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Employment-at-Will in the United States and the Challenges of Remote Work in the Time of COVID-19

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Abstract: How should employers and employees negotiate the strange and unexpected issues that COVID-19 has forced us to confront in the past two years? Remote work, in particular, has dramatically changed the dynamic of many people's jobs, often altering the tasks and boundaries of employment, blurring the lines between work and home, public and private. U.S. employment law, and particularly the powerful employment-at-will doctrine, sets a clear standard but can sometimes be a blunt instrument. Is there any nuance to be found, or to be desired, from employers in these unprecedented times of COVID-19? We will discuss the doctrine of employment-at-will, the standard it creates for American employment, and the various exceptions to it that have arisen over the past several decades. We will then examine a couple of hypothetical workplace scenarios that could arise in a work-from-home environment, discuss how current law would address them, and whether the letter of the law is the best source of guidance in these matters. We will further discuss the challenges faced by many companies as they attempt to deal with these abrupt changes to their working environments. What are the effects, if any, on long-standing employment traditions and practices? What are the legal issues that may arise from them?

Keywords: employment-at-will; privacy and security; remote work; COVID-19

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1. Introduction

With the advent of the COVID-19 pandemic in early 2020, many workplaces have shifted from in-person to work-from-home models. Meetings and other types of inter-office communication are now frequently held over Zoom or other video-chat applications, giving employers, managers, and coworkers an often-intimate peek into employees' and coworkers' homes and personal lives. Video conferences can now be interrupted by children, spouses, roommates, or pets (Vozza 2021). Overextended parents who are simultaneously working and facilitating their children's remote schooling may not be as attentive to their dress or grooming as they were when they worked in the office. Employees' living arrangements and décor are now routinely on display for the curiosity or judgment of others (Schwedel 2020). Some employees, perhaps due to the familiarity and intimacy of their surroundings or feelings of impunity that may derive from remoteness (Diaz and Paybarah 2020), may engage in unprofessional or even vulgar behavior that is visible to their coworkers.

In typical twenty-first century workplaces, there are generally accepted standards for things like behavior and appearance. They may vary somewhat, depending on the type of work being done or the culture of the industry or company, but workers are expected to adhere to the norms of their workplaces. When the entire working environment is so abruptly changed, however, there can be legitimate questions about which norms should continue to be followed and which can be at least temporarily abandoned in the name of convenience, expediency, or employees' interests in their privacy. It is still work, and

employers are still the boss, but when the workplace is also the home, do those boundaries shift at all? For instance, can employers require workers to turn on their cameras during video conferences? Can dress codes be enforced? Can workers eat, drink, or smoke during video conferences?

In addition, these intimate looks into the homes of workers may reveal information that makes those workers subject to illegal discrimination. The comparative formality and impersonal nature of many office environments may make it easier for workers to conceal—or at least to minimize or to deflect attention from—parts of their lives that may expose them to the bigoted reactions of others: their sexual orientation, religion, national origin, etc. However, when coworkers have the ability to look directly into one another's homes, those associations with protected groups may become more apparent than they may be in the sterile environment of a workplace. Imagine, for example, an office worker who is suddenly found to live in a home with multiple generations of their family, where it is clear that the primary language spoken is Spanish. What about a worker whose webcam reveals a Buddhist shrine in the corner of the room or a mezuzah on the door frame? Or family members who are of a different race? Or home décor, such as a rainbow flag, that suggests the worker's sexual orientation?

What are some options for employers who find themselves and their employees suddenly thrust into these scenarios? How can employers maintain an appropriate level of professionalism and decorum while at the same time acknowledging the unique and unprecedented stress of the current moment? What are the privacy and anti-discrimination interests of employees who are working from home, and how do we respect them while still maintaining a functioning workplace?

2. Employment-at-Will Is Still the Default Standard

In the vast majority of cases, the answer to the above questions can be stated very simply: the default employment standard in the United States is one of employment-at-will.[1] This means that, barring some contract to the contrary, employees can quit or can be fired at any time for any reason or for no reason, with no notice required. This regulation is in stark contrast to European legislation, as discussed by Peráček (2021). So, does COVID-19 create unique challenges for workers? Is there discomfort created by the forced intimacy of the Zoom chat? Do workplace rules about dress, grooming, decorum, or workplace tasks seem suddenly unfair or unnecessary? Has the work-from-home dynamic created new and unexpected job tasks? Simply put: too bad. If workers are dissatisfied, under the employment-at-will standard, they are free to quit, or they can be fired.

