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A Federal Court recently affirmed an employer's decision to discharge a janitor who claimed the employer discriminated against him on the basis of his religious belief. *Bolden v. Caravan Facilities Mgmt., LLC*, No. 1:14-CV-26-RLM, 2015 U.S. LEXIS 73619 (N.D. Ind. June 8, 2015). The employer, pursuant to a neutral, rotating schedule, assigned the plaintiff-employee janitor to work on six Sundays over a ten-week span. The employer had negotiated the schedule as part of the