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The Grayest Areas of Employment laws - Transcript

[Speaker 1]

Welcome to Charity Therapy, a podcast from Birken Law about building better nonprofits. I'm your host, Jess Birken. Hello and welcome to this episode of Charity Therapy.

Today I am joined by Zaylore Stout from Zaylore Stout & Associates right here in my home city of Minneapolis. Zaylore is an employment law attorney and wrote the book, *Our Gay History in 50 States*. Welcome Zaylore and happy Pride.

It is Pride Month while we are recording this.

[Speaker 2]

Absolutely. Thanks so much for having me.

[Speaker 1]

I am really glad you're here. I wanted to have you join me for this one because I always get a ton of employment law questions from clients and from listeners and just friends, right? So, I thought I had some good employment law questions that came in and you are a great guest to chat about them with me because you actually represent plaintiffs, employees, and employers.

So, you kind of have a good perspective on both sides of any sort of employment law issue, which I love. So, before we get into that, though, I have to ask you about your book. It's an LGBTQ history book.

And so, can you share a little bit about that?

[Speaker 2]

Yes. Our Gay History in 50 States highlights significant people, places, and queer facts on a state-by-state basis. It was published just in time for the 50th anniversary of the Stonewall Riots.

I think we've sold 2,500 copies in the first 18 months.

[Speaker 1]

Nice.

[Speaker 2]

11 either finalists or winner of 11 book awards. It's been kind of crazy.

[Speaker 1]

Shut up. Seriously?

[Speaker 2]

First book, too.

[Speaker 1]

That's awesome. Absolutely. Wow.

Wow. I had no idea. This is awesome.

Well, that's great. And I know that you've got a website for the book. And actually, if you get the book, there's like a donation attached to that.

[Speaker 2]

Absolutely. So, if people purchase the book from our website, which is Gay50States.com, they can identify one of the LGBT nonprofits that we have listed, and they can get 10% of the book's proceeds.

[Speaker 1]

I love that. That's awesome. Congrats.

Let's get right into the meat and potatoes here with our first question. Okay, are you ready?

[Speaker 2]

I am.

[Speaker 1]

All right, here we go. I'm the board president of a small nonprofit. Yesterday, I received a complaint from one of our employees about inappropriate conduct by one of our board members.

This employee is the ED, and he said this board member has a pattern of flirting with him. She asks about her relationship status, or his relationship status, jokes about how their work meetings are, quote, dates, and that she better be careful if they have a one-on-one meeting because she's married, things of that nature. He's clearly uncomfortable with her behavior, but I'm not sure if this legally counts as harassment.

Plus, a nonprofit board member is a volunteer, and they're some of our best donors. I'm not sure how to handle this. What do we do now?

Well, hopefully they got a lawyer. Because we're just going to give some general advice. What do you think about this?

[Speaker 2]

So, here's the thing. Interestingly enough, like there's been a rash of these lately, especially over the last five years. And one of the reasons why I think small nonprofits have extra challenges in this area is because they don't have a designated person that's their HR contact, right?

And so, if there's an issue with the executive director, then where do people go? Where do the employees go if they have an issue with the executive director? Where do board members go if they have issues?

And so in regards to this particular situation, it could qualify as quid pro quo sexual harassment because the board is in essence the boss for the executive director. And regardless of whether they're volunteers or not, regardless of whether they're donors or not, doesn't matter. They're the ones that are making decisions in regards to the terms or conditions of that individual's employment.

Whether they're going to get promotions or raises or things of that nature. So, they are in essence the boss. And so, the ideal situation, and this is recommendations that I've had for other small nonprofits in the exact same situation, is to, of course, connect with either an employment lawyer or an HR professional to conduct an investigation, right?