The rationale behind this standard, which is unique to the United States among industrialized democracies (Corbett 2021), is multifold. Forcing employers and employees to remain in a relationship with each other against the will of either party is contrary to the laissez-faire spirit of the United States economy; allowing employers to hire and fire at will allows them to respond swiftly to changes in the marketplace, which allows them to meet the needs of their businesses with maximum efficiency It encourages employers to hire more people than they otherwise might, knowing that they aren't bound to continue the relationship indefinitely; in systems where firing is harder to do, employers are often more hesitant to hire workers in the first place.

[1] Payne v. Western Atlantic Railway, 81 Tenn. 507 (1884). Payne was a businessman who operated a store near the Chattanooga, TN railyards. He claimed that the defendants "unlawfully, wickedly, wantonly, [and] maliciously" aimed to destroy his business by threatening to fire any railroad worker who patronized Payne's store. Id., at 511. The court's decision, stating that the defendants were well within their rights to fire those workers, became the dominant standard in twentieth-century American law. Employment relationships exist at the will of the parties. They can be terminated for any reason or no reason, with no notice required. "Defendants had the right to discharge employees because they traded with plaintiff, or for any other cause . . . or even for cause morally wrong." Id., at 510 and 520.

3. Exceptions to Employment-at-Will

While employment-at-will does remain the dominant standard, there is a general recognition on the part of the courts that, despite the fact that the standard nominally treats both parties the same, it naturally favors the interests of the employer. The power to fire is greater than the power to quit when one of the parties has their immediate livelihood on the line.[2] There are, therefore, a number of exceptions to the employment-at-will standard that have been recognized by U.S. courts over the past several decades.

3.1. Contractual Exceptions

It has traditionally been difficult for terminated employees to make claims against their employers on contractual grounds. The notion that an at-will employer has a contractual obligation not to terminate an employee is contradictory to the employment-at-will doctrine, especially since the assumption in these cases is that the employee may still quit without notice or cause.

If an employee belongs to a union, however, there will almost certainly be some protection from arbitrary termination. Almost all collective bargaining agreements include provisions stating that employees can only be fired for good cause. "Good cause" can, of course, vary somewhat in its definition from one collective bargaining agreement to another, but it does generally provide fairly robust protection for workers from being fired capriciously or for minor or isolated infractions.

In situations where the parties lack a formal contract, the law has been hesitant to recognize any claims based on either oral or written assurances of continued employment. In Gordon v. Matthew Bender & Co., a case out of Illinois, oral statements that "satisfactory performance" would result in continued employment do not have any impact on the at-will nature of the employment.[3] The "satisfactory performance" standard is too subjective to rise to the level of the "good cause" standard typically found in collective bargaining agreements and relies too heavily on the discretion of the individual employer and whatever criteria they use to establish what is "satisfactory." The court in Gordon, in fact, noted that a "satisfactory performance" standard could be inferred in any employment relationship, and, if it could be used to change the at-will nature of the relationship, it could "eviscerate [the employment-at-will paradigm] altogether."[4] A nonspecific "satisfactory performance" standard would be unlikely to provide workers with very much protection from termination.

Despite the reluctance of courts to infer contractual obligations in the employment-at-will realm, there have been a few exceptions made. In the case of Pugh v. See's Candies, Inc.[5], the plaintiff was terminated from his job, despite having been repeatedly told by his employer that, "if you are loyal to [See's] and do a good job, your future is secure." The court in Pugh determined that the at-will relationship is a rebuttable presumption that can be overcome by contrary evidence, such as an agreement "that the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services".[6]

When do such oral assurances rise to the level of a contractual obligation not to fire an employee arbitrarily? (Fineman 2008) Pugh applies a totality of the circumstances test, taking into account a number of factors: What are the employer's personnel policies and practices? What is the actual language of the oral assurances given? What is the length of

[2] Chessin, Brett J., Individual Liability for Wrongful Discharge in Violation of Public Policy: An Emerging Trend, 48 Wake Forest L. Rev. 1345, Winter 2013, at 1349. "The primary critique of employment at will is that there is actually an immense disparity in bargaining power, which in fact favors the employer. While employers may be disadvantaged by one of their employees quitting earlier than expected, employees may be summarily fired for reasons not related to employment and therefore would be unable to feed their families".

