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FEBRUARY 10th - 12th, 2014

# POP CULTURE AND EMPLOYMENT LAW

Kylie Crawford TenBrook, Best Western International, Inc.

# KYLIE TENBROOK



- Kylie Crawford TenBrook serves as Corporate Counsel at Best Western International, Inc
- Arizona Employment Law Letter, entitled Blind Carbon Copy, in which she discusses the misdeeds of celebrities, politicians, and professional athletes, and the tenuous connection between those missteps and what she does for a living.

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# POP CULTURE AND EMPLOYMENT LAW

# BACKGROUND CHECKS

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# BACKGROUND CHECKS (CONT' D)

- Implicate discrimination laws
- EEOC Guidance:
  - Arrest, conviction, and credit records may have a disparate impact on certain protected classes.
  - Arrest records are never job-related and consistent with business necessity.
  - [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

# BACKGROUND CHECKS (CONT' D)

- **Background checks must be:**
  - **Job-related**
  - **Consistent with business necessity**
- **Consider:**
  - **Nature and gravity of the offense**
  - **Time passed since the offense**
  - **Nature of the job sought**

# BACKGROUND CHECKS (CONT' D)

- **EEOC wants you to conduct an individualized assessment for each person screened out by background checks, but stops short of requiring it.**
  - **Notice to the individual**
  - **Opportunity to demonstrate exclusion should not apply in applicant's circumstance**
  - **Consideration of the additional information by the employer**

# BACKGROUND CHECKS (CONT' D)

- **Some states limit how employers can use criminal history information and/or when they can check such history.**
- **Some states currently restrict employers' ability to request credit checks, subject to limited exceptions.**
- **Some states have their own versions of the Fair Credit Reporting Act.**
- **The laws of both the state in which the applicant resides and the state in which the applicant is applying must be followed.**



# DISCRIMINATION AGAINST THE SEXY

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Discrimination  
based on  
being  
“really, really,  
ridiculously  
good looking.”

# LOOKS DISCRIMINATION (CONT' D)

- **Sexual Harassment:**
  - Unwelcome conduct
  - Of a sexual nature
  - Severe or pervasive

# LOOKS DISCRIMINATION (CONT' D)

- Sex discrimination: Employee/Applicant treated differently than similarly situated employees based on sex.

# WEIGHT DISCRIMINATION

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# WEIGHT DISCRIMINATION (CONT' D)

- **Weight as a disability**
  - **Liberal definition of “disability” under the ADA Amendments**
  - **EEOC now arguing obesity is a disability**
  - **Contrary to previous EEOC guidance**
  - **Consider conditions accompanying obesity**

# WEIGHT DISCRIMINATION (CONT' D)

- **Ban discrimination based on weight and height:**
  - Michigan
  - San Francisco, CA
  - Santa Cruz, CA
  - Binghamton, New York
- **Ban discrimination based on personal or physical appearance:**
  - Madison, WI
  - Urbana, IL
  - Washington D.C.

# GENDER IDENTITY DISCRIMINATION

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# GENDER IDENTITY DISCRIMINATION (CONT' D)

- **Eleventh Circuit Court of Appeals:  
termination of public employee based on  
transition from male to female violates  
Equal Protection Clause**
  - **Court relied on a private employment case**
- ***Glenn v. Brumby*, 663 F.3d 1312 (11th  
Cir. 2011)**



# GENDER IDENTITY DISCRIMINATION (CONT' D)

## ■ EEOC' s Position

- Gender identity discrimination/stereotyping = sex discrimination under Title VII
- <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>
- Position is binding on all 53 field offices
- What will the courts say?

# GENDER IDENTITY DISCRIMINATION (CONT' D)

- **Laws prohibiting discrimination based on gender identity or expression:**
  - **17 states (CA, CO, CT, DE, HI, IL, IA, ME, MA, MN, NV, NJ, NM, OR, RI, VT, WA)**
  - **160 localities**

# WORKPLACE BULLIES

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# SUPERVISOR DISCRIMINATION/ HARASSMENT

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And because she is such a great source of employment law lessons...

# SUPERVISOR DISCRIMINATION/ HARASSMENT (CONT' D)

- **Alleged Harasser = Non-management**
  - **Employer will be liable only if it was aware of the harassment/discrimination and failed to take prompt remedial action**
- **Alleged Harasser = Management**
  - **In most jurisdictions, proof of harassment/discrimination creates liability for the employer, regardless of its actions**

# PAY CLASSIFICATION: EXEMPT V. NON-EXEMPT

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# PAY CLASSIFICATION (CONT' D)

## Exempt

- Meets the requirements of an exempt classification
- Paid on a salary basis
- Same salary for all hours in a workweek
- Not entitled to overtime

## Non-Exempt

- Anyone who is not exempt
- Typically paid on an hourly basis
- Pay will fluctuate based on the number of hours worked
- Must be paid overtime for hours over 40 worked in a week

# PAY CLASSIFICATION (CONT' D)

- **Executive Exemption**
  - **≥\$455/week on a salary basis**
  - **Primary duty of management**
  - **Customarily and regularly directs work of at least 2 other employees**
  - **Has the authority to hire or fire, or suggestions must be given particular weight**



# PAY CLASSIFICATION (CONT' D)

## ■ Professional Exemption

- $\geq \$455$ /week on a salary basis
- **Learned Professionals:** Primary duty of performing work requiring advanced knowledge in a field of science or learning acquired by prolonged specialized instruction
- **Creative Professionals:** Primary duty of performing work requiring invention, imagination, or talent in field of artistic endeavor

