.

Colorado Law: CCRD Investigation

- CCRD investigator process:
  - Initial Position Statement and responses to Requests for Information
  - Interviews and/or follow-up requests
  - Usually send employer response to employee for rebuttal
- CCRD Investigator ultimately drafts a determination, including findings of probable cause, no-probable cause or some combination if more than one claim

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Colorado Law: CCRD Jurisdictional Time Limits

- For any charge filed on or after August 10, 2022, CCRD now has 450-days to complete the investigative process.

Colorado Law: CCRD Potential Results

No Probable Cause Finding:

- Complaining employee has ability to file an appeal, which is reviewed by the CCRD Commission, which can affirm the Director's decision or overturn it
- If appealed, then deadline to file suit is stayed until Commission decision is issued, after which deadline to file suit in state district court is 90 days
- If not appealed, employee has 90 days from the issuance of the original determination letter (not receipt) to commence litigation in state district court

Probable Cause Finding:

- If original determination was probable cause, or if contrary finding was overturned on appeal to the Commission, then the parties are sent to conciliation
- If conciliation is unsuccessful, then CCRD will either issue a right-to-sue letter giving employee 90 days to commence litigation in state district court, or the matter is referred to the Colorado AG for an administrative proceeding before an ALJ

Colorado Law: Quiz 1

Facts:

- Employee worked for Colorado State Patrol for many years with positive evaluations and several promotions before resigning.
- 3 months later, Employee applied for reinstatement, and during polygraph examination his sexual orientation became clear, along with that he once inadvertently viewed child pornography.
- Employee claimed revealing information about his sexual orientation heightened his anxiety during the examination.
- State Patrol refused to reinstate Employee after he failed the polygraph examination.

Claim:

- CADA claim.

Results?

Colorado Law: Quiz 1

Results:

- ALJ found that:
  - State Patrol's actions were arbitrary, capricious, and constituted unlawful discrimination based on Employee's sexual orientation. ALJ's conclusions based upon:
    - Employee's exemplary record,
    - State Patrol's swift refusal to reinstate,
    - Supervisors' previous knowledge of Employee's sexuality,
    - Failure by supervisors to take action against previous allegations of sexual orientation discrimination, and
    - Departure from normal reinstatement procedures, i.e., requiring a polygraph at all and asking improper questions
  - State Patrol's non-discriminatory rationale for denying reinstatement, the failed polygraph, was pretextual.

Williams v. Dept. of Pub. Safety, 369 P.3d 760 (Colo. App. 2015).

Colorado Law: Quiz 2

Facts:

- Female, Asian doctor was employed in a general surgery residency with health center employer.
- Doctor received consistently poor evaluations during her first year and scored at the bottom of her class on written examination.
- Health Center nonetheless moved her up to her second-year residency, but placed her on probation: requiring her to receive only marks of "A" or "B."
  - Doctor continued to receive many "C"s and "D"s.
- Doctor posted nude photographs of herself online, which was revealed to the Heath Center.
- Doctor was subjected to under-their-breath comments, snickers, and "knowing stares" by fellow residents, which reportedly caused severe embarrassment and the Health Center declined to intervene.
- Health Center supervisor requested Doctor's resignation based on the photographs, Doctor declined, and Health Center subsequently terminated her from the program, citing her poor academic record.

Colorado Law: Quiz 2

Claims:

- Improper termination from the residency program, in that the photographs were a pretextual reason to terminate her because of her race and gender.
- Disparate Treatment based on her race and gender, in that the other residents were not subjected to such treatments or probationary programs.
- Hostile Work Environment by her fellow residents from the comments, snickers, and stares, and the Health Center's non-action to stop such.

Results?

Colorado Law: Quiz 2

Results:

- Trial Court dismissed all of Doctor's claims on summary judgment.
- Trial Court reasoned that:
    1. Doctor failed to establish a *prima facie* case of disparate treatment because she was not similarly situated to other residents, i.e., her conduct in posting pornographic photographs was different from the conduct of the other Health Center residents, who looked at and gossiped about such photographs.
    2. Doctor failed to establish that, even if there was a *prima facie* case of disparate treatment, the Health Center's non-discriminatory reason for discharging her – that she failed to satisfy the terms of her residency probation by attaining "C"s and "D"s – was pretextual for discrimination because of her race/gender.
    3. Doctor failed to establish that other residents' comments under their breath, without any specifics therein, and alleged snickers and looks, were insufficient to establish the existence of a hostile work environment.

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St. Croix v. Uni. of Colo. Health Cntr., 166 P.3d 230 (Colo. App. 2007).

Changes to Employer Policies

- Ensure policies are not limited to conduct which is severe or pervasive.
- Must be mindful that disability reasonable accommodation should be provided unless it is impossible for employee to perform the functions of the job with their disability
- Must maintain a separate, designated repository for all complaints of workplace discrimination or unfair employment practices
- Must maintain employment and personnel records for 5 years
- Continue to provide all employees (supervisory and non-supervisory) with anti-discrimination plan implemented by the employer, document this at all steps
- Continue to take immediate remedial actions in response to any complaints, document this at all steps

Responding to Employees' Complaints

- Gather all information regarding the complaining employee and the alleged perpetrators of the harassment, discrimination or retaliation
- Determine if investigation is needed into what happened to adequately respond
- Ensure to appropriately document any activities

Questions?

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Thank You!

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