[3] 562 F.Supp. 1286 (N.D.Ill.1983).

[4] Id.

[5] 171 Cal.Rptr. 917 (Cal.App.1981).

[6] Id.

the relevant employee's service? What is typical industry custom? According to the court, "oblique language will not, standing alone, be sufficient to establish agreement." Courts have, in any case, been hesitant to recognize the oral assurances exception, seeming to find it to be overly vague.

A contract-based exception to the employment-at-will standard that has met with greater acceptance than oral assurances of continued employment is that of written assurances of continued employment. These written assurances have often come in the form of an employee handbook or manual.

In the case of Woolley v. Hoffman-LaRoche, Inc.[7], for instance, the plaintiff was presented with an employee handbook when he started his job. This handbook covered many aspects of the employment relationship, but most crucially for the case, it gave details of the employer's termination policy. It stated, "It is the policy of Hoffman-LaRoche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively".[8] It then listed some reasons for which an employee could be fired, as well as the precise steps to be followed in such cases.

When plaintiff Woolley was terminated, Hoffman-LaRoche gave him neither a reason for the firing nor did they follow the procedure that had been discussed in the handbook. The employer's argument was that the handbook was to be interpreted merely as a statement of the employer's business philosophy and was not intended to establish a contractual relationship with employees.[9]

The court, however, stated that the way in which the handbook was prepared and shared with workers gave it an aura of significance and supported Woolley's reasonable expectation that its stated procedures would be followed.[10] In the years since the Woolley decision, however, most employers have learned to include very visible and explicit warnings on their handbooks that disclaim any contractual obligation that such a document might otherwise create.

3.2. Public Policy Exceptions

There are also some public policy-related exceptions to the employment-at-will doctrine that might protect workers from termination. The very first case to chip into the employment-at-will monolith that had been established by the case of Payne v. Western Atlantic Railway in 1884, was a 1959 case from California called Petermann v. International Brotherhood of Teamsters Local 396.[11] In this case, the plaintiff, Petermann, had been ordered by his employer to commit perjury before a California legislative committee. He refused to do so and was, therefore, fired. Under a traditional application of the employment-at-will doctrine, such a termination, while troubling, would be entirely legitimate. Employers are free to dismiss employees for any reason, "even for cause morally wrong".[12]

However, the Petermann court determined that enforcing a termination under such ethically suspect circumstances would be against public policy. They called the employer's conduct "wrongful discharge".[13] In establishing this very first exception to employment-at-will, the court stated that, "to hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs".[14]

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7 491 A.2d 1257 (N.J.1985), modified, 499 A.2d 515 (N.J.1985).

8 Id.

9 Id.

10 Id., 1271. "It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege".

11 344 P2d 25 (Cal.App.1959).

12 See supra, note 4.

13 See supra, note 16.

14 Id.

The public policy exception articulated in the Petermann case was based on the employee's refusal to violate state criminal law. Over the years, however, courts have expanded this exception to include many different statutory and legal sources. The case of Frampton v. Central Indiana Gas Co.[15], for example, involved a worker who was fired for filing a legitimate worker's compensation claim. The court in that case recognized a public policy-based exception to employment-at-will even though the circumstances were different from those in the earlier Petermann case. In the Frampton case, the plaintiff was fired not for refusing to violate criminal law but for exercising a right conferred under civil law.

In addition, if a worker makes a good faith report[16] of his employer breaking the law, many states will protect that worker with whistleblower statutes. In Marsh v. Delta Airlines[17], the plaintiff, Michael Marsh, was terminated for writing a letter to the editor of the *Denver Post* in which he criticized his employer, Delta Airlines. The letter stated, in part, that Delta "has decided to flush 60 years' worth of care and paternalism down the executive washroom toilet, putting thousands of loyal Delta employees and their families on hold or in the street".[18] Marsh claimed that reporting Delta's supposed misdeeds to the public made him a whistleblower worthy of protection from termination.

