

## **Private School Employment Law**

### CONSISTENCY & UNIFORMITY IN EMPLOYMENT PRACTICES

#### **I. Hiring Practices**

##### **A. Job Description**

- Job descriptions should be established for each position stating, at a minimum, the minimum educational training, skill and experience required and the essential job duties. Required qualifications, as stated in job description, should be related to essential job duties. Careful attention must be given to preparation of job descriptions with expectation of being bound to follow by job description with regard to selection process and subsequent employment practices.
- A school employer may lawfully establish essential job qualifications that have the effect of excluding persons on the basis of sex if school is religious and position in question is "ministerial" or "ecclesiastical" and qualifications for the position are related to a religious purpose or mission. *Jocose v. Labor and Industrial Review Commission*, 538 N.W.2d 588 (Wis. App. 1995) (female found to be unqualified for position requiring experience as a priest).
- An employer may lawfully establish a job qualification or requirement based on gender if gender is a bona fide occupational qualification for the position. *Hernandez v. University of St. Thomas*, 793 F. Supp. 214 (D. Minn. 1992) (held it was lawful for a university to deny male custodian job in female dorm; sex found to be bona fide qualification in the interest of protecting students' legitimate privacy interest).
- Effective job description serve a number of positive functions for employer: 1. Supports and justifies job selection decisions; 2. Establishes what equivalent position would be for purposes of restoration following leave under Family Medical Leave Act; 3. Substantiates Americans With Disabilities Act (ADA) compliance; job description describing job functions is factor considered in determining whether a particular job function is essential. 29 C.F.R. § 1630.2(n).

##### **B. Posting/Advertisement**

Posting of job notice or advertisement of position includes nondiscrimination tag line conforming with federal and state requirements, including requirements for recipients of federal financial assistance.

##### **C. Selection Process and Procedures**

The process and procedures for selecting employees should be established before the job posting is ever made. Care must be taken to follow the process and procedures uniformly and consistently in all employment and hiring decisions. Some general guidelines to follow in the hiring process include:

- Treat all qualified applicants, both internal and external applicants, the same.
- Establish a diverse hiring/selection committee of three or so staff, including administrators, faculty or other appropriate staff of school, to review all resumes and applications submitted and interview applicants. Ensure that Committee member is knowledgeable concerning appropriate guidelines for hiring process.
- Interview questions should conform to the following guidelines:
  1. . Ask same lawful questions of all applicants; 2. Do not ask questions suggesting unlawful animus (e.g., questions relating to age, sex, pregnancy, disability or religion); 3. Comply with Title VII Guide to Pre-Employment Inquiries.

##### **D. Reference Checking**

Process and procedures for checking references should be established and followed for all applicants deemed to be qualified for further consideration.

##### **E. Disparate Impact Consideration**

Hiring manager should consider whether hiring process and procedures disproportionately exclude any protected group.

##### **F. Records Retention**

Hiring records should be retained for at least one year after a hiring decision is made or longer if required by state law or if school gets notice of charge of other discrimination or other investigation by a Federal, state or local agency.

## **II. Compensation**

- Under the Equal Pay Act, it is unlawful to pay different wages to employees based upon the sex of the employee for equal work on any job requiring equal skill, effort and responsibility and which is performed under similar working conditions. 29 U.S.C. § 206(d).
- In determining whether positions are comparable position for purposes of compensation, the following factors should be considered: 1. Do the positions being compared require essentially the same skill, effort and responsibility? 2. Do job descriptions for positions being compared state comparable required qualifications and job duties?
- Even religious schools are required to comply with Equal Pay Act.

## **III. Evaluation of Work Performance**

- The process and procedures for evaluation, including the evaluation instrument, should be uniform within each category of job or position and process and procedures should be followed uniformly.
- Performance criteria to be evaluated should be clear, verifiable and as objective as possible for all employees. Criteria should be communicated to employee.
- School administrators have wide latitude and discretion in establishing performance criteria provided that criteria are reasonably related to essential job functions and responsibilities.

*Kuhn v. Ball State University*, 78 F.3d 330 (7th Cir. 1996) (appellate court upheld private university's expectations of superior performance in determining whether assistant professor should be promoted). *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995) (held lawful to require black faculty member to complete advanced degree as condition of tenure even though white faculty without advanced degree was granted tenure where advanced degree was not explicit condition for tenure when white faculty member was hired).

