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Tidal Wave: More Systemic Cases on the Horizon

By Stephen S. Zashin*

The Cleveland Field Office of the United States Equal Employment Opportunity Commission ("EEOC") recently welcomed a new Director. Sworn in on October 6, 2014, Cheryl Mabry-Thomas now presides over the EEOC's Cleveland Field Office, which is part of the Agency's Philadelphia District. The Director's responsibilities include management of the office's staff and activities.

Ms. Mabry-Thomas has worked for the EEOC for nearly three decades, including many years investigating systemic claims. The EEOC investigates charges of discrimination on an individual and systemic basis. The EEOC defines systemic discrimination broadly as "a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area." Given Ms. Mabry-Thomas' background and the EEOC's recent activity, employers should expect to see more systemic charges coming out of the Cleveland Field Office.

In recent years, the EEOC has increased its systemic enforcement efforts. The EEOC can make a greater impact with systemic cases involving many employees, as compared to cases involving only a single employee. In 2005, the EEOC established a special task force regarding systemic discrimination. While the vast majority of the charges of discrimination the EEOC receives are for single individuals, the EEOC can turn a charge of discrimination by a single individual into a systemic investigation. As part of its systemic enforcement efforts, the EEOC has targeted recruitment and training programs that may have discriminating barriers of entry, age discrimination in reductions in force, and compliance with client or customer wishes that result in the discriminatory placement or hiring of employees.

The EEOC also targets company policies that are "uniformly applied" but do not accommodate an individual or that have a broad impact on a protected class of employees. For example, hiring or promotion policies that unintentionally, but routinely, exclude certain groups, such as through criminal background checks, are ripe for systemic investigation by the EEOC. Employers should review their company policies and revise any that may have this result when applied.

***Stephen S. Zashin**, an OSBA Certified Specialist in Labor and Employment law and the head of the firm's Labor and Employment Groups, has extensive experience counseling employers on class or collective actions, including systemic charges brought by the EEOC. For more information about the EEOC's enforcement strategies or your labor and employment law needs, please contact Stephen (ssz@zrlaw.com) at 216.696.4441.

What's Next? EEOC Files Its First Ever Lawsuits Based on Transgendered Status

By Drew C. Piersall*

On September 25, 2014, the Equal Employment Opportunity Commission ("EEOC") sued two employers alleging sex discrimination on the basis of transgendered status. According to the EEOC, each employer violated Title VII of the Civil Rights Act of 1964 by firing an employee because "[she] is transgendered, because of [her] transition from male to female, and/or because [she] did not conform to the . . . employer's sex or gender-based preferences, expectations, or stereotypes." These "gender stereotyping" lawsuits likely signify a shift in the EEOC's enforcement efforts concerning an individual's transgendered status.

In each case, the employer discharged the employee after the employee announced her transgendered status or began presenting as a woman. In one, the employer discharged the employee approximately four months after she began wearing feminine attire. See *EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-cv-02421 (M.D. Fla. filed Sept. 25, 2014). The EEOC alleged co-workers ignored the employee and made derogatory comments and that the employer confronted the employee about her changing appearance. The employer also allegedly told the employee it was eliminating her position but then hired a replacement approximately a month later. In the second case, the employee allegedly informed her employer via letter of her plans to undergo a gender transition. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710 (S.D. Mich. filed Sept. 25, 2014). The EEOC alleged that less than one month later the employer's owner stated the employee's plan to undergo a gender transition was unacceptable and fired the employee. In both cases, the EEOC seeks injunctive and monetary relief.

These cases are not anomalies or outliers. Rather, in its most-recent Strategic Enforcement Plan, the EEOC identified "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions" as a top enforcement priority. In addition, the U.S. Court of Appeals for the Sixth Circuit, which covers Kentucky, Michigan, Ohio, and Tennessee, previously held that a transgendered individual presented a valid Title VII discrimination claim. See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). The U.S. Office of Special Counsel recently reached a similar conclusion. On August 28, 2014, the Office of Special Counsel found the Army discriminated against an employee based on gender identity following the employee's announced transition from male to female. The Office of Special Counsel analogized the situation to Title VII claims.

Given the EEOC's increased emphasis on protecting transgendered employees, employers must be cognizant of the protections Title VII and related state laws afford transgendered employees and should update their company handbooks and policies accordingly.