Whistleblowers do indeed have protection from firing in many states, but the court in Marsh ruled that the plaintiff did not meet the definition of a true whistleblower. A whistleblower is someone who reports specific incidents of employer wrongdoing, such as bribing a government official or supporting a culture of sexual harassment. What Marsh did, however, was simply acting as a "disgruntled worker venting his frustrations to his employer whom he felt betrayed him and his coworkers".[19] Merely writing a letter is not typically enough to trigger the protections due to true whistleblowers. If an employee desires to receive the protection of whistleblower statutes, they must generally report the alleged wrongdoing to their supervisor or the relevant government authority.[20] Merely writing a letter to the editor of a newspaper does not meet that requirement.

While there have been differing interpretations of the public policy exception to employment-at-will, a general standard has emerged, as expressed in the case of Gantt v. Sentry Insurance.[21] According to this standard, employees may not be fired for: (1) refusing to violate a statute[22]; (2) performing a statutory obligation[23]; (3) exercising a statutory right or privilege[24]; (4) reporting an alleged violation of a statute of public importance.[25]

3.3. Anti-Discrimination Exceptions

A major limitation on the employment-at-will default standard comes from anti-discrimination law. Employment discrimination laws exist at every level of government, apply to a wide variety of categories of people and behavior, and affect nearly every workplace relationship.

The primary source of employment discrimination law is Title VII of the Civil Rights Act of 1964[26], a sweeping piece of legislation that prohibits discrimination in employment

15 297 N.E.2d 425 (Ind.1973).

16 Whistleblower laws can protect workers even if they are wrong about the supposed wrongdoing of the employer, provided that the employee has a good faith, reasonable belief that the employer behaved illegally.

17 952 F.Supp. 1458 (1997).

18 Id., at 1460.

19 Id., at 1463.

20 Id. Delta had a toll-free telephone number where employees could anonymously report grievances, but Marsh did not call this number. He also did not report his concerns to Delta management or any relevant government agency.

21 824 P2d 680 (Cal.1992).

22 As in the Petermann case. See supra, note 16.

23 Such as jury duty.

24 Such as filing a workers compensation claim, as in Frampton. See supra, note 20.

25 As in Gantt, where the plaintiff was constructively terminated for supporting and pursuing a colleague's claim of sexual harassment. See supra, note 26.

26 42 U.S.C. § 2000e et seq (1964).

on the basis of race, color, religion, sex, and national origin. The 2020 United States Supreme Court case of Bostock v. Clayton County, Georgia[27], extended the scope of the sex discrimination provision to also prohibit discrimination on the basis of sexual orientation and gender identity.[28]

Further protecting workers at the federal level is the Americans with Disabilities Act of 1990.[29] Like the Civil Rights Act of 1964, the ADA is very broad in its scope, with components addressing such matters as accessibility in building construction and in public transportation. The employment discrimination component of the statute prohibits discrimination in employment on the basis of a real or perceived physical or mental disability and requires employers to reasonably accommodate workers' disabilities.

There is also the federal Age Discrimination in Employment Act of 1967[30], which prohibits discrimination in employment on the basis of age over 40.

Then, at the state and local levels, there are frequently numerous statutes and ordinances prohibiting discrimination in employment on the basis of various factors. These state and local laws often expand on the range of protected categories, adding to what we see at the federal level. Such categories may include marital status, familial status, record of military service, weight, height, or hairstyle.

4. How Does This Affect COVID-19 Workplaces?

In the COVID-19 environment, where remote work can rather paradoxically lead to greater intimacy, employers must be mindful of how these employment-at-will exceptions can have an impact on their decision-making processes.

Employers may also wish to remember that, legal considerations aside, these have been difficult times for all. There are the challenges of adjusting to work-from-home, remote schooling, and the decreased privacy and lack of personal space that comes from being stuck at home. There is also the constant stress, fear, and economic anxiety of living during a pandemic, not to mention the fact that the disease itself has touched many people very closely. They or their loved ones may have been ill; their loved ones may even have died. Being then put in the position of having to invite coworkers and superiors into their homes, albeit electronically, requires a kind of forced intimacy that can be uncomfortable even under the best of circumstances.

