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What Not to Say

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What Not to Say

By Kiala E. Ellingson

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Laurie Chadwick was a successful, long-time employee of WellPoint, an insurance company. *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 41 (1st Cir. 2009). After almost 9 years at the company, and at the urging of her supervisor, she applied for promotion to a management position. *Id.* Chadwick was already performing several of the responsibilities of the management position. *Id.* Additionally, she received excellent performance evaluations in her current position. *Id.*

Chadwick was also a mother of four children: an 11-year-old son and six-year-old triplets. *Id.* at 42.

During the decision-making process, Chadwick's supervisor sent an email to Chadwick saying, "*Oh my – I did not know you had triplets. Bless you!*" *Id.* Two months later, Chadwick was denied the promotion, and it was given to a less qualified candidate. *Id.* After the promotion decision was made, Chadwick's supervisor tried to "soften the blow" by telling her: "*It was nothing you did or didn't do. It was just that . . . you have the kids and you just have a lot on your plate right now*" and "*if [the three interviewers] were in your position, they would feel overwhelmed*." *Id.*

Chadwick subsequently filed suit against Wellpoint, alleging that the company denied her the promotion based on the sex-based stereotype that mothers, particularly those with young children, neglect their work duties in favor of their presumed childcare obligations. *Id.* To support her claim, she pointed to her supervisor's statements. *See id.* The 1st Circuit Court of Appeals agreed with Chadwick and held that, under the circumstances, these statements constituted sufficient evidence from which a reasonable jury could conclude that the promotion denial was caused by discrimination. *Id.* at 46-48.

Who would have thought that these seemingly well-intentioned statements (including the common Texan stock phrase, "*Bless you*") would result in a discrimination lawsuit?

Most employers can identify the "classic" cases of discrimination and harassment in the workplace. For example, telling an employee outright that she was not chosen for a promotion because she was a woman with young children would clearly constitute sex-based discrimination under Title VII. However, it is also important for employers to be aware of the less obvious situations that can arise, like *Chadwick*. Under the right circumstances, even well-intentioned statements or seemingly harmless jokes can have legal repercussions.

The risk of litigation is higher than ever before. The US Equal Employment Opportunity Commission (EEOC) recently reported a "88,531 new charges of discrimination in the fiscal year 2024 alone, reflecting a more than **9% increase** over the number of charges filed in fiscal year 2023." *See* U.S. Equal Employment Opportunity Commission, 2024 Annual Performance Report, January 17, 2025, https://www.eeoc.gov/2024-annual-performance-report. The EEOC also filed 111 new lawsuits and secured "almost $700 million in monetary relief . . . **the highest monetary recovery in its recent history** . . . through mediation, conciliation, and settlements . . .." *Id.* With this sharp increase, employers (and their HR and legal teams) must be prepared to face increased exposure to discrimination lawsuits.

As in the *Chadwick* case, many of these lawsuits could arise from statements or comments made in the workplace. Notably, employers can be held **strictly and vicariously liable** for statements or comments made by their supervisors pursuant to an employment action. *See Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013). An employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take "tangible employment actions" such as hiring, firing, promoting, demoting, reassignment, or a decision causing significant change in benefits. *Id.* at 431. Merely having the ability to exercise discretion or authority over an employee's work is not sufficient. *Id.* Employers can also be held liable for a co-worker's unlawful harassment (including verbal harassment) if the employer was negligent in preventing and correcting the offensive behavior. *See id.* at 427.

Additionally, with the ever-increasing use of electronic communications, virtual platforms, and remote work arrangements, the "workplace" has expanded beyond physical spaces. This means that what a supervisor or manager says over email, text, or social media can also subject employers to liability in some circumstances. For example, as seen in the *Chadwick* case, the 5th Circuit considered comments made by a supervisor over email to be evidence of discrimination. *See Chadwick*, 561 F.3d at 41. However, even if no EEOC charge or lawsuit is filed, employers could still face significant time and expense, not to mention negative PR, dealing with these situations.

It is imperative now, more than ever, for employers and supervisors to be aware of these risks and to be educated regarding what *not* to say. This article will highlight some recent cases where comments by a supervisor or manager subjected the employer to liability. This article will also summarize the EEOC's recent guidance on harassment in the workplace when it comes to electronic communications and social media, along with some illustrative examples. Finally, this article will outline some

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