*Schneider v. Northwestern University*, 925 F. Supp. 1346 (7th Cir. 1996) (in the absence of evidence contradicting university claim that quality of female faculty member's scholarship was not of sufficient merit to warrant tenure, no discrimination established).

- Evaluation of all employees by the various administrators, supervisors and managers should be overseen and monitored by a single manager or administrator to ensure school-wide consistency and fairness in evaluation of employees.

## **IV. Promotion and Advancement**

- School administration should establish clear, logical criteria for promotion and advancement and ensure that criteria are followed in making promotion and advancement decisions.
- Decision-maker has wide discretion in establishing criteria for promotion and advancement, provided that criteria are logically related to job functions for position.
- Opportunities for promotion and advancement must be available on non-discriminatory basis. Opportunities for mentoring, training and development, work-related travel, sabbaticals and the "high-profile" or highly valued work assignments should be accessible equally without regard to any unlawful factor.
- Criteria for promotion and advancement must be uniformly applied. *Nayar v. Howard University*, 881 F. Supp. 15 (D. DC 1995) (evidence of discrimination in denying plaintiff tenure where tenure

policy was not applied uniformly; tenure criteria were not adequately considered; tenure committee was not competent to judge professor's work).

## V. Discipline of Employees

- Discipline for employee misconduct must be handled consistently and without regard to an employee's age, sex, national origin, religion or any other protected factor.
- Exceptions in case of performance problems, including attendance problems, related to disability or absences covered by Family and Medical Leave Act leave.
- Disparate treatment of employees for misconduct not unlawful if decision maker not aware of misconduct of non-protected employee. *Friedel v. New York State Division of Human Rights*, 632 N.Y.S.2d (N.Y. 1995) (no liability for failure to discipline white employee for misconduct for which black employee was fired where decision maker/supervisor was ignorant of misconduct by a white employee).
- Where progressive discipline policies and procedures are in effect, ensure that such policies and procedures are followed in each case.
- Under certain circumstances, disciplinary action may be justified by reference to religious or ethical considerations. *Boyd v. Harding Academy of Memphis*, 887 F. Supp. 157 (W.D. Tenn. 1995) (lawful to discipline a female employee for sex outside marriage consistent with religious doctrine of church school where policy of disciplining employee for sex outside marriage was uniformly applied to both men and women whether or not pregnancy occurred; terminating employee for violation of religious tenets and school's policy was held legitimate and non-discriminatory reason for termination. *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991) (court upheld termination of teacher for marrying a divorced man in violation of church doctrine; church school was found to be exempt under § 702 of Title VII). *Vigars v. Valley Christian Center of Dublin, Cal.*, 805 F. Supp. 802 (N.D. Cal. 1992) (termination of teacher for becoming "pregnant out of wedlock" could constitute discrimination based on sex and pregnancy in violation of Title VII; therefore, plaintiff's action could proceed to jury; Court rejected school's argument that plaintiff's adulterous relationship, as evidenced by her subsequent pregnancy, was a legitimate "religious reason" for her termination.).
- A religious school may discriminate in its employment practices, including its disciplinary practices, on the basis of religion where the school is substantially "owned, supported, controlled or managed" by a religious organization or if the curriculum of the school "is directed toward the propagation of a particular religion." *Boyd v. Harding Academy of Memphis*, 887 F. Supp. 157 (W.D. Tenn. 1995) *Maguire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987) (religious school owned and operated by religious group found exempt from Title VII; therefore, no violation of Title VII in denying a promotion to female professor because of her liberal views on abortion; court held that First Amendment prohibited any court from considering plaintiff's claim since the university's interests and integrity of its Theology Department was overriding factor; court of appeals further found that plaintiff's Title VII claim failed as a matter of law because she would have been denied the promotion even if she were a man). *EEOC v. Kamehameha School/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993) (school's refusal to hire non-Protestant applicant for teaching position on the ground that school was religious organization and therefore exempt from Title VII by the religion exemption under Section 702 was rejected where curriculum was highly secular and mission of school did not include propagation of religious values. *EEOC v. Kamehameha School/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993).

As always, a school should consult its legal counsel as it designs and executes its employee practices and related documents.