***Drew C. Piersall**, a member of the firm's Columbus office, practices in all areas of labor and employment law. If you have questions about the impact of transgendered issues on your workplace, please contact Drew (dcp@zrlaw.com) at 614.224.4411.

CONGRATULATIONS 2015 Best Lawyers

Z&R is happy to announce the following Z&R Labor and Employment Group lawyers have been selected for inclusion in **Best Lawyers in America 2015**

George S. Crisci
Employment Law Management, Labor Law – Management, and Litigation – Labor and Employment

Jon M. Dileno
Employment Law – Management

Jonathan J. Downes
Employment Law – Management and Labor Law – Management

Stephen S. Zashin
Labor Law – Management

The FLSA's Professional Exemption Requires a Degree

By Michele L. Jakubs*

The U.S. District Court for the Northern District of Ohio recently shot down a restaurant's effort to classify several chefs as "learned professionals" under the Fair Labor Standards Act ("FLSA"). See *Solis v. Suroc, Inc.*, 2014 U.S. Dist LEXIS 127929. The Department of Labor sued the owners of several Ohio restaurants for failing to pay minimum wage and overtime to certain chef employees. Generally, the FLSA requires employers to pay non-exempt employees minimum wage and, for hours worked in excess of 40 hours in a work week, overtime wages.

The restaurant claimed that the chefs, referred to as #2 and #3 chefs, fell within the FLSA's exemptions for professionals and executives. Codified as 29 U.S.C. § 213, the FLSA provides several exemptions from its minimum wage and overtime wage requirements, including "any employee employed in a bona fide executive, administrative, or professional capacity." The Code of Federal Regulations further defines the exemptions for professionals in 29 C.F.R. § 541.301 and for executive employees in 29 C.F.R. § 541.100.

To fall within the professional exemption, an employee must: (1) "perform work requiring advanced knowledge;" (2) the work must be in a field of science or learning; and (3) customarily, the employee must have acquired the advanced knowledge through a "prolonged course of specialized intellectual instruction." The regulations specify that a degree is *prima facie* evidence that an employee has met the third requirement.

In applying these three factors, the court determined that the restaurant failed to prove that the #2 and #3 chefs fell within the professional exemption because their respective job descriptions did not require any degree or formal culinary education. Further, the court found that the chefs' extensive on-the-job training was insufficient to meet the regulation's requirement of a prolonged course of specialized intellectual instruction. The court noted that the restaurant offered no evidence supporting its argument that the chefs received instruction by using the restaurant as a school-type setting during off-hours.

The regulation specifies that the professional exemption does not apply to occupations in which most employees acquire their skill through experience rather than advanced, specialized intellectual instruction. The court refused to extend the exemption to positions requiring extensive work experience, but no degree, like with the #2 and #3 chefs. The court continued that for the professional exemption to apply, the employee must begin the job in possession of the advanced knowledge customarily acquired through a prolonged course in specialized instruction. Generally, training the employee after hire is insufficient.

The restaurant also argued that the #3 chefs fell within the executive employee exemption, as defined in 29 C.F.R. § 541.100. In order to fall within the executive employee exemption, an employee must: (1) be compensated on a salary basis of no less than $455 per week; (2) have the primary duty of managing the enterprise or a department or subdivision of the enterprise; (3) "customarily and regularly" direct the work of two or more employees; and (4) have the authority to hire and fire other employees, or make suggestions regarding hiring, firing, and promotion that "are given particular weight." The court analyzed only the fourth requirement, finding that the #3 chefs did not meet the exemption as they had no authority to hire and fire other workers, and there was no evidence that the #3 chefs made suggestions or recommendations regarding hiring, firing, or promotion decisions.

As this case demonstrates, determining whether an employee meets the requirements for exemption from minimum wage and overtime under the FLSA is fact intensive. Improperly applying an exemption can prove costly for employers, and when in doubt, employers should contact counsel.

***Michele L. Jakubs**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. For more information on the FLSA's wage and hour requirements or exemptions, please contact Michele (mlj@zrlaw.com) at 216.696.4441.

Will Supervisors Soon Be Off the Hook in Employment Discrimination Cases?

