

# GARDNER, WILLIS, SWEAT & GOLDSMITH, LLP

## Employment Law Update

NOVEMBER 2005

### Common Misconceptions Under the ADA

The Americans with Disabilities Act (“ADA”) prohibits covered employers from discriminating against people with disabilities in all employment-related activities. Often, employers misinterpret the ADA as offering broader protections to disabled persons than what is mandated by the ADA. Below are some of the myths that have arisen out of those misconceptions and an explanation as to how they are flawed.

**Myth:** The ADA forces employers to hire unqualified individuals.

**Fact:** An applicant who is unqualified for a job cannot claim discrimination under the ADA, even if he or she is disabled. To be protected by the ADA, an applicant must be able to perform the essential functions of the job in question, with reasonable accommodations.

**Myth:** If an employer has several qualified applicants, one of whom is disabled, the employer must hire the disabled applicant.

**Fact:** An employer is always free to hire the applicant of its choosing as long as the decision not to hire is not based on the fact that one of the applicants is disabled. For example, if two people apply for a data entry job, and one of them is disabled, but the other types faster, the employer may hire the applicant who types faster on the grounds that he or she is better qualified.

**Myth:** The ADA protects employees who are troublemakers because it prevents employers from being able to discharge such persons if they are disabled.

**Fact:** Improper behavior is not a disability in and of itself, nor does having a disability excuse employees from following the same standards of conduct required of all employees. Courts have consistently ruled that “common sense” conduct standards, such as getting along with co-workers and listening to supervisors, are legitimate job requirements that employers can enforce equally among all employees.

**Myth:** Under the ADA, an employer cannot fire an employee who has a disability.

**Fact:** An employer can terminate an employee who has a disability if (1) the termination is unrelated to the disability; (2) the employee cannot perform the essential functions of the job with reasonable accommodations; or (3) the employee poses a direct threat to the health or safety of the workplace due to his or her disability.

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Gardner, Willis, Sweat & Goldsmith, LLP hopes you find the information in this newsletter helpful. This information is intended to be general in nature and is not a substitute for competent legal advice. Because every employment law issue is unique, we do not recommend that you apply the information in this newsletter without first seeking appropriate legal advice.

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## Church Avoids Negligent Hiring Claim Arising out of Minister's Affair

In recent years, courts have seen an increase in the number of negligent hiring claims filed. For example, in Poole v. North Ga. Conference of the Methodist Church Inc., 273 Ga. App. 536, 615 S.E.2d 604 (2005), Poole sued his church for negligent hiring of the church minister who, while providing marriage counseling to Poole, was also having a clandestine affair with Poole's wife.

The Georgia Court of Appeals noted that "an employer may be liable for hiring or retaining an employee that the employer knows or in the course of ordinary care should have known was not suited for the particular employment. When an incompetent employee is hired for a particular position, it is reasonably foreseeable that such employee may injure others in the negligent performance of the duties of that position, and accordingly, an employer may be held liable for injuries caused by the negligent performance of the incompetent employee where evidence shows the employer knew or should have discovered that incompetency."

With regard to the specific claim against the minister in this case, the evidence showed that the church was not aware that the

minister had a history of misconduct at his prior churches. Representatives personally interviewed the minister and required him to undergo a psychological evaluation, which was generally positive.

Poole contended that the church should have interviewed some of the minister's former employers because it would have discovered that the minister allegedly sexually assaulted a young man, tried to date a woman while he was married, and was accused of improperly touching another parishioner. However, the Court of Appeals found that even if the church had performed a background check with interviews of the minister's former employers, it would not have necessarily been placed on notice that it was reasonably foreseeable from the minister's

prior tendencies or propensities that he could cause the type of harm sustained by Poole. Poole's alleged harm arose out of the betrayal of their *counseling relationship*, but there was no evidence of a betrayal of that nature by the minister while working with a prior employer. Thus, the Court found there was no genuine issue of material fact on the negligent hiring claim and granted summary judgment in favor of the church.

Although the church in this case escaped liability, it probably could have avoided the entire litigation if it had conducted a thorough background check before hiring the minister. Employers should

**Employers should consider requiring standard background checks for employees since both the courts and the public have placed increased emphasis on employer awareness of potential dangers caused by their employees.**

consider requiring standard background checks for employees since both the courts and the public have placed increased emphasis on employer awareness of potential dangers caused by their employees.

If you need assistance in preparing a background check policy or in determining the proper procedure for conducting background checks, please contact us for additional guidance.

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## Practice Tips for Performing Employee Evaluations

Performance evaluations are helpful for several reasons. They provide an objective manner in which employers may determine whether an employee needs improvement and to what extent an employee's efforts should be rewarded by an increase in compensation. The following is a list of practical tips to follow when performing performance evaluations:

1. Be certain the evaluation is based on job related criteria.
2. Determine whether the evaluation should be performed by or based on information from more than one member of management to ensure objective analysis.

3. Do not be tempted to simply reiterate a previous evaluation, regardless of whether it was negative or positive. Each year should be judged on its own merit.
4. When possible, have another member of management review the written evaluation before it is adopted or provided to the employee.
5. Adopt clear, measurable standards as to how all managers are to judge employees to ensure a more consistent rating of all employees.
6. Do not be lenient with employees merely because you want to avoid a confrontation regarding a poor evaluation or because you are afraid to hurt the employee's feelings.
7. Base the evaluation on accurate data contained in the employee's personnel file, which requires year-round, consistent documentation of the employee's performance.

### **FMLA FACT**

**Employees are not eligible for FMLA leave unless they have worked for the employer for at least 12 months and have worked at least 1250 hours during the 12 months preceding the leave.**

# Preparing Sexual Harassment Policies

The first step in preventing sexual harassment claims is to develop a clear and comprehensive policy against harassment. The policy should include the following points:

- A strongly worded statement prohibiting harassment in the workplace;
- A clear definition of harassment, preferably with examples;
- An identification of individuals covered by the policy;
- An identification of individuals to whom complaints can be made. The employee should be given several alternatives since requiring an employee to address all complaints to his or her supervisor will hardly be satisfactory if the supervisor is engaging in harassment;
- A requirement that employees and supervisors report any harassment they experience or observe;
- An explanation of procedures that apply in the event of a complaint, such as a commitment that there will not be any retaliation and that, to the extent possible, confidentiality will be maintained; and
- A statement of disciplinary consequences.

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