In this paper, we will be examining a couple of possible workplace scenarios that could arise under COVID-19; situations where the work-from-home environment contributes to a situation where an employee is terminated. We will then examine these scenarios from an employment law perspective: What principles of employment law are implicated? Does the employee have any legal recourse against their employer? Does the employment-at-will paradigm still apply, or does the situation fall under one of the exceptions discussed above?

Then we will conclude with some advice for employers and employees whose workplaces have been altered in the COVID-19 environment. What are some things that employers and employees can do to protect themselves in these extraordinary times? As we emerge from the pandemic in the months and years to come, how can these lessons be applied to future employment relationships?

4.1. Scenario 1, the Case of Jill and the Missing Documents

4.1.1. Facts

Jill is a receptionist for Donovan Consulting, Inc., located in Central Illinois. She had been working for this company for eight years when COVID-19 struck in early 2020. Jill's commute takes approximately 30 min from her home in the country to the office. Her

[27] 140 S.Ct. 1731 (2020).

[28] Id., "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids".

[29] Pub. L. 101-336. § 1. 26 July 1990. 104 Stat. 328.

[30] Pub. L. 90-202., 81 Stat. 602.

workday starts at 8:00 a.m., and she usually heads home around 5:00 p.m. Jill usually takes a 1-h lunch at noon but often stays in the building during that hour since she brings her lunch from home. In Jill's job description, it states that the receptionist is the "face of Donovan Consulting, Inc." and she is expected to provide a professional, polite, and always positive atmosphere for all callers and visitors.

Jill loves her job, and her performance evaluations have always been excellent. No complaints about her work from either colleagues or clients have ever been observed or reported.

On 15 March 2020, Donovan decided to move Jill's job online, and, although a precise timeframe was not provided, it was presumed that she would be working from her home for the duration of the pandemic. Appropriate infrastructure was established at her home, including a web-camera, high-speed internet, and some extra money to enhance her office space at her house, as she originally did not have an office space. Jill was trained on proprietary communication software in order to receive phone and video calls from potential clients and stakeholders of a variety of ongoing projects.

Jill's job description shifted somewhat, and the tasks she was charged with changed, too, but those changes were not officially documented. For example, she stopped receiving visitors in person; all visits were now virtual. She began to arrange for all of her required duties to be performed online. Jill was eager to learn the software and adjust to her changing role while working from home, even though she enjoyed going to the office and meeting her friends there.

Jill's performance during the first month of remote work was excellent. She enjoyed the new challenges and worked very well with her colleagues and customers, despite the uncertainty and stress caused by the ongoing pandemic. Nevertheless, during the second month of the lockdown, Jill's performance started to decline. Customers started to complain that their phone calls were not being returned in a timely manner; coworkers often found her lines busy and could not always get through to her with important business communications.

Jill's supervisor contacted her and asked her if she was doing OK and if she needed some additional help or training. She said that she was doing fine and that she did not need any additional training. Nevertheless, at the end of the second month of Jill's home office experience, one of the major clients of Donovan Consulting, Inc. complained about not receiving important documents in a timely manner and terminated the relationship. Donovan Consulting then fired Jill.

The IT specialist at Donovan later discovered that there were a number of documents in the company cloud that Jill had been responsible for forwarding to the client, but to which she had not been granted access. A similar scenario had happened a few months prior to the beginning of the pandemic. At that time, Jill was able to ask the IT specialist to provide her access to the cloud, but he only provided her with one-time access.

Jill was hurt and angry at having been fired after over eight years of service. She started considering a lawsuit against Donovan after learning that she had not had access to the documents that she was fired for not having forwarded. What can Jill do? Does Donovan Consulting have any legal liability for having terminated an employee for something that is out of their control?

4.1.2. Discussion

Being fired for something out of one's control is no doubt a frustrating and infuriating situation to be in. When one's termination is the product of a misunderstanding or mistake on the part of the employer, if the termination would not have occurred absent the mistake, it carries with it a strong sense of injustice. Surely, under such circumstances, employees must have some kind of legal recourse?

As we now know, the major caveat to almost any question of wrongful termination is the powerful default standard in the United States of employment-at-will. Employers have the power to terminate (and employees have the power to quit) at any time, for any reason

or no reason, with no notice required.[31] This standard extends even to situations where the termination is based on something that turns out to be wrong. It is, therefore, unlikely that Jill would succeed in any lawsuit she might bring.

