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The GSH 60-Second Memo

July 14, 2010

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How to Deal with Common Interviewing Pitfalls

By Marcie B. Cornfield, Esq.

- *"I've never heard such a stupid question."*
- *"Can we wrap this up quickly? I have someplace to go."*
- *"My old boss didn't like me, so one day I just left and never came back. And here I am!"*

Last summer, [an Internet article](#) offered a list of forty-three odd and humorous remarks, including the three above, which were made by applicants in job interviews and gave pause to human resources. Some of the above-referenced remarks were noted as reasons why an applicant was rejected for employment, and indeed, such remarks indicate that an applicant may not be the best fit for your company. However, other types of statements, which may touch upon a protected classification, may be problematic if they are relied upon to bar an applicant from employment, regardless of whether the employer considers the statement "appropriate" for an interview:

"Can I get a tour of the breast pumping room? I heard you have a great one here, and while I don't plan on having children for at least 10 or 12 years, I will definitely breast-feed and would want to use that room."

This is an odd statement for someone to make during an interview by someone who is so far off in her plans to have children. That said, if a working mother were to ask a similar question and be refused employment on that basis, the EEOC may take issue. EEOC regulations clearly state that there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment. Accordingly, when statements such as this are made, interviewers should avoid following up with questions or remarks such as, "So you do plan on having a family one day?"

Furthermore, employers may want to consider discussing the company's approach to work-life balance concerns with all applicants rather than assuming only female applicants would be interested in work-life balance concerns.

"I am an alcoholic and do not deserve this job."

While it goes without saying that claiming that you do not deserve the job is not the best statement to make during an interview, alcoholism - and various other medical conditions - may be considered a disability under both the Americans with Disabilities Act and/or state law. It is important to proceed with caution when such medical conditions are disclosed during an interview. Do not refer to the condition as a "disability," as you do not want the applicant to be able to later argue that he or she was perceived as disabled. Further, while inquiring as to whether the individual will be able to perform the job's duties, avoid using heavy-laden legalistic terms, such as "essential functions" and "accommodate," unless the applicant is obviously disabled.

"When you do background checks on candidates, do things like public drunkenness arrests come up?"
"Can we meet next month? I am currently incarcerated."

The EEOC has made it clear that while no federal law prohibits an employer from asking about arrest and conviction records, using such records as an absolute bar to employment could have a disparate impact on some protected groups. In other words, the EEOC does monitor the use of background checks. However, the EEOC has stated that employers may consider the *conduct* underlying an arrest or conviction, rather than the arrest or conviction *per se*, when making employment decisions. When looking at the underlying conduct of an arrest or conviction, the EEOC recommends employers look at the nature and gravity of the offense or offenses, the time that has passed since the conviction, and the nature of the job held or sought.

Of course, state law may have more stringent prohibitions. In Wisconsin, for instance, if a job offer is rescinded after discovering a criminal conviction, the conviction must be "substantially related" to the position sought.

"If I get an offer, how long do I have before I have to take the drug test?"

Drug tests are an area of concern for the EEOC. The EEOC has made it clear that asking about current illegal drug use is not a disability-related question and that tests for the use of illegal drugs are not considered medical examinations. However, questions about *past* addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program *are* disability-related questions because past drug addiction generally is considered a disability by the EEOC. Accordingly, an applicant's questions about an employer's drug testing program(s) should be answered with a standard answer regarding the company's testing policies and procedures, and employers should avoid answering the

question with follow-up questions regarding the applicant's past drug use.

"I was fired from my last job because they were forcing me to attend anger management classes."

"I get angry easily and I went to jail for domestic violence. But I won't get mad at you."

Workplace violence is a serious concern and cannot be taken lightly. Employers are well aware that negligent hiring and negligent retention open a company to potential liability. Accordingly, statements such as these cannot be taken lightly. However, an employer may need to make a tough business decision when an employee admits to having a conviction record for domestic violence. Should an employer risk potential liability for discriminating on the basis of a conviction record or risk potential liability for a later act of workplace violence? This is a business decision every employer must weigh for itself. That said, employers should always be vigilant for warning signs of potential violent behavior. Hostile behavior or even the slightest indication of a tendency towards violence during an interview is ignored at your company's peril.

When asked about hobbies and interests, "[He said] 'Well, as you can see, I'm a young, virile man, and I'm single -- if you ladies know what I'm saying.' Then he looked at one of the fair-haired board members and said, 'I particularly like blondes.'"

Sexual harassment should be the first thought that crosses the interviewer's mind with this type of comment! Sexual harassment is a huge potential liability for employers, especially when hiring for a supervisory position where there may be a strict liability standard. Comments such as these should give an interviewer pause, if for no other reason that such behavior will most certainly impact employee morale.

With these pitfalls in mind, here are general tips for interviewing applicants to go along with [some advice we have offered in the past](#):

1. Document. Interviews and interviewing decisions should be documented. If these hiring decisions are later challenged, you will want to be able to establish a legitimate reason for the decision that was made.
2. Train hiring managers. Train your managers on appropriate hiring decisions and the best responses to some of the tough interview issues that could arise, such as disability-related inquiries.
3. Ensure that routine interviewing practices are implemented and followed. While interviews do not need to be cookie-cutter, with the exact same questions asked of all applicants, some standard practices should be implemented. For instance, if work-life balance issues are to be discussed with applicants, discuss them with all applicants, not just female

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applicants. And do not conduct background checks on some applicants without conducting them on all applicants.

4. Review hiring information. Your company may want to review the demographics on the applications received, on those who are interviewed, and on those who are hired to ensure that decision-makers are not pre-screening out qualified minority applicants. For instance, if you notice that 90 percent of the applicants are minorities, but only 10 percent of those interviewed are minorities, this may be an issue that needs to be addressed before a failure to hire claim is asserted.
5. Think about your company's needs and if the applicant will be a good fit for your company. It is not illegal to refuse to hire an applicant because of his or her personality or because you do not believe the individual is qualified. Consider the high costs associated with turnover and training new hires, and do not ignore your gut when making hiring decisions.

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