

HIRING TO FIRING PODCAST

HIRING TO FIRING SERIES – EPISODE 01

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TRACEY PUCCIO AND EVAN GIBBS

KATHERINE PUCCIO

[TRACEY DIAMOND]

Hello everybody. Welcome to Hiring to Firing the Podcast. I'm Tracey Diamond and I'm here with my co-host Evan Gibbs. We are both Labor and Employment Lawyers at Troutman Pepper and handle all human resources and crazy employment issues as they arise. Today, we're here to talk about *Emily in Paris* and national origin discrimination. With us is our guest, Kate Puccio, who is VP of People and Deputy General Counsel at EMR USA Metal Recycling, a US arm of European Metal Recycling, a world leader in scrap metal recycling. EMR USA operates in 13 states and has approximately 1,500 employees. The US headquarters, which is located in Camden, New Jersey, has had a presence for over a 100 years. Welcome, Kate!

[KATE PUCCIO]

Thank you for having me.

[TRACEY DIAMOND]

Thanks for joining us. We would like to talk today about *Emily in Paris*, a series on Netflix which follows Emily, a driven 20-something American from Chicago who moves to Paris for an unexpected job opportunity. She is tasked with bringing an American point of view to a venerable French marketing firm. Cultures clash as she adjusts to the challenges of life in Paris while juggling her career, new friendships and love life. She has many clashes with her supervisor, Sylvie. Sylvie often makes comments about Emily's "Americanness," which she considers to be a euphemism for lack of sophistication and lack of luxury and makes her unsuitable for working with clients of luxury brands. Here is an example of an exchange between Sylvie and Emily, where Sylvie complains about Emily's "Americanness," which she perceives to be euphemism for her lack of sophistication:

"We work very exclusive brands. They require mystery and, you have no mystery"

[TRACEY DIAMOND]

And here is another example:

"You're the enemy of luxury because luxury is defined by sophistication and taste, not by Emily in Paris."

Assuming Emily was in America and we were calling this "Emily in America," would this be the basis for nation origin discrimination? So let's start with the standard for national origin discrimination and harassment. Evan, can you start us up with the standard?

[EVAN GIBBS]

Yeah I mean in general it's making a hiring or firing or any other decision about somebody's terms and conditions of their employment, based on somebody's national origin. It's pretty straightforward.

[TRACEY DIAMOND]

When we talk about national origin, what are we really talking about here?

[EVAN GIBBS]

It's where you're from, it's the country where you either immigrated from or where you were born. It's any of those things.

[TRACEY DIAMOND]

Can national origin sometimes be intermixed with race or are they separate concepts?

[EVAN GIBBS]

A lot of times it can be hard to separate the two if you've got someone who is from another country and also of another race, from the decision maker. That's what you always look at, the difference between the decision maker and the employee that's at issue. It can a lot of times be very hard to separate the two out and so, we see a lot of , in lawsuits, we see these claims together, because they don't have to, a plaintiff in a lawsuit or a claimant with a charge with EEOC, they don't have to separate it out. It's our job as defense lawyers to separate that out, so we see them brought together a lot of the time.

[TRACEY DIAMOND]

Kate what do you think? If this was Emily in America rather than Emily in Paris, would Sylvie's comments to Emily be considered discrimination?

[KATE PUCCIO]

I think when you look at the whole picture it's certainly possible. So we know that national origin discrimination, it excludes things like simple teasing, offhand comments or isolated incidents. But when you look at the whole series and how she's being treated, I think it's a likelihood. I would certainly say she had a claim.

[TRACEY DIAMOND]

Emily often shrugs off the comments when Sylvie makes them and just moves on. What should she be doing differently if she's offended by them?

[KATE PUCCIO]

I can speak about our company. What I would like to see is that employee reaching out, whether it's to another supervisor or ideally to HR, to say that comments are being made and they're uncomfortable with them and how can we help.

[TRACEY DIAMOND]

If an employee doesn't reach out, doesn't go to HR, let's say, because they're uncomfortable doing that or they just haven't done it for some reason, Evan, what do you think, could that be a defense to a claim of national origin discrimination or national origin harassment?