Because it wouldn't be necessarily fair for the executive director if individuals that are on the board conduct the workplace investigation, because there could be potential views of bias as it relates to that because of relationships that board members have with each other. So, if you get a third party that comes in and does that impartial investigation in regards to the circumstance and is able to report back their findings, whether it rises to the level of severe and pervasive, which is the current legal standard that's required as it relates to sexual harassment matters, they can address it. And so not all sexual harassment complaints that come forward require somebody to be terminated.

Sometimes it's just making it clear so that people know that their conduct is violating people's rights or making people feel uncomfortable or things of that nature. But I definitely recommend the investigation in regards to this, because then you also get that documentation that you would need later on if things don't go well.

[Speaker 1]

Yeah. And, you know, one of the things here is like you, I think you hit the nail on the head. Small nonprofits tend to not have an HR person because they're too small.

Just they just don't have the org tree to support that. But also, I see a lot of small nonprofits don't even have a written policy or they don't even have an employee handbook or they don't

even have a point person who accepts grievances or like a process around submitting a complaint. So, any nonprofit of any size could certainly do the paper to put some of those things in place, even if you don't have an HR manager because your org is too small.

Right. So, I love that. And absolutely yeah; That third party investigation. And this is so this can be so tough when you especially when you have like intergenerational like I see a lot of this kind of stuff where it's like, you know, and we don't know from this question, but like maybe this ED is, you know, under 40 and this board member could be quite a bit older and it's just a lot more acceptable for people born in the 70s and earlier to make a lot of like lewd jokes or like, ha, ha, ha, isn't that funny or like just that's the way a lot of like my older friends have been raised. And so, you kind of have to be like, stop, don't that's not OK anymore.

And so, there's a there can be a little bit of a training problem where, you know, we have younger professionals who are very comfortable saying this is not OK and I'm going to tell you about it. And that's good. And we kind of need to like work with that, too.

So, I have definitely found, you know, I've done a couple of investigations. I'm not you, but sometimes I get roped into it. And it's like people will be completely aghast that they've been accused of harassment, like they have no idea that their behavior was not appropriate.

So, I think coming into it, just knowing that, like, it's OK to do this investigation, even if you think, well, this person probably didn't mean anything by it. But you still need to go through the steps to protect the nonprofit and to protect yourselves. You know, employment issues are like such a source of costly litigation and problems like you don't want to just blow this off when it happens.

[Speaker 2]

Exactly. And the other part that I always throw in for folks, especially if they're an organization on the smaller side, is to call your insurance broker and make sure you have EPLI coverage, employment practices, liability insurance, because otherwise you are paying a lot of money to

attorneys for the hourly rate out of pocket in regards to potential litigation. And it's pennies on the dollar by getting by adding that insurance coverage.

[Speaker 1]

Now, does EPLI insurance cover the cost of an investigation?

[Speaker 2]

No, it doesn't. But if there were to be litigation in the future, it covers sexual harassment, discrimination, wrongful termination, the big costly stuff as it relates to employment law.

[Speaker 1]

That's awesome. OK, that's really good information for people to know, because I think a lot of small nonprofits also don't have the insurance that they need, and they don't even know that they need it. Right.

Like I have a little YouTube series on my YouTube channel with a colleague that does commercial lines of insurance. And it's like, let's break down all the different kinds of insurance, because sometimes we think like, oh, but we're a nonprofit. It's like, well, that doesn't matter.

Like you're still an employer. You still have to follow the rules. And that's that can be kind of a rough lesson if you learn it the hard way.

[Speaker 2]

One thing I want to make sure I add, I love the fact that you brought up the training aspect, because that's really where the rubber hits the road, too. That's the proactive aspect in regards to educating folks in regards to what type of conduct is allowed and is appropriate and not

appropriate. And so, you have the younger folks that have worked for companies that have been doing these types of trainings for years.

And then you have folks that have been in the industry for a long period of time and may not have attended these types of trainings or been made aware in regards to the standards that have changed as it relates to employment law. Because I remember seeing my first episode of Mad Men, and I was like, I can't believe this is what was happening. And that's exactly that was a lived experience of women in the workplace.

