

# Employment Law: Avoiding Mistakes When Hiring

by Beth C. Rogers, Esq.

This article is an introduction to many of the laws and situations you need to keep in mind to avoid mistakes when hiring employees. This article is not intended to address all state and federal employment laws (including but not limited to the Age Discrimination in Employment Act, the Americans with Disabilities Act, Immigration laws, Equal Pay laws, Affirmative Action and other employment laws). Employers must make certain that their hiring process complies with all current state and federal laws and local/

industry rules and regulations. This article will help an employer start down the road toward improving its hiring process.



## **Major Laws Impacting the Hiring Process**

There are a number of state and federal laws that employers must follow when hiring employees. Generally speaking, these laws prohibit discrimination in employment decisions based on race, color, religion, sex (including pregnancy), age (40 or older), ethnic/national origin, disability, genetic information, or veteran status. See Title VII of the Civil Rights Act of 1964 ("Title VII") and New Jersey Law Against Discrimination N.J.S.A. 10:5-1 et seq., ("NJLAD").

In EEOC v. WalMart Stores, Inc., retail giant Wal-Mart settled a pregnancy discrimination lawsuit wherein Wal-Mart paid \$220,000 in damages for its failure to hire a female applicant due to her pregnancy, and also agreed to engage in comprehensive training concerning the Pregnancy Discrimination Act. (EEOC v. WalMart CIV 94-465 TUC WDB).

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## **New Jersey Unreported Decision In Anti-Gay Discrimination Case Attracts National Attention**

Unreported decisions by trial courts rarely attract national attention. Such is not the case in Ferguson v. JONAH (Superior Court of New Jersey Law Division-Hudson County Docket No. HUD-L-5473-12). On February 10, 2015, Hudson County Assignment Judge Peter Bariso Jr., held that it is a misrepresentation that violates the state Consumer Fraud Act to advertise gay "conversion therapy" services by depicting homosexuality as abnormal or a mental illness, and that advertising "success" statistics for such services in the absence of a factual basis amounts to consumer fraud.

This appears to be the first gay discrimination decision in the United States decided on a consumer fraud basis and it could provide litigants with a new strategy for combating some forms of anti-gay discrimination.

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"You never know what is enough unless you know what is more than enough."

- William Blake

"As we acquire more knowledge, things do not become more comprehensible, but more mysterious."

- Albert Schweitzer

## Avoid Hiring Mistakes

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It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. And in New Jersey, it is illegal to retaliate against a person because the person reported or threatened to report a violation of law (in some cases, even if the employer did not violate any actual law!) See Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"). These situations may arise when an employee who has previously complained about discrimination/alleged violation of law applies for a promotion/different position within the company.

### **Not All Discriminatory Practices Are Forbidden**

Generally, the opportunity to obtain employment without being subjected to unlawful discrimination is a civil right. However, not all discriminatory practices are forbidden.

### **Bona Fide Occupational Qualifications**

Employment laws do not prohibit the establishment and maintenance of bona fide occupational qualifications. Specifically, employers are not prohibited from refusing to hire any individual on the basis of a characteristic where that characteristic is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

Nor are employers prohibited from circulating advertisements, using employment applications, or making inquiries in connection with prospective employment that express limitations, specifications, or discrimination as to a protected class / race, gender, color, creed, disability, nationality or national origin if based upon a bona fide occupational qualification.

### **What Should an Employer Do?**

Employers can be held liable at the hiring stage for discriminatory or retaliatory practices. It is essential that management be made aware of what can, and cannot, be said or done during the hiring process. Charges alleging discrimination during the hiring process can lead to employer liability. Employers must make certain that their hiring process complies with all current federal and state laws and local/industry rules and regulations. Regular reviews and updates of hiring procedures may help to avoid future employee problems.

## Anti-Gay Discrimination Case

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Plaintiffs included four young men (and two of their mothers) who obtained gay conversion therapy through Defendant Jews Offering New Alternatives for Healing (JONAH), a Jersey City nonprofit formerly known as Jews Offering New Alternatives to Homosexuality.

The Plaintiffs claim JONAH (its co-director and a counselor) engaged in "unconscionable commercial practice, deception, fraud, false pretense, false promise, and misrepresentation." Specifically, plaintiffs claim JONAH misrepresented that: (1) homosexuality is a mental illness or disorder, (2) JONAH could cure or treat the disorder within a specified time, (3) JONAH has a specific success rate, and (4) JONAH's program is capable of changing people from homosexual to heterosexual.



Bariso's ruling came days after a decision in which he barred six defense experts (which included a practicing psychiatrist, a licensed clinical professional counselor, a licensed psychologist and a Rabbi) from testifying at the upcoming trial because they based their opinion on the view that homosexuality is an illness and a disorder that can be cured, which Judge Bariso said was contrary to the overwhelming weight of scientific authority. Judge Bariso ruled that "the general consensus in the mental health field [is] that homosexuality is not a mental disorder but is instead a normal variation of human sexuality." Thus, "any representations made to the contrary would qualify as ... misrepresentations under the CFA [Consumer Fraud Act]." JONAH also attempted to rely upon information from the U.S. Centers for Disease Control about HIV and AIDS but Bariso noted that he had already determined such evidence was irrelevant in ruling on the experts because the case does not turn on any harms that might be caused by homosexual conduct.

Bariso acknowledged there were factual disputes about JONAH's success rate but held as a matter of law that it is a misrepresentation in violation of the CFA "to use specific success statistics in advertising and selling of services when client outcomes are not tracked and records are not maintained."