By Sarah K. Ott*

Recently, the Ohio Supreme Court issued a game-changing decision concerning whether supervisors can be held liable alongside employers in employment discrimination cases. The case, *Hauser v. City of Dayton Police Dep't.*, 140 Ohio St. 3d 266, 2014-Ohio-3636, involved a female police officer who claimed that the Dayton Police Department and her supervisor treated her unfavorably as compared to her male peers. The officer named both the Dayton Police Department and her direct supervisor as defendants. The court did not rule on the merits of Hauser's discrimination claim; instead, it only addressed the narrow question of whether Ohio law expressly imposes liability on employees of political subdivisions in employment discrimination cases.

Ohio Revised Code § 2744.03 grants employees of political subdivisions (such as police departments and other government employers) immunity from tort liability, unless another section of the Ohio Revised Code expressly imposes liability. The court's analysis focused on whether R.C. § 4112.02(A), which prohibits employer discrimination, expressly imposes liability. Ohio Revised Code § 4112.01(A)(2) defines "employer" as "the state, any political subdivision of the state, any person employing four or more persons within the state, and **any person acting directly or indirectly in the interest of an employer**" (emphasis added). The Ohio Supreme Court previously interpreted the bolded phrase to include employees as among those liable for employment discrimination (the seminal case being *Genaro v. Cent. Transp.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999)).

In *Hauser*, the Ohio Supreme Court found that Ohio law does not permit individual liability of a supervisor of a political subdivision in a discrimination case brought under R.C. § 4112.02(A). In reaching its decision, the court followed two lines of reasoning. First, it found that in the historical context in which the General Assembly drafted R.C. Chapter 4112, the theory of *respondeat superior* governed. *Respondeat superior* refers to the general rule that an employer is responsible for its employees' acts performed in the course of the employees' job; that is, an employer is vicariously liable for the acts of an employee. Under the same theory of vicarious liability, federal courts decline to hold individual employees liable under Title VII. As such, the court reasoned that it is contrary to the theory of *respondeat superior* to impose liability on an individual employee.

Second, the court reasoned that imposing liability on individual employees contradicts the general context and purpose of R.C. § 4112.02(A). The court noted that it makes little sense to hold supervisors liable when R.C. § 4112.02(A) exempts employers with fewer than four employees from discrimination liability. Furthermore, the court observed that the statute expressly provides for individual liability elsewhere. Ohio Revised Code § 4112.02(J) holds individuals liable for aiding and abetting the discriminatory practices of an employer, but this section is arguably superfluous if R.C. § 4112.02(A) requires individual liability. Ohio Revised Code § 4112.02(J) demonstrates that when the General Assembly intends to impose individual liability on employees, it does so expressly rather than by implication.

So what does this mean for employers today? It means that supervisors in political subdivisions are not personally liable in employment discrimination cases brought under R.C. § 4112.02(A). This decision also may be a harbinger of future rulings similarly finding that private sector employees are likewise immune from liability for employment discrimination. While the *Hauser* Court refused to overrule *Genaro*, its decision calls into question the holding in *Genaro* and suggests the Ohio Supreme Court may be willing to revisit whether supervisors of private employers are subject to employment discrimination liability under R.C. § 4112.02(A). Also, do not be surprised if savvy plaintiff's attorneys start bringing more aiding and abetting claims under R.C. § 4112.02(J).

***Sarah K. Ott** practices in all areas of labor and employment law. For more information about the Ohio Supreme Court's decision in *Hauser* and its consequences, please contact Sarah (sko@zrlaw.com) at 216.696.4441.

Public Sector Alert: How To Conduct Yourself Under the Open Meetings Act

By Jonathan J. Downes*

The Second District Court of Appeals came down hard on an Ohio public body for violating Ohio's Open Meetings Act. *Maddox v. Greene Cty. Children Servs. Bd. of Dirs.*, 2014-Ohio-2312. Over the course of a year, the public body entered into executive session during numerous public meetings to discuss an employee's job performance and employment status. After the public body discharged the employee, the employee challenged the discharge. The employee claimed the public body violated Ohio's Open Meetings Act by holding private meetings to discuss the employee's performance and job status. The court agreed with many of the former employee's claims. The decision provides a great reminder as to how public bodies must conduct themselves and highlights the following important sections of Ohio's Open Meetings Act:

1. When entering an executive session, public bodies must specifically cite the appropriate statutory exception for conducting a meeting outside the public's purview.