It's different. It's different now. People need to get on board and get with the times.

[Speaker 1]

Yeah, I love that. I love that. Okay, here we go with question two.

I work for a social justice group that does community organizing and advocacy in Black communities in our metropolitan area. After some budget issues, we decided to narrow our focus and shut down some of our organizing efforts. Because of that, we let go of a couple of 1099 contractors.

One contractor who we've had some interpersonal conflict within the past is now claiming his contract was canceled due to racial discrimination. He's Black, and so is our executive director who terminated the contract and virtually everyone this contractor worked with. He's threatening to file a complaint with our state's Department of Human Rights.

Can he really claim racial discrimination in a situation like this?

[Speaker 2]

Well, anybody can claim anything, unfortunately, right? I know, right?

[Speaker 1]

Oh, God, how many times do we tell that to clients, right? People are like, well, can they sue us? Well, anybody can sue for anything, I'm afraid, whether it's right or wrong.

[Speaker 2]

So, I think the proper question is, is there a likelihood of success as it relates to this in regards to his claim? And so, there's a couple of things that jump out at me in regard to this one. They indicated that there were a couple of 1099 employees that were let go.

If there was more than one person that was let go, that's helpful because it doesn't appear then necessarily that this person was singled out, especially if it's something that was based on budgetary reasons. If they can show that this was the lowest performer, they can show that this was a person out of the interpersonal conflicts. This is the person that was the newest person.

This was a person that was working on a particular project that they're no longer servicing, yet the other contractors were working on different projects that they helped and kept. All of those factors come into play and would be things that the city or state agency would be looking into in regards to this. But, you know, just always reading the tea leaves in regards to these questions.

So, the other part is that they were saying, well, he's Black and our executive director that terminated him was Black and all these different types of things. So, here's the part that part of the mini education here is that there can be discrimination amongst Black folks as well, right? And part of that is called colorism.

So based on an individual's color, you know, that sometimes there's discrimination against individuals that are darker skinned or lighter skin. And so just because everybody's Black doesn't necessarily mean that there can't be some type of discrimination that's there. And colorism is covered under Title VII of the 1964 Civil Rights Act, as well as many of the state discriminatory acts that are also listed.

The thing is, is the interesting part is that independent contractors have, don't have the same rights as employees do. So that's the other aspect. If there is a contract or if there's a contract dispute between businesses, which is what it is with a employer and a business and an independent contractor, then they can just go to superior court in regards to that and hash that out.

And so, there's not necessarily a avenue or a mechanism for independent contractor, sue for discrimination in regards to these types of circumstances. So that's a challenge for them, too.

[Speaker 1]

Yeah, what's interesting about this one is the person. Now, I don't know where they are, and I'm assuming most states work like Minnesota where we where we are. If the person is going to complain to the State Department of Human Rights, that seems like an employee type of claim, not a 1099 contractor type of claim.

So that's what you're saying when you're saying there's not really a remedy for them other than to just like straight up sue you in court.

[Speaker 2]

But I don't even necessarily see there being, you know, if they were to sue in court, I don't necessarily see there being a cause of action in regards to this.

[Speaker 1]

Oh, no, me either. No, it sounds like they're shutting down their program and it's like not related to anything other than they're they're just not going to be doing that work anymore, whatever it is. And so, it's really not about you, friend.

[Speaker 2]

Now, the one part that I would caution this the person that submitted this question on is the classification of this individual as an independent contractor. Now, that's a very gray legal area that a lot of employers get in trouble with because they think that they can just classify anybody as an independent contractor. And there's certain legal requirements and standards that need to be met in order for somebody to be properly classed as an independent contractor.

So what could happen is this person could bring their complaint forward with the city or state agency, and they may look into whether this person was properly classified and make that determination. And if they determine that they were an employee, then all of a sudden, we're in a different situation than we were before.

[Speaker 1]

Oh, that's interesting. So, the state agency can just make that determination. They can go, well, we think this was actually an employee.

