EMPLOYMENT LAW

Fifth Edition

Mark A. Rothstein
Charles B. Craver
Elinor P. Schroeder
Elaine W. Shoben
L. Camille Hébert

Hornbook Series

EMPLOYMENT LAW

Fifth Edition

Mark A. Rothstein
Herbert F. Boehl Chair of Law and Medicine
University of Louisville
General Editor

Charles B. Craver
Freda H. Alverson Professor of Law
George Washington University

Elinor P. Schroeder
Paul E. Wilson Professor of Law
University of Kansas

Elaine W. Shoben
Judge Jack and Lulu Lehman Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas

L. Camille Hébert
Carter C. Kissell Professor of Law
Michael E. Moritz College of Law
The Ohio State University

Abridged from Rothstein, Craver, Schroeder, Shoben, & Hébert, "Employment Law", Vols. 1 & 2, Practitioner Treatise Series (Thomson Reuters, 2014)

HORNBOOK SERIES®

WEST ACADEMIC PUBLISHING

444 Cedar Street, Suite 700
St. Paul, MN 55101
1-877-888-1330

Printed in the United States of America

ISBN: 978-1-63459-277-2

WEST ACADEMIC PUBLISHING'S LAW SCHOOL ADVISORY BOARD

Preface

Employment law is a dynamic and, at times, seemingly disconnected field of law. We have written this hornbook to provide law students with a conceptual framework and explanations of the legal doctrines involved in the field. Because employment law is the study of nonunion employment, the book does not discuss the law of unionization and collective bargaining under the National Labor Relations Act.

The book is organized chronologically. It proceeds through the employment relationship from formation, through terms and conditions of employment, to termination. This approach recognizes that a potential legal controversy at any stage of the employment relationship may simultaneously implicate numerous statutory and common law considerations.

Throughout the book, references have been kept to a minimum. Students interested in more detailed reference material, such as citations to every applicable federal or state statute or more expansive case citations, should consult our two volume work, Employment Law, in Thomson Reuters' Practitioner Treatise Series.

M.A.R.
C.B.C.
E.P.S.
E.W.S.
L.C.H.

October 2015

EMPLOYMENT LAW

Fifth Edition

Summary of Contents

Table of Contents

Chapter 1

ESTABLISHING THE EMPLOYMENT RELATIONSHIP

Analysis

§ 1.1 Introduction

As discussed in the Introduction, modern employment law has limited traditional employer prerogatives essentially in a negative way. Especially in the private, nonunion sector, in which employment is regulated by neither civil service laws nor collective bargaining agreements, the law has been more proscriptive than prescriptive—prohibiting employers from engaging in certain practices rather than requiring that they behave in certain ways.

The hiring process is an excellent illustration of this general principle. Employers have fairly wide discretion in adopting hiring practices they deem valuable to the enterprise. For example, they may use want ads, employment agencies, hiring halls, or any other method of developing a pool of applicants; they may use application forms, interviews, references, or other methods of soliciting information from or about the individual; they may check an individual's credit record or criminal record; they may require aptitude tests, physical ability tests, or drug tests. The employer's selection method will run afoul of the law only if it violates a specific legal proscription.

There are four main categories of legal doctrines regulating the hiring process. First, for public sector employees and some governmentally-regulated employees, constitutional protections apply. For example, Fourth Amendment principles apply to the drug testing of both public employees and private sector employees where the drug testing is government mandated. Second, federal statutes regulate various aspects of the hiring process. For example, the Employee Polygraph Protection Act prohibits most polygraph testing in the private sector. Third, state constitutional law and state and local statutes regulate the hiring process. For example, numerous states have laws prohibiting blacklisting and inquiring into an applicant's HIV status. Fourth, there may be common law, primarily tort, remedies available to applicants to redress defamation, invasion of privacy, intentional infliction of emotional distress, and other wrongs, as well as remedies available to third parties, such as for negligent hiring, to redress harms caused by the hiring process.

