Hiring Practices, Do They Have A Case?

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Many employers are surprised to discover that specific Federal laws governing hiring practices focus on the criteria used by employers in selecting candidates to a greater extent than on who they actually hire or promote. Under federal law, an employer cannot base hiring decisions on personal characteristics that aren't job related, like age, race, sex, religion, national origin or disability. Therefore, in an interview, an employer cannot ask questions relating to any of these characteristics. Similarly, employers cannot ask if the candidate is married, is planning to get married, has children or is planning to have children. Likewise, an interviewer cannot inquire as to where the applicant was born, their sexual orientation or if the applicant has ever been arrested. However, some of these queries may be appropriate if they are "job-related." If the particular personal characteristic in question is relevant to performance on the job, then the question is permissible.

Such allowable questions may include:

- Have you ever been convicted of a crime?
- Can you prove that you are eligible to work in the U.S.?
- Do you have the right education, training, and skills?
- Can you satisfy the job's requirements or essential functions (describe them to the applicant).
- How much time off did you take in a previous job (but not why).
- Why did you leave a previous job?
- Where it seems likely that an applicant has a disability, you may ask whether the applicant will need an accommodation, and what kind of accommodation is necessary. This is an exception to the usual rule that such questions should come after making a conditional job offer.
- Can you do this job with or without reasonable accommodations?

Generally, an employer may:

- Explain what information the employer needs to know (e.g., the type of impairment, how the

impairment limits a major life activity, like sitting, standing, performing manual tasks, or sleeping);
• Request information about how an accommodation would enable the employee to perform job-related tasks, and
• Consider providing the candidate's health care professional with a description of the job's functions to increase the likelihood that accurate information will be provided at the outset.

Generally, an employer may not ask questions about an applicant's physical or mental impairment or how the applicant became disabled, an applicant's use of medication, or about an applicant's prior workers' compensation history. So if a candidate believes an employer discriminated in its hiring practices, what must the employee prove to succeed in a civil action? In a discrimination case, the employee must establish a "prima facie case"; that is a minimum set of facts to include in a court complaint which, if proven, will result in a successful claim. To be successful, the prospective employee ordinarily needs more than the minimum set of facts to establish the prima facie case. Rarely are the facts to support a discrimination claim clear and unambiguous. If the employer has stated a policy, for example, that the employer "will hire only females to be receptionists," the employee may have a clear cut case. However, this is rare because employers do not usually say such things verbally or in writing. Alternatively, the candidate can present "circumstantial evidence."

The U.S. Supreme Court has held that the plaintiff must show the candidate was a member of a protected class, applied for the job, and the job was open. The plaintiff must also prove that he or she had the minimum qualifications for the job, was not hired, and the job remained open, or a person of another race (or other characteristic) was hired. The attorneys at our firm have the experience to guide you through the intricacies of employment law. The best way to be proactive in these matters is to consult with an attorney early to understand the laws and regulations to avoid unnecessary litigation.