[Speaker 2]

Well, so, yes, they're tasked with making those types of determinations because their job is to make sure that they're, you know, asserting employees' rights and assisting them and making sure they're not being discriminated against. So that would be one of the threshold questions that they'd have to address is whether this person is an employee or not. You know, Department of Labor is generally the agency that's involved with making those types of determinations, especially since more often than not, the question and issue and concern regarding whether somebody is an independent contractor or not really revolves around

compensation and pay, especially when you deal with situations like overtime or final pay and things of that nature.

That's normally where it arises, but it can arise under these circumstances, especially when there are certain rights that employees have that independent contractors don't.

[Speaker 1]

Yeah, that's really mind boggling to me. You know, you deal with this every day. I don't generally deal with these claims because I don't litigate.

So that's mind boggling to me that the state agency can make a determination that like, well, we think this is probably an employee. Prove that they weren't, I guess. That's crazy.

And I'm going to put that in my back pocket when I talk to clients because that is definitely part of my drill of, hey, you can't just call everybody a 1099 contractor because nonprofits do love to do that. And I get it. It's a big undertaking to do wage and hour law and payroll and unemployment, blah, blah, blah, blah, blah.

Right. It's much easier to just call people a 1099 and give them a check and let them deal with taxes. But it just doesn't work that way.

So, I'm always like, don't ask, you know, and then if you're in my subscription program, you can get like a 1099 contractor template agreement. But I'm always like, don't make the scope a job description and create an employee anyway. They'll just shoot themselves in the foot repeatedly sometimes.

So, it's really good to get a little legal advice when you're hiring and making a determination. Is this position W2 or 1099? That's like, if you can, you should really ask someone ahead of time so that you don't misclassify them because the whole back taxes and payroll and wage and hour stuff, the government is not playing around with that.

They will come for you with penalties.

[Speaker 2]

Absolutely. And it's not just with the independent contractors and the 1099, but also exempt versus non-exempt. Right.

So, putting some money on the salary and all that kind of stuff, that's the other area. Those are the two wage and hour areas where employers should really, really be cautious.

[Speaker 1]

Right on. Okay, let's go on to our third and final question. Can we ask our employees to volunteer for work within our organization?

I know the law prohibits an employer to ask an employee to volunteer for the job they already have. But what about volunteering for things outside of their job description, like serving on a board committee or at a fundraising event? We have a few part-timers who do back-office work for us, and the board would like them to volunteer to help plan and staff a new event series we're starting this summer.

I'm not sure if I can really encourage them to do this. Is it legal?

[Speaker 2]

This is one of the challenging ones. You know, my gut instinct based on my 20 years in this area would be stay away from this type of situation. Because part of the question would be, is this person really volunteering on their own volition?

Or is this something that they're being pressured or coerced or really something that's seen as compulsory? And so ideally, you want to be able to have individuals that are not employees be on your board and things of that nature. But I know, because I've served on boards for nonprofits, so I know that having staff involvement is always something important and crucial.

Then you just need to be able to work that time in that they're going to be spending there on the board into their hours worked. That's the smartest and cleanest way to be able to do it. Because the last thing you need is for somebody to come back after the fact.

Normally, after some type of adverse employment action, they're terminated for some performance issue. And then they come back and say, well, I worked all these extra hours, and I didn't get paid overtime. And now you're either dealing with the state or federal government or an attorney in regards to a wage and hour complaint.

And now you're on the defense trying to defend all these hours. And I can assure you, those nonprofits aren't tracking the hours that the employee is volunteering. And so that becomes an issue in regards to if there are back wages, who's going to be calculating what those back wages are?

And the employees likely track that information. And so, it could be a whole lot more than what you would think. And so more often than not, it's not worth the hassle and the risk.

[Speaker 1]

Yeah, I'm with you on this one. This is just asking for trouble. You know, it's not super clear.

