Is Your Non-Profit's Anti-Nepotism Policy Inherently Discriminatory?

BY JOHN P. HAGAN, ESQ.

The *Multi Community Diversified Services* (MCDS) is a nonprofit corporation with a mission to assist disabled persons. Barry Adamson and his wife Patricia, both of whom would eventually sue MCDS, served on its Board of Directors.

Barry, age 56, also served as MCDS' Chief Executive Officer. **As CEO, he decided to incorporate the organization's subsidiary,** Cartridge King of Kansas, Inc. (CKK), into a separate entity. **He then hired his wife and daughter Jessica, as CKK's business manager and sales representative,** respectively.

The CEO Violates Your Anti-Nepotism Policy – What Do You Do?

As a result of these moves, Barry directly supervised his wife and daughter, even though MCDS employed the following anti-nepotism policy:

> We have no general prohibition against hiring relatives. However, a few restrictions have been established to help prevent problems of safety, security, supervision and morale.
>
> We will accept and consider applications for employment from relatives of current employees. Parents, grandparents, children, spouses, brothers, sisters, or in-laws will, generally, not be hired or transferred into positions where they directly supervise or are supervised by another close family member . . .

According to Barry, the rest of the Board approved hiring Patricia, knowing she was his wife, and knowing that he would be supervising her. Jessica's position did not require Board approval.

Let Your Board Know, Of Course!

Nevertheless, shortly after Barry made these moves, the Board fired all three Adamsons -- Barry, Patricia and Jessica. Reasons were that Barry's "unilateral management style" and actions with respect to CKK, and in particular **money transfers from MCDS to CKK, had raised eyebrows and alienated employees,** and that the Board was concerned the family's employment relationships were ill-advised and violated the non-profit's anti-nepotism policy. One Board member expressed concern that Barry would **exert "undue influence"** over Patricia and Jessica, after Barry mentioned that he was thinking about retiring some time in the future.

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The Board replaced Adamson with CFO Sherry Plenert, a long-term female employee who was 63.

And Then You Wait For The Lawsuit to Come . . .

Barry, Patricia and Jessica filed suit, claiming their terminations pursuant to the anti-nepotism policy constituted unlawful gender discrimination against

them as "husband, wife and daughter" in violation of Title VII of the Civil Rights Act ("Title VII"). The Adamsons noted that MCDS did not terminate father-son and mother-daughter duos who worked there, and contended that MCDS' anti-nepotism concerns were but pretexts for age and gender discrimination.

pretexts for age and gender discrimination?

Barry also claimed his termination was the result of age discrimination in violation of the Age Discrimination in Employment Act (the "ADEA"), even though MCDS replaced him with a 63-year old who was seven years older! Barry also denied any wrongdoing related to CKK and claimed his comment about retiring sometime in the "near future" to a Board member gave rise to age discrimination.

Not So Fast, Mr. CEO, So Says the Court!

MCDS denied all of these allegations and moved for summary judgment. The federal court agreed with MCDS and threw out all of the Adamsons' claims. **The Adamsons appealed, but lost on February 1, 2008.** HERE'S WHY:

> **Plaintiffs like the Adamsons prove discrimination with either direct or circumstantial evidence. Direct evidence is the typical "smoking gun," demonstrating on its face that the employment termination was discriminatory. Circumstantial evidence permits the jury to draw a reasonable conclusion from facts indirectly related to discrimination that discrimination, in fact, occurred.**
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> **Here, there was no smoking gun of age or sex discrimination, so the Adamsons had to prove their case based on circumstantial evidence alone.**

Where's the AGE Discrimination?

In circumstantial evidence age discrimination cases, employees such as Barry usually have to **prove among other things that his employer replaced him with a younger person,** although not necessarily one less than 40 years of age. Obviously, the 56 year old Barry could not do that here, since MCDS replaced him with a 63-year old.

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However, the law gives employees, like Barry, another option. The law says that while replacement by an older employee does not per se doom an age discrimination case, the employee must present some other evidence that reveals that he was fired because of his age.