Nevertheless, this situation could have been handled better by Donovan. To fire a long-term, highly competent employee for something beyond her control is rather petty. It could have the unfortunate consequence of making Donovan seem like a company that is inflexible and vindictive and that fears technological challenges. This is hardly the kind of reputation that a 21st-century consulting company would wish to have. Legal matters aside, Donovan may wish to reconsider their decision.

4.2. Scenario 2, the Case of John and the Pride Flag

4.2.1. Facts

John is a successful marketing executive for a major Chicago-based architecture firm, Smith Architects. He worked there from the time he received his MBA in 2010. He was very successful and, in 2019, received an excellence award for exceeding the expected sales volume for new contracts.

In addition to John's successful career in the architecture firm, he was also very active in his local community, a Chicago suburb, as an elected member of the city council since 2018. When he started to fundraise and organize his campaign in 2017, he was reminded by his employer that he needed to clearly separate his professional life from his political views and endeavors. His supervisor, Helen Watson, had him sign an employment amendment to his contract to assure that John would not use his professional network for political purposes.

With the onset of COVID-19, Smith Architects decided to go fully online. An excellent remote work infrastructure had already been developed prior to the pandemic, as a few of the marketing staff and sales representatives had already been working from home offices. For John, however, working from home was a brand-new experience, as his position had, up until that time, required him always to be physically present at the headquarters in downtown Chicago. John did not have a real home office, as he was never expected to work from home before. He, therefore, decided to use his man cave as a temporary home office since it was the quietest room in the house and his children, who were doing remote schooling, knew not to disturb him there. Since this was considered only a temporary home office environment, he did not put any effort into changing the décor.

John continued his weekly updates with Helen Watson via the phone, as they had always done in the past. He also attended monthly staff meetings by phone, exactly the way it was done prior to the pandemic, so no changes occurred in the internal communications between John and his supervisors and colleagues. However, a major change that occurred in John's work environment was that all client and potential client meetings were to be conducted via Zoom video chat.

In October 2020, Helen Watson received a phone call from a client who was about to sign a major contract with Smith Architects. The client, Mark Williams, expressed his concerns that John might not be the most appropriate representative of the firm; that he might make clients uncomfortable. Mark did not provide any additional details but stated that he had not yet decided if he wanted to sign the contract with Smith Architects or another firm.

Helen then scheduled a Zoom meeting with John. John was surprised by this since he had always communicated with Helen via phone in the past. When Helen and John met via Zoom, Helen intended to express her concerns about the ongoing challenges with this client. During the video conference, Helen noticed that John, indeed, worked from his man cave. Helen saw a large rainbow Pride flag in the background. An imprint on the flag stated, 'Welcome to John & Larry's 2019 Pride Party!" One week later, John had a notice of termination of his job in the mailbox.

[31] See supra, note 4.

John was devastated to have been fired after ten years of excellent and award-winning work at Smith Architects. He had always had good relationships with clients. What could have been different this time? When he learned that Mark had said he was an inappropriate representative of the company after their Zoom call, John put two and two together and realized that it must have been because of the Pride flag in the background of the call.

John has contemplated filing a lawsuit against Smith Architects for wrongful termination on the grounds of sex discrimination. Does he have a strong case? How could Smith Architects respond?

4.2.2. Discussion

Discrimination in employment on the basis of sexual orientation has been illegal at the federal level since 2020[32], in the state of Illinois since 2006[33], and in the city of Chicago since 1988.[34] If John can show that this was the reason for his termination, he can build a strong case against Smith Architects.

There are a few challenges facing him in building that case. First of all, John will need to convince a jury that Mark Williams's discomfort about John's alleged inappropriateness was, indeed, the result of his presumption (based on the Pride flag) about John's sexual orientation. Then, he will need to connect Mark's discomfort with the ultimate decision made by Smith Architects to fire John. After all, even if Mark's reactions were the result of bigotry, he is not the one who did the firing.