It sounds like they're asking them to do event planning or maybe be on a committee and not be board members. I personally don't like when staff also serve in a board role. I don't.

That's not a best practice in the nonprofit sector. I don't like that. I don't recommend that.

[Speaker 2]

But what about committees? So, being on committees, though?

[Speaker 1]

Right. Well, what I don't like about this question is it's like, well, it's a committee. Well, is it really?

Or are you just trying to avoid hiring an event planner, whether they're staff or consultant? Because this is work that you at a larger organization, you would have a staff person do. So, for me, if it's work that you would have a staff person do and you're asking an employee to do it for free is not the answer for an increased paycheck because you're going to pay them for the hours that they worked on this new other duties as assigned part of their job.

That seems like the better answer here. I feel like this is this is a classic sort of like, well, it's not really in the budget and we need volunteers. Well, great.

Go get an actual volunteer. Don't ask your employees to do it. Go get somebody that's just a volunteer to do this as a volunteer and avoid the snafu.

Right.

[Speaker 2]

Absolutely.

[Speaker 1]

Yeah.

[Speaker 2]

We're on the same page.

[Speaker 1]

Well, we are in alignment, Zaylore.

[Speaker 2]

We are in alignment.

[Speaker 1]

So, what I'm seeing, like there's a bunch of really good takeaways here today. And, you know, first and foremost, write this stuff down and have actual policies and procedures. You can't say you followed your policy if it doesn't exist.

Right. So have a policy, have procedures. Even if you don't have an HR manager, you can have those.

And then, of course, right up front, if you don't have EPLI insurance, maybe you don't know what that word means. Maybe you don't even know what we're talking about, but you have employees. You need to get that.

So, figure out if you've got it. Is it current? Keep it up.

Do your due diligence on having insurance. And then one thing you said that we didn't get deep on, but I think is really important, is you need to be proactive, like invest a little up front in training. You know, there are lots of places you can get training.

There are tons of like software as a service places you can get training. It doesn't have to be overly burdensome. But it's such a cost savings in the end to just train your people up front and have clear expectations around what the rules are when it comes to employees and HR stuff.

And then I think the last one that's really important for small nonprofits, especially, is be careful about classifying your employees. Get it right on the front side. You know, ask for help.

Should this position be a W-2 or a 1099? And whether you want it to be is not necessarily the question, right? If you don't know the difference between exempt and non-exempt, you should be getting some help from, you know, an HR consultant or someone like Zaler or me.

Just get some help because those are really important determinations that can have big, big consequences if you don't do it right.

[Speaker 2]

And they're not easy ones, they're not easy. These are the grayest areas there are in wage and hour law. And so, you really have to dig in because sometimes, you know, the job description can say one thing, but the work that they're actually doing on the ground is completely different.

[Speaker 1]

Yeah, right.

[Speaker 2]

And so, yeah, I mean, connect with the professional to help you in regard to that. Do that work on the front end. Be proactive.

[Speaker 1]

Yeah, that's great advice. Zaylore, thanks so much for joining me. If listeners want to connect with you and learn more about what you can do for them, where can they find you?

[Speaker 2]

They can catch you on my website, stouts, s-t-o-u-t-s, law, l-a-w dot com.

[Speaker 1]

Right on. And don't forget to check out that book at Gay50States. That's gay50states.com.

10% of your purchase goes to an LGBTQ charity of your choice.

[Speaker 2]

Yeah, absolutely.

[Speaker 1]

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About the Author



Hi, I'm Jess Birken.

I'm the owner of Birken Law Office, I help nonprofits solve problems so they can quit worrying and get back to what matters most – The Mission. I'm not like most attorneys, I actually have an outgoing personality, and – like you – I like to think outside the box. Most of my clients are passionate and have an entrepreneurial spirit. I'm like that too. My goal is to help you crush it. Getting bogged down in the minutia sucks the joy out of the important stuff. My clients want to do the work – not the paperwork.

Let's connect!

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