[EVAN GIBBS]

I mean it certainly cuts against the strength of their claim for sure. You know, look, the reality is, this doesn't get brought up until the employee has ten pages of notes and you've got this long litany of grievances that has piled up over the years, or you go to the supervisor and, low and behold, the supervisor's got a folder full of discussions and things that they've had with the employee and in there, "I can't understand their accent," or typically something like that. I mean, it is rare, frankly, I have never had a situation where it works like we want it to work and the employee handbook, where you're like, please reach out to HR if you have a problem. Usually there's a bunch of text messages at first, and then some emails and so usually you've got some stuff in writing that we're dealing with and, we always tell people, go to HR, but I found that employees a lot of times are terrified to get HR involved because they assume that they're going to get fired or demoted or whatever because they have made a complaint about their supervisor and so I think that's an issue. Maybe Kate has a culture around taking these complaints seriously. Is that something that you've seen, that you've dealt with, sort of creating a culture for....

[KATE PUCCIO]

For sure, we definitely have to work hard, and not just us, but all employers, you have to create a culture where HR is seen as not just management, where it's really seen as an ally and a facilitator to both sides. But we definitely hear from employees, "oh I didn't want to get HR involved, I didn't want to get so and so in trouble, it really wasn't a big deal." And then that's where I see, I look at the supervisor, right, because inevitably if someone is making comments like this they're witnessed by someone else. And that's where we try to have a culture of, "see something, say something." It's cliché, but enforcing policies only works if we're looking out for each other.

[TRACEY DIAMOND]

Kate, how do you handle the fact that HR plays this game between being the enforcer of the rules and sometimes coming down on employees, disciplining or terminating them, but also wanting to be the ally of the employees and being this open door where employees should be coming to them when they have complaints? It's a fine line.

[KATE PUCCIO]

So I would agree with you and I think it's really having a commitment to fairness and transparency and being honest with the employees because there's always a resolution to an issue that doesn't necessarily mean that the employee likes the resolution but we always find that things tend to go better if we're open and honest from the beginning about what we can and can't do and what can and cannot remain private and the limitations on both sides. We find, or I've found, that that helps. And of course the employees always remain skeptical, they always think you're never really on their side.

[EVAN GIBBS]

Do you get a lot of the issues from employees who get a complaint or something like that, where it goes to HR or the supervisor and there's like this request for confidentiality, you know they'll go to HR and say I want to complain to you about this...

[TRACEY DIAMOND]

But don't tell anybody.

[EVAN GIBBS]

Yeah, if this person's complaining about my accent, but don't tell my boss, I just wanted you to know, please don't tell him. Do you run into that issue?

[KATE PUCCIO]

Yes. They will go: I just wanted to talk to you about it but I don't want you to do anything about it...

[TRACEY DIAMOND]

Yes.

[KATE PUCCIO]

... and then we have to have the conversation that we have an obligation to do something about it, and we can talk about, there can be five different ways to resolve something, something from you know, the most intervention to the most conservative, and sometimes we'll talk about those with the employees and try to make them feel comfortable with the decision. Because what we don't want to do is alienate someone who it was probably very hard for them to come to HR in the first place.

[TRACEY DIAMOND]

It's a tough one. When I was in HR and people would come to me, they used to call my office the "complaint department," and they would come in and they would tell me their complaint, often in great detail over a very long period of time, and then they would say "but don't tell anybody." I would always say, "well it was important enough for you to come to me, it's my job to do something about it. If I don't do something about it then I can't do my job and clearly it was important to you because you felt the need to tell me about it so you need to let me do my job." But it is tough, for sure.

One of the fun things about watching Emily in Paris is the fantastic clothing. I believe that, in one of the early episodes, Sylvie comments on Emily's poor clothing choices as an example of her not trying to fit in. Emily, of course, then dresses to the nines despite, who knows what clothing budget she must have. It made me think a lot about uniform policies and the employee's choice of clothing in the context of national origin discrimination. Clearly sometimes cultures have different clothing choices and companies need to respect that. What are your thoughts on uniform policies in the workplace and how do you avoid national origin discrimination claims in that world?