Mark Williams may decline to admit that John's Pride flag was what caused his discomfort, and it might be difficult to prove with absolute certainty. Luckily for John, employment discrimination cases are not held to a standard of absolute certainty but rather to a preponderance of the evidence. In other words, is it more likely than not that Mark's presumption about John's sexual orientation was what caused his discomfort? In making this argument, John can point to a number of factors: his award-winning work at his job, his excellent relationships with previous clients, the fact that the Pride flag was seemingly the only variable that made this Zoom call with Mark different from other client interactions. It would certainly be an easier case to make if Mark had been more explicit in his comments, but juries are capable of reading between the lines.

Smith may attempt to deflect any liability by claiming that their decision to fire John was the result not of their own homophobia but rather the homophobia of their prospective client, Mark Williams. After all, they need to please their clients, right? This has been a tempting defense for many employers who have sought to appease the bigotries of their customers and clients or even to pass the buck when it comes to their own prejudices. However, it is not generally a successful defense against an accusation of illegal discrimination.

According to the landmark case of Diaz v. Pan Am World Airways from 1971[35], Pan Am had a policy of exclusively hiring female flight attendants. They claimed that the reason for the discrimination was not based on any sexism espoused by the company, but rather on the preference of their customers; that Pan Am customers vastly preferred being waited on by female flight attendants and that if that preference were not satisfied by Pan Am, that they would refuse to fly with them. This line of argument was unsuccessful, however, and

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[32] See supra, note 32.

[33] 775 Ill. Comp. Stat. 5/1-101.1 (2005). Illinois Governor Rod Blagojevich signed an amendment to the Illinois Human Rights Act on 21 January 2005 making it illegal to discriminate on the basis of a person's sexual orientation in employment, housing, public accommodation, and certain financial transactions. The law went into effect on 1 January 2006. According to the statute, sexual orientation is defined as a person's "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth".

[34] Chicago, Ill., Mun. Code Ch. 2-160.

[35] 442 F.2d 385.

Pan Am lost the case. The prejudices of one's clientele are not generally legitimate grounds for discrimination on the part of an employer.[36]

John could have a strong case against Smith Architects, provided he can persuade a jury that it was more likely than not that the Pride flag and Mark Williams' discomfort with it made the difference in Smith's decision.

5. Conclusions

Remote work has confronted many workplaces with unanticipated stresses. Workers must accustom themselves to new technologies, find ways to integrate their personal and work-related spheres, and attempt to continue completing their duties as smoothly as possible. After two years of COVID-19 and its concomitant social and professional upheavals, serious challenges remain.

In the cases of Jill and John, we see companies, fearful of a client's displeasure, reacting impulsively to terminate a competent employee. Sometimes it is legal to do so, sometimes not, but in these uncertain times of COVID-19, where we are all adapting to unfamiliar circumstances, such hasty and harsh decision-making should be more carefully considered. Businesses should consider the significance of their reputations, the perceptions of their work environments, their employee satisfaction levels, and other factors that help them to compete for the shrinking pools of potential new hires. More careful consideration can also help to boost company morale and minimize employee turnover.

The law is generally on the side of employers. Employment-at-will is still the dominant standard in the majority of situations. Regardless of the letter of the law, however, employers may find that exercising their prerogative to fire someone may have unintended consequences. It can make employers appear panicky in the face of new technology and the mistakes that can sometimes result from it, and it can make them seem unsupportive and cruel toward their workers. In these times of low unemployment (Schwartz and Smith 2021) and increasingly high worker expectations (Rosalsky 2021), this is not how most employers would wish to be viewed. Future research could be conducted to include current federal and/or state mandates, rules, and regulations regarding vaccination and testing requirements. How can the privacy of health records be maintained in this new paradigm of employer/employee relationships? How much employee privacy can be expected? How can the well-being of all be ensured when returning to in-person work?

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[36] Client preferences may "'be taken into account only when it is based on the company's inability to perform the primary function or service it offers,' that is, where sex or sex appeal is itself the dominant service provided." Wilson v. Southwest Airlines Co., 517 F.Supp. 292, at 301 (N.D. Tex. 1981), quoting Diaz, supra, note 40. Femininity is a necessary trait for, say, a Playboy bunny or exotic dancer, where sex appeal is the main part of the job, but flight attendants have to ensure the safety of the flying public, which makes their sex appeal to (mostly male) passengers, largely unimportant, or at least of lesser importance. The ability to provide safety in an airline emergency is not contingent upon one's sex.

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