When holding meetings, courts construe the Open Meetings Act liberally in favor of taking action and conducting deliberations in meetings open to the public. Public officials may convene private executive sessions to discuss sensitive information, but when doing so must follow certain procedures. Specifically, public officials only may conduct executive sessions for one of the reasons detailed in Ohio Revised Code Section 121.22(G) and must state the reason during the public meeting. The *Maddox* Board went into executive session to discuss the following: 1) an employee's evaluation; 2) "upcoming negotiations;" and 3) "personnel matters" or "personnel issues." In each instance, the *Maddox* Board failed to sufficiently specify the executive session's purpose during the public meeting.

Public bodies may discuss an employee's job performance in an executive session, but before doing so, must identify a R.C. § 121.22(G) purpose. In *Maddox*, the Board went into executive session to discuss the "Executive Director's Evaluation." The Open Meetings Act does not specifically include evaluating a public employee as an exception to the open meeting requirement. However, the court considered a previous decision where a public body discussed an employee's job performance when considering that employee's dismissal. Ohio Revised Code Section 121.22(G) authorizes executive sessions to consider the dismissal of public employees. Since the Open Meetings Act does not include an exception for evaluating public employees, a public body must link each executive session regarding an employee's job performance to an exception enunciated in R.C. § 121.22(G).

In fact, public bodies should always reference a specific R.C. § 121.22(G) exception. At different points, the *Maddox* Board entered executive session to discuss "upcoming negotiations" and "personnel matters" or "personnel issues." Relying on case law, the court concluded these non-specific references were not proper statutory purposes and did not satisfy R.C. § 121.22(G). Instead, the *Maddox* Court found that "the statute requires [the body] to be more specific by denoting the precise type of 'personnel' matters it would address, such as hiring, discipline, termination, etc." Therefore, whenever a public body wishes to enter executive session, it should specifically reference a R.C. § 121.22(G) exception.

2. After concluding an executive session, public bodies must re-open the meeting to the public and move to adjourn the meeting prior to concluding business.

After an executive session ends, the public body must reopen the meeting to the public and make a motion and vote to adjourn the public meeting. The *Maddox* Board regularly ended the executive sessions without reopening the meeting to the public, which the court found violated the Open Meetings Act. Instead, the *Maddox* Board should have given those present a reasonable opportunity to re-enter the room after the executive session ended, before officially concluding business. Public bodies that enter an executive session should always re-convene the public meeting before adjourning that meeting.

3. When public bodies make decisions based on improper deliberations, they must hold subsequent deliberations sufficient to support the decision prior to taking formal action.

Ohio Revised Code Section 121.22(H) invalidates formal actions based on deliberations held in closed meetings that do not comply with one of the executive session exceptions detailed in R.C. § 121.22(G). The *Maddox* Board terminated an Executive Director after holding a proper executive session. However, the court concluded the *Maddox* Board based its termination decision on previous deliberations held during improper executive sessions. In response, the *Maddox* Board pointed to additional discussions held in the proper executive session. However, it was not enough "to point to some 'new' or 'additional' deliberations if the employment action" still resulted from improper deliberations. Therefore, the *Maddox* Board had to re-deliberate in either a public session or a properly held executive session. In particular, those subsequent discussions had to be sufficient "to support a finding that [the Board's] discharge decision did not result from prior improper deliberations." Any time a public body suspects previous deliberations or actions were improper, the public body should hold subsequent substantive deliberations prior to taking formal action.

AN EXCELLENT REMINDER OF HOW PUBLIC BODIES MUST CONDUCT THEMSELVES IN LIGHT OF OHIO'S OPEN MEETINGS ACT.

These principles serve as an excellent reminder of how public bodies must conduct themselves in light of Ohio's Open Meetings Act.

*__Jonathan J. Downes__, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience advising public entities and employers. For more information about the application of the Open Meetings Act to executive sessions, please contact Jonathan (jjd@zrlaw.com) at 614.224.4411.