# PAY CLASSIFICATION (CONT' D)

## ■ Administrative Exemption

- Ugh.
- $\geq \$455$ /week on a salary basis
- Primary duty of performing office or non-manual work directly related to the management or general business operations of employer or its customers
- Primary duty must include the exercise of discretion and independent judgment with respect to matters of significance

# “INTERNS”

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# INTERNS (CONT' D)

- **To be unpaid, an internship must:**
  - **Be similar to training given in an educational environment;**
  - **Be for the benefit of the intern;**
  - **Not displace regular employees;**
  - **Provide no benefit to the employer;**
  - **Not entitle the intern to a job at the conclusion; AND**
  - **Be clear that intern is not entitled to wages.**

# SOCIAL MEDIA



**Justine Sacco**

@JustineSacco



Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!

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RETWEETS

**1,469**  
FAVORITES



W



10:19 AM - 20 Dec 13

# SOCIAL MEDIA (CONT' D)

- **Section 7 of National Labor Relations Act**
  - Unionized AND Non-Unionized workforces
  - Right to engage in concerted activities for collective bargaining or other mutual aid or protection
  - Employees can't be disciplined for discussing wages, hours, or other "terms and conditions of employment"
  - *Hispanics United of Buffalo, 359 NLRB No. 37*
  - *American Medical Response*

# SOCIAL MEDIA (CONT' D)

- **Should I have a social media policy?**
- **Consider:**
  - **NLRB scrutiny**
  - **Your other policies**
  - **Common sense**

# EMPLOYEE CONTRACTS

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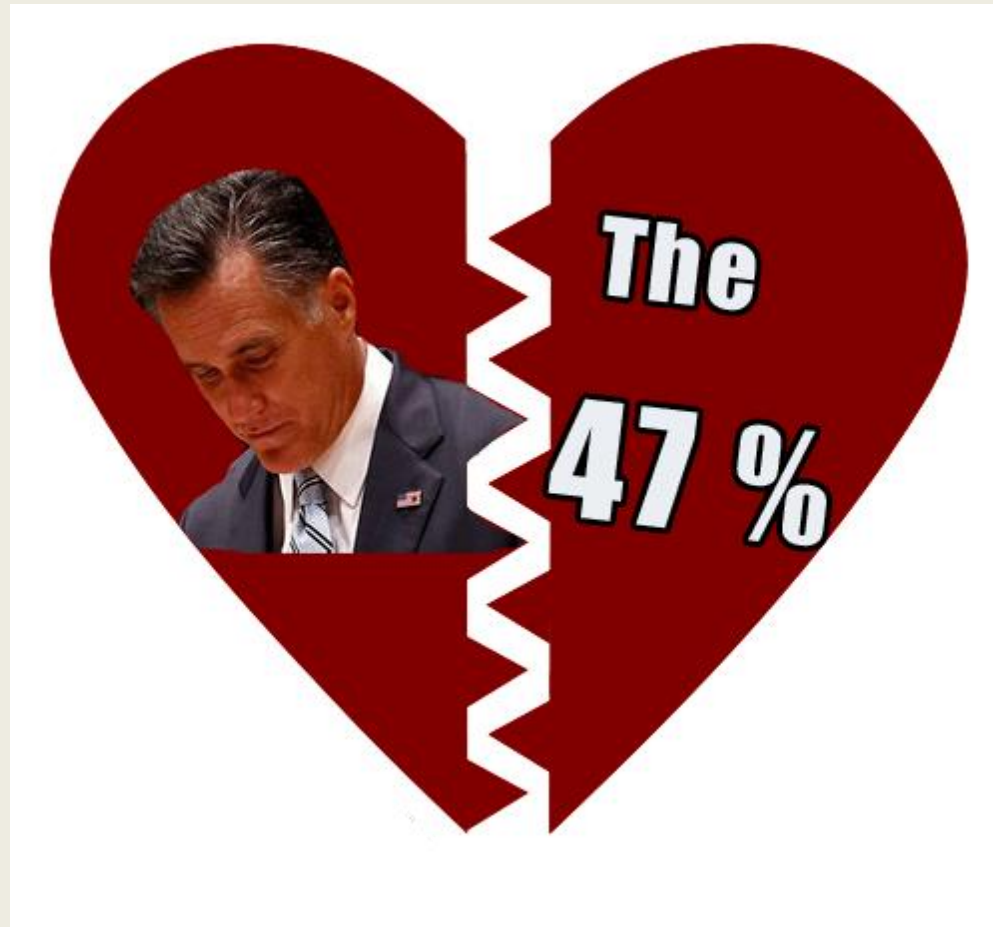




# EMPLOYEE CONTRACTS

- **Most states are at-will (watch out for Montana!)**
- **Before taking action against an employee, consider whether there is a contract with the employee or whether you have unwittingly created one.**

# RECORDING CONVERSATIONS



# RECORDING CONVERSATIONS (CONT' D)

- **One-Party Consent State**
  - Only one party must consent
  - This could be the person recording
- **Two-Party Consent State**
  - All parties must consent

# RECORDING CONVERSATIONS (CONT' D)

- **Other Considerations**
  - **Privacy Claims**
  - **Wiretapping Laws**
  - **Big powerful employer v. weak helpless employee**

# Questions?