Global Trends in Discrimination, Harassment and Equal Opportunity Laws

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US vs. ex-US Discrimination/Human Rights Law: Differing Historical/Legal Contexts

• The unique US legacy of slavery/racial discrimination/civil rights and the historical importance of immigration

• Employment at will vs. civil law termination for cause with substantial remedies for unfair dismissal

• Litigation process: US civil procedure permitting “notice pleading” and broad discovery vs. civil law emphasis on documentary evidence and limited pretrial proceedings
Sources of US Discrimination Law

- Federal statutes
  - Title VII of the Civil Rights Act of 1964 (race, color, national origin, religion, pregnancy, gender)
  - Age Discrimination in Employment Act (age)
  - Americans with Disabilities Act (disability)
Sources of US Discrimination Law (cont’d)

• State statutes and local ordinances
  – Applicable only within territory of state or municipality
  – Frequently add protected classes such as sexual orientation, gender identity, and marital status
  – In some states (e.g. New Jersey, California) there are no limits on damages
  – Depending on the jurisdiction, state law may be the preferred route for employee claimants
Sources of EU Discrimination Law

- EU Directives
  - Directive on Race (2000/43/EC) (race, ethnic origin)
  - Directive on Equal Treatment in Employment and Occupation (2000/78/EC) (religion, disability, age, sexual orientation)
Sources of Ex-US Discrimination Law

• National Laws
  – Often add protected categories (e.g. in France, marital status, nationality, genetic characteristics, political opinions, trade union activities, physical appearance, family name, and medical condition)
  – Some countries impose criminal fines on individual or corporate entity
  – Limited damages recoverable (but no limit in UK)
Common Elements of US and Ex-US (particularly EU) Approaches

- Disparate treatment/impact parallel to direct/indirect discrimination
- Hostile environment harassment
- Affirmative action to compensate for legacy racial/ethnic disadvantage
- Protection against retaliation ("victimisation")
- Shifting burden of proof to employer
- National level equal treatment agencies
Distinctions in US and Ex-US Approaches

• Discrimination is far more common claim in the US
• Damages far greater and less predictable in US
• Criminal penalties in some countries
• Many countries have more nuanced view of age discrimination
• Differences in process: extensive administrative proceedings and litigation in US with extensive disruption to lives of managers; more prescriptive solutions (e.g. quotas) outside US
Recent Trends to Watch

- Gender discrimination taking on much greater visibility:
  - Gender quotas in corporate governance (e.g. Germany, France, Norway)
  - New measures against sexual harassment (e.g. India, Hong Kong, Japan, Singapore, South Korea)
  - Expansion of family/maternity/paternity leave
  - Pay equity initiatives (e.g. UK)
India’s Sexual Harassment Law

- Passed in 2013 in the wake of several highly-publicized incidents of violence and sexual offenses against women
- Broad definitions of unacceptable conduct
- Potential claimants include contractors, volunteers, trainees, whether regular or temporary, in addition to employees. Workplace includes not only usual place of employment but any place visited by employee or means of transportation provided by employer
- Any employer with more than 10 employees must set up Internal Committee to investigate harassment allegations, comprised of
  - Presiding Officer who is a woman employed at senior level
  - At least 2 members committed to cause of women or who have relevant experience in social work or law
  - One member from an NGO or association committed to the interests of women or sexual harassment issues
Other Recent Global Trends

• Religious discrimination and accommodation issues (e.g. Muslim headscarves)
• Expansion of, but also increasing polarization concerning, LGBT rights
• Delay of pension eligibility, and curtailment of notice/severance entitlements
• Expansion of protections for the disabled through quotas, social agreements, and litigation (e.g. 2014 ECJ decision on obesity as a potential disability)
• Continued efforts to expand “mobbing” or “bullying” as a concept to address harassment
Best Practices to Avoid Discrimination

Claims are Universal

• Strong Codes of Conduct/Policies/Work Rules
• Enforcement at all levels
• Training, where appropriate
• Timely and Thorough Investigation of Claims
• Consistent and Well-Documented Performance Management and Discipline
Hypothetical #1

You are the chief labor/employment counsel for your US-based multinational Company and part of the team responsible for preparing a global Code of Conduct. Up to now, there has been a robust and detailed US Code of Conduct, with a variety of local policies, handbooks, and work rules governing the ex-US operations. The team’s mandate is to use the US Code as a model and develop a template that can be translated for use throughout the world without local adaptation; strictly local issues such as work hours, vacations/leaves, organizational structure, expense reporting, and the like will be dealt with through local supplements or work rules.
Hypothetical #1 (cont’d)

The Company is particularly proud of the section of the Code relating to “Our Colleagues”, which contains a number of important provisions:

- “Our policies prohibiting discrimination, harassment and retaliation are global policies intended to create a workplace that promotes a positive and productive environment.”
- “We treat applicants and employees without regard to personal characteristics such as race, color, ethnicity, ancestry, religion, sex, sexual orientation, age, gender identity or gender expression, national origin, marital status, pregnancy, childbirth or related medical condition, genetic information, military service, medical condition, mental or physical disability, or veteran status. “
- “Unless otherwise agreed upon in writing, each Company employee is employed on an at-will basis. At-will employment means that employment is not guaranteed for any specific amount of time, and the Company retains the right to terminate an individual’s employment at any time, with or without cause or notice.”
- “Retaliation against any colleague who in good faith seeks advice, raises a concern, reports misconduct or provides information in an investigation is strictly prohibited. If any individual retaliates against a colleague who has truthfully and in good faith reported a potential violation, the Company will take appropriate action up to and including termination, even if no violation is revealed upon investigation.”
Hypothetical #1 (cont’d)

The team begins its work by sending out the US template to senior HR and operating executives outside the US for comment.