Zashin & Rich is pleased to announce the return of

Jason Rossiter

Jason Rossiter has returned to Zashin & Rich after a short stint out on the west coast. Jason, who first began working at Zashin & Rich in 2007, has been practicing law for nearly 15 years. He has a wealth of experience drafting contracts, advising employers on compliance with workplace employment, privacy, and technology laws, and representing employers in employment-related litigation.

Ohio's Minimum Wage to Increase to $8.10

By David P. Frantz*

On January 1, 2015, pursuant to a 2006 Amendment to the Ohio Constitution, which provides for an annual minimum wage increase tied to the rate of inflation, Ohio's minimum wage will increase fifteen cents for non-tipped employees to $8.10 per hour. The state minimum wage for tipped employees will increase seven cents to $4.05 per hour. The increase will apply to all Ohio employees, age sixteen and older, employed by businesses with annual gross receipts of more than $297,000.

Ohio employees of businesses with annual gross receipts below $297,000 and fourteen- and fifteen-year-old employees are only entitled to receive hourly wages equivalent to the federal minimum wage. The federal minimum wage currently stands at $7.25 per hour for non-tipped employees and $2.13 per hour for tipped employees and is not subject to an automatic annual increase.

*__David P. Frantz__ practices in all areas of labor and employment law. For more information about minimum wage changes or your labor and employment law needs, please contact David (dpf@zrlaw.com) at 216.696.4441.

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Zashin & Rich Proudly Launches New Website

After several months of development, we proudly launched on November 10, 2014. Many thanks to Unity Design (unitydesign.biz) for capturing our energy and corporate culture in our re-branding and website. Please visit us at **zrlaw.com**.

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Family Law

Congratulations Zashin & Rich Family Law Attorneys for receiving a 1st Tier ranking in Cleveland, Ohio by U.S.News – Best Lawyers ®.

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Upcoming Speaking Engagements

Friday, December 19, 2014, at 1:45pm

Drew C. Piersall is presenting *"Individual vs. Official Capacity and the Ex Parte Young Doctrine"* at 1:45 p.m. for the Ohio Department of Public Safety's inaugural "Defending §1983 Actions Against Public Clients" at the Department's headquarters located in Columbus, Ohio.

Monday, February 2, 2015, beginning at 3:30pm

Jonathan J. Downes presents *"Virtual Realities: Dealing with Arbitration, Arbitration Decisions, and Mid-Term Bargaining"* at OHPERLA 31st Annual Training Conference beginning at 3:30 p.m. at the Roberts Centre in Wilmington, Ohio.

Tuesday, February 3, 2015, beginning at 10:30am

Drew C. Piersall presents *"'Modern Family' Employment: Today's Discrimination Trends"* at OHPERLA 31st Annual Training Conference beginning at 10:30 a.m. at the Roberts Centre in Wilmington, Ohio.

Thursday, February 12, 2015, at 2:00pm

Patrick J. Hoban presents *"Affordable Care Act"* at 2:00 p.m. for the American Payroll Association, Greater Cleveland Chapter at the Crown Plaza in Independence, Ohio.

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With offices in Cleveland and Columbus, Ohio, Zashin & Rich represents employers in all aspects of employment, labor, and workers' compensation law. The firm represents private and publicly traded companies as well as public sector employers throughout Ohio and the United States. Z&R defends employers in all aspects of private and public sector traditional labor law, employment litigation, and workers' compensation matters. The firm also counsels employers on a variety of daily workplace issues including, but not limited to, employee handbooks, non-compete agreements, social media, workplace injuries, investigations, disciplinary actions, and terminations. Z&R publishes its quarterly newsletter, "Employment Law Quarterly," for its clients and friends. The ELQ and information about the firm may be found at zrlaw.com.

Employment Law Quarterly is provided to the clients and friends of Zashin & Rich. This newsletter is not intended as a substitute for professional legal advice and its receipt does not constitute an attorney-client relationship. If you have any questions concerning any of these articles or any other employment law issues, please contact Stephen S. Zashin at 216.696.4441. For more information about Zashin & Rich, please visit us on the web at zrlaw.com. If you would like to receive the Employment Law Quarterly via e-mail, please send your request to ssz@zrlaw.com. **ELQ Contributing Editors:** David R. Vance and David P. Frantz. | Copyright© 2014 – All Rights Reserved Zashin & Rich.