[KATE PUCCIO]

So I can talk about us. In many of our facilities we have uniforms that the employees are required to wear. We consider the uniform to be part of their PPE, their personal protective equipment, depending on the different aspect of it. But, we do have to be careful that the uniform doesn't interfere with, I don't know, say someone had a particular cultural item of clothing that they needed to wear and I know we're not talking about religious discrimination, but there are many religious items of clothing that people wear as part of their religious practice, so we need to be careful when we're setting policies that were able to accommodate those variations. We also have dress codes, which I think are actually more difficult than a uniform because they're so much gray in a dress code, which I think is what Sylvie was getting at. She inarticulately expressed that there are branding standards and a clothing style that they expect people working in a PR world to adhere to and we have dress codes. They're certainly not to that degree but you definitely need to be flexible and be willing to live in the gray.

[TRACEY DIAMOND]

Sure I would think so. How does perception factor into all of this? In other words, if Emily was really Canadian and Sylvie made snide comments about her being American, would Emily have a claim for national origin discrimination? Even what do you think about that?

[EVAN GIBBS]

Yeah, it's all about context in these cases and it's kind of hard to say. If there are enough comments, and, I'll say for the record, I think the comments we saw in the clips wouldn't give rise, they're not of severe enough nature, to constitute national origin discrimination in my opinion. Even if those sort of comments were made on a pretty routine basis, I still feel like she'd have a hard time with a claim under US law. But let's just assume that it was worse than in the clips and that it was either really severe or pervasive enough that it....

[TRACEY DIAMOND]

Actually I want to stop you there, because I don't know if I agree with that. Definitely not severe, but is it pervasive? If it happened routinely?

[EVAN GIBBS]

Well, I'll tell you. in the Eleventh Circuit where I'm at, in the deep South, it's not going to fly. I've read some cases out of Alabama and Georgia and it is a really, really high bar to set. I have read some cases and just been blown away, like I cannot believe that as a defense lawyer I've read the cases and was like I cannot believe that the judge didn't find this pervasive enough. You know, I feel like in the South if you're not huddled in a corner crying, then it's just not going to, get to a claim if,...

[TRACEY DIAMOND]

Well that's really interesting because I think you're going to see very different results in different parts of the country. In the Ninth Circuit, it is much easier to prove that this would be pervasive, if not severe. In California state court, again, even that much easier to prove, probably true in

some of the other state courts as well. So that's something to keep in mind, depending on where you are within the country itself, like so much else about everything in our country these days.

[EVAN GIBBS]

Yeah that's right. To your point, I think she'd have a tougher time if she was Canadian. It just depends on how she related the comments about her appearance and her dress to expressly to her being an American. To me, that is sort of the hook. If she just is constantly ragging on her clothes, telling her she looks sloppy, in a French accent, that's, to me, not enough. But if she's saying, "you're such a disgusting American, we cannot tolerate that, these American clothes," I think that is sort of the hook. I think there would need to be an express reference to her country of origin to get her across that line.

[TRACEY DIAMOND]

What do you think, Kate?

[KATE PUCCIO]

I think it's a little more blurry. I think perhaps the Canadian/American distinction is not a loss but where, perhaps, in the United States, if someone just generically referred to you as middle eastern or Asian, and you weren't, or they picked a specific country and they assigned it to you and you actually weren't from that country, I think there may be a claim there because it, but again I think it depends on how severe the conduct is, and whether the person to whom it's directed has made known, "you're making these comments, I'm not from that country, or I'm not from that place or my accent," it's not the same.

[TRACEY DIAMOND]

Let's make it an easier case. What if you add in that the person was treated differently in terms of being excluded from meetings or having their pay affected or even being disciplined because of the perception that they're from a certain country, even if they're not from that country.

[KATE PUCCIO]

Right. I definitely think that there would be a claim there, because it doesn't matter if it's not true, they're getting treated differently because of the perception and that's what's important.

[TRACEY DIAMOND]

Sure. In the show, Emily's boyfriend is British, in the second season. If Sylvie made anti-British comments to Emily, would that give rise to a claim for national origin discrimination?