For example, **if an employee can show that he was fired because he was close to receiving retirement benefits, then he may be able to prove that age was one of the reasons his employer decided to fire him.** As we all know, those employee most likely to be closer to retirement are those 40 years old and older, which is exactly the age range protected under the ADEA. And, of course, if an employee's age is even part of the reason why the employer fired the employee, then the employer has discriminated against the employee in violation of the ADEA.

Barry's age discrimination claim focused on his comment to a Board member regarding his plans to retire "sometime in the future." **Barry claimed that the Board fired him at least in part to avoid paying him retirement benefits, knowing that he would retire soon.**

The appeals court did not buy Barry's argument, because it found that his comment about retiring "sometime in the future" was too indefinite. Barry's comment could have meant that he was retiring in six weeks, six months or six years. Thus, there was no motivation for MCDS to fire him at that point in time.

If Barry would have said that he was definitely going to retire in six weeks or six months, then his age discrimination claim probably would not have been tossed out on summary judgment. But, because he was indefinite about retirement, his comment could not overcome the fact that MCDS replaced him with a woman who at age 63 was herself only two years away from retirement.

Where's the SEX Discrimination?

The Adamsons' sex discrimination claims were two-fold. First, they claimed that, because their terminations were made based on their individual status as "husband, wife and daughter," which they contended was inherently sex-based, they were discriminated against because of their sex. Second, they claimed that a Board member's stated concern that Barry would exert "undue influence" over his wife and daughter was direct evidence of sex-based discrimination -- against Barry as a man who ostensibly would unduly influence women, and against Patricia and Jessica as women who would be so influenced.

The court took note that it was quite peculiar for a husband and wife to be arguing simultaneously that MCDS was both anti-male on the one hand and anti-female on the other.

Nevertheless, the appeals court rejected both arguments. Regarding the first, it categorized it not as sex discrimination, but as "familial status" discrimination, which is not protected from discrimination under Title VII. "Familial status" is not a classification based on sex any more than is being a "sibling" or "relative." It is, by definition, gender neutral. The use of gender to parse those classifications into subcategories of "husbands, wives and daughters" is a social and linguistic convention that neither alters this fact nor elevates those subcategories to protected status.

"familial status" is not a classification based on sex

Consequently, Barry's claim that MCDS terminated him in violation of Title VII based on his status as Patricia's "husband" (and Jessica's "father"), and Patricia and Jessica's claims that they were terminated by virtue of being Barry's "wife" and "daughter," respectively, fell outside the protection of Title VII. In a word, Barry, Patricia and Jessica were complaining about conduct that was not against the law, and therefore, the court told them to go away because there was nothing it could do for them.

What this also meant was that MCDS' anti-nepotism policies (and all other similar nepotism policies) are not inherently discriminatory. Because discriminating against an employee as "husband" or "wife" or "mother" or "father" is not protected under Title VII, evidence of such discrimination in an anti-nepotism policy is simply not against the law.

Regarding the Adamsons' second sex discrimination argument, statements that Barry might "exert undue influence" over his wife and daughter were not "direct evidence" of discriminatory intent because they were not linked, in any direct manner, to the characteristic upon which any actionable sex-based claim would be based, i.e., Barry's gender.

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They were, if anything, tied to Adamson's "familial status" and assumed supervisory role over his wife and daughter, neither of which implicated Title VII's prohibitions. To the extent Barry relied on this statement as evidence of MCDS' bias against men, that was circumstantial evidence that did not, without additional "background circumstances," give rise to any inference of discrimination. To the contrary, it suggested only that Barry, an at-will employee who was terminated from his job, happened to be a man. Barry's sex discrimination claim therefore failed as a matter of law, without ever having to send the issue to a jury.

The only evidence offered by Patricia and Jessica to establish discrimination was the "undue influence" remark and the fact MCDS did not apply the anti-nepotism policy to fire a father and son also working for the company. For two reasons, the court did not buy the "undue influence" argument. First, it noted that the remark was gender-neutral on its face. Second, it was an isolated and ambiguous comment, which is generally considered too abstract to support an inference of discrimination.

it was an isolated and ambiguous comment

Finally, Patricia and Jessica's evidence of inconsistencies in MCDS' application of the anti-nepotism policy did not help their case, either. The fact that MCDS did not apply it against a mother-daughter duo, in addition to a father-son duo, provided no basis to argue that the policy was discriminatory toward women.

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