Although this chapter is concerned with the hiring process, a number of the cases cited in the chapter are actually discharge cases. This is because there are relatively few hiring cases brought by unsuccessful applicants for employment. One reason for this is that the law is less sympathetic to the claims of individuals who have been denied an opportunity to obtain employment as opposed to employees whose employment, perhaps after a long tenure, has been wrongfully ended. For example, there is a large body of case law on common law wrongful discharge actions in tort and contract, but there is little if any case law involving actions for wrongful refusal to hire. Second, unsuccessful job seekers are much less likely than discharged employees to file a lawsuit, because the loss to them is less tangible and other employment options are often being pursued concurrently. The other reason for including non-hiring cases in this chapter is simply that it is more efficient to discuss, for example, all of drug testing in one place.

Much of the controversy surrounding legal regulation of the hiring process has to do with the regulation of access to information. Although employers still may not be told whom to hire or how to hire, if employers are limited in the types of information available to use in deciding employability, then the hiring process can be regulated indirectly and, perhaps, less pervasively. At the same time, this type of regulation also furthers other interests, such as protecting privacy and confidentiality.

The final sections of this chapter deal with the contract and tort issues arising from hiring. They discuss the formation of employment contracts and their express and implied terms. They also focus on the determinants and significance of the employment relationship for tort purposes, including the vicarious liability of employers for torts committed by their employees within the scope of employment.

§ 1.2 Want Ads and Other Employer Solicitations

Section 704(b) of Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer, labor union, or employment agency to publish any notice or advertisement indicating any preference, limitation, specification, or discrimination in employment based on race, color, religion, sex, or national origin.[1] Most of the cases involving alleged violations of this provision have centered on gender-based preferences. According to Equal Employment Opportunity Commission (EEOC) guidelines, section 704(b) prohibits placing advertisements in gender-segregated newspaper columns.[2]

Although employers, unions, and employment agencies would violate Title VII by placing gender-segregated want ads, it was not clear from the statute and regulations whether newspapers could be held responsible under Title VII for running the discriminatory ads. Based on the legislative history of Title VII, the courts have been unanimous in holding that newspapers are not liable for these ads under Title VII. This reasoning undoubtedly would apply to websites that posted discriminatory want ads, but it is not clear whether they could be liable under state "aiding and abetting" laws, discussed below.

To bring an action under section 704(b), an individual must be aggrieved. In *Hailes v. United Air Lines*, the Fifth Circuit held that for purposes of section 704(b), an aggrieved person is someone who is "able to demonstrate that he has a real, present interest in the type of employment advertised [and is] able to show he was effectively deterred by the improper ad from applying for such employment."[3] In *Hailes*, the court held that the plaintiff had met this test because, even though he did not apply for United's "stewardess" position under a "help wanted-female" column, he had been rejected because of gender when he had answered a similar ad run by another airline.

Section 4(e) of the Age Discrimination in Employment Act (ADEA) contains a similar prohibition on age-based want ads.[4] Although want ads traditionally have not been segregated by age, they often have contained language indicating a preference for younger applicants. In *Hodgson v. Approved Personnel Service, Inc.*, the Fourth Circuit rejected the Department of Labor's guidelines, which indicated that certain "trigger" words, such as "young," "boy," and "recent college graduate," were per se illegal under the ADEA. Instead, the court held that the context must be considered. If the trigger words are used as part of a general invitation to prospective customers to use the employment agency's services, then they are not illegal; if they refer to qualifications for a specific job, then they are.[5]

---

1 42 U.S.C.A. § 2000e–3(b).

2 29 C.F.R. § 1604.5.

3 Hailes v. United Air Lines, 464 F.2d 1006, 1008 (5th Cir. 1972).

4 29 U.S.C.A. § 623(e).

5 Hodgson v. Approved Personnel Serv., Inc., 529 F.2d 760, 765 (4th Cir. 1975).