[EVAN GIBBS]

I don't think so. In my opinion, no. I had a case one time where it was, and I can't remember what the legal term of art is, like an associational discrimination claim, where it was "you're discriminating against me based on," and I think the one I had was a race case, I think it was,

“you’re discriminating against me based on the race of my spouse or significant other,” and at least in Eleventh Circuit, if I recall correctly, now look again this podcast is not legal advice, so no one take this as gospel, but I recall that the law said that that’s not a claim, that a sort of derivative claim, you know of someone you’re associated with, I don’t know that that’s actionable and...

[TRACEY DIAMOND]

That might depend on the jurisdiction you’re in because I believe that in certain areas, I’m not sure if it’s under Title VII or if it’s just an under state law, there is such a claim for associational discrimination in the national origin world.

[KATE PUCCIO]

So I think, Tracey, your question was, if Sylvie had made anti-British comments does that give rise to a claim for Emily. I don’t think anti-British comments alone does, but if Sylvie starts saying much more serious things about Emily’s association with a British person and starts taking negative action against her, then I think potentially there is a claim. Or, and I think the race example, that’s an easier claim if you worked in a company where you had a spouse of a different race and they started treating you differently or excluding you, or not promoting you because of the race of your spouse.

[TRACEY DIAMOND]

So where there’s an adverse job action, then it’s a clearer cut case for sure because of your association with someone of the protective category.

[KATE PUCCIO]

I think so. I still think it’s a more difficult case because it’s not about you, it’s about a third party, where the third party wouldn’t have a claim.

[TRACEY DIAMOND]

It’s about your relationship with that third party who is in the protective category, rather than about your protective category, per se.

[KATE PUCCIO]

Right.

[TRACEY DIAMOND]

So what are some real life examples that we’re seeing lately of national origin discrimination or national origin harassment?

[EVAN GIBBS]

Well I'll tell you, I think we're about to see a lot for individuals from Russia, to take something out of the headlines happening right now. I read an article somewhere talking about how there were fears among Russia immigrant communities here in the US that they would be unfairly targeted. And I think that's probably a pretty real concern. I would certainly be nervous, so I think that's an area where we could see.

[KATE PUCCIO]

I do too, especially because that I think that is a good example of perception as well, because in eastern Europe there are many non-Russians who speak Russian and there are a lot of people who may have been born in Russia but are not ethnic Russians and there are a lot of people who are born in other countries but are ethnic Russians. So I think that will certainly be interesting. Another example I think we've all seen in the news is that Asian American and Asian hate crimes are on the rise in the US have been since the pandemic started.

[EVAN GIBBS]

Yeah and especially over the last several years, with the beginning of the pandemic, I feel like there's been more of an emphasis on, individuals of Chinese origin. There's a lot of rhetoric around the virus, especially when the pandemic first started, there was a lot of rhetoric around China and the origins of the virus. I have a relative who is a Chinese immigrant and she did not report having any negative interactions around it but we were certainly concerned for her during the pandemic, especially in the early stages.

[TRACEY DIAMOND]

So, Kate, as an employer, how do you handle where there's a potential for groups to be targeted because of what's going on in the news, the rise in the coronavirus leading to anti-Asian sentiments, the Russian invasion of Ukraine potentially adding to anti-Russian sentiments, how do you as an employer handle that or protect against it happening in the first place?

[KATE PUCCIO]

So, I think, to protect against it happening in the first place, you do your diversity and inclusion training. We do a lot of considerate communication training, which is a basic seminar about how to talk to people and about how to talk to people when you have disagreements, or how to talk to people who are different than you. And, I think, again, we rely a lot on our supervisors to be proactive. They know their staff, they know the people who've been working there for 20 years, they know where the pressure points are and they look out for their people. I think it's about being proactive, but also listening and being able to support people and intervene when necessary.

[TRACEY DIAMOND]

Well I think that's a really good place for us to wrap up. I want to give a great thank you to Kate Puccio for joining us today and thank you to our listeners for listening in. Stay tuned for our next episode of Hiring to Firing the Podcast.

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