The team receives back the following comments:

• The VP of HR for Europe observes that “Clearly the team does not understand employment law in European countries. We routinely, and in many instances are required to, take account of age, marital status, family status, military service and disability when we carry out collective dismissals. We also have mandatory retirement ages in a number of our countries, and quotas for hiring applicants with disabilities.”

• An anonymous commenter states that “In my country we have a protection against discrimination based on the employee’s political belief or activity. Why does the Company not have this protection in its global code? I also don’t see any protection against bullying or mobbing.”
Hypothetical #1 (cont’d)

- An executive responsible for the Middle East and Africa asks “Are you aware that many countries in my region make homosexual activity a crime, and some can even impose the death penalty? Are you saying that we must employ people engaged in crimes as defined by the local law?”
- A Latin American executive comments that “We want to make it clear that US standards for things like sexual harassment won’t be forced on the rest of the world. We don’t think there is anything wrong with hugging or kissing someone you haven’t seen in a while.”
- A French executive comments that “We don’t like the provisions on retaliation. You don’t understand that employees reporting on employees echoes back to the Nazi era for people in Europe. If anything, we should be punishing people for informing, not protecting them. In any event, retaliation may not be sufficient basis for termination in our country.”
- An anonymous commenter asks “If the Company is really interested in diversity, why doesn’t it adopt a quota for women’s participation in supervisory and managing boards of directors, as many countries are now requiring?”

How will you advise the team with respect to each of these comments?
Hypothetical #2

You are the chief labor/employment counsel for your US-based global Company with responsibility for worldwide labor and employment matters. Last year, you worked with external counsel in India to update the Company’s sexual harassment policy to comply with India’s new, strict law (“Policy”) but have had no issues to date. The head of human resources for India calls you for advice on how to handle the following situation: a woman who is working for the company as a contractor through an outside agency for about a year (“complainant”) has approached a female member of the HR team to report that a Company employee has sexually harassed her. The alleged harasser (“respondent”) holds a more senior position and has been with the Company for ten years. The complainant wants to keep the matter confidential, but wanted HR to know. The two work in the same department, in close proximity to one another.
Hypothetical #2 (cont’d)

• Do you advise the team to immediately activate the investigation procedures under the Policy?

• Do you report the matter to the agency the complainant works for?

• Do you advise that any interim measures be taken at this point?
Hypothetical #2 (cont’d)

• With the Policy activated, you need to set up the three member investigative panel (“Panel”) and have the panel begin the investigative procedures.

• One member has to be from outside the Company and committed to the interests of women or sexual harassment issues
  – Can you choose a member of your outside law firm?
  – If you do, can that law firm also provide you with advice on the matter?
Hypothetical #2 (cont’d)

• Should the Panel record its proceedings?
• The complainant says she wants her husband to attend with her—can he?
• Is the Company obligated to provide the Panel with Company e-mails, IMs, video surveillance and other information related to the matter?
  – Are there data privacy concerns?
• During the course of the investigation, the complainant adds an allegation of rape to the proceedings.
  – What do you do?
Hypothetical #2 (cont’d)

The Panel issues its report, concludes that the complainants allegations are not supported, and that she made false allegations, and recommends termination of the complainant. You do not agree with the investigative report’s conclusions.
Hypothetical #2 (cont’d)

• What recourse does the Company have?
• What should the Company do?
• The Complainant receives a copy of the final report, and sends an email to the CEO, COO, CFO, General Counsel, CHRO and Head of India to complain about her treatment.
• What steps do you take now?
Hypothetical #3

Helen is a Vice President of Marketing in her late 40’s, well-respected for her achievements in the US headquarters of your Company. At her request, she was given an ex-pat assignment one year ago at the Paris regional office headquarters reporting to the President, EMEA. Without knowledge of US Human Resources, the President, EMEA commissioned a 360 review of all his direct reports, all of whom are European males except for Helen. As part of the review, managers, peers, and subordinates provided unfiltered comments to a consultant, who then synthesized them and provided them to the President, who met with each of his direct reports together with his local HR Director to provide the 360 feedback. The comments relating to Helen were positive on her skills and work ethic, but negative on social skills and personal interaction. Some felt that Helen was too “shrill” and “aggressive” in managing conflict with her peers, while in contrast others noted that she was “too passive” in meetings. One of the European Managing Directors stated that she need to “loosen up” socially. The President, EMEA informed Helen that, as much as he respected her abilities, he wondered if this position was the “right fit” for her particular skills.
Hypothetical #3 (cont’d)

Upon receiving this feedback, Helen wrote a letter to the Senior VP Human Resources in the US, with copies to the COO and CEO of the Company, complaining that her evaluation was based on gender stereotyping by an almost entirely male organization and requesting immediate intervention to ensure that her performance would be judged fairly.

At the same time, after the 360 review the President, EMEA informed his HR Director that he would make a number of changes to his organization, including the replacement of Helen with a European marketing executive more “in tune” with the regional market and with a “longer runway” in a career with the Company. Helen’s former position in the US has been filled and there is no comparable position open in the US or elsewhere for which she would be qualified.
Hypothetical #3 (cont’d)

You are the chief labor/employment lawyer for the Company, and have been asked for advice by the Senior VP Human Resources on the following issues:

• What law applies to this situation?
• If we can’t find a position for Helen, what should you do and what types of claims could she bring?
• Do we need to investigate the conduct of the President, EMEA and, if so, what would be the plan of investigation?
• If we take disciplinary action against the President, EMEA, what types of claims might he bring against the Company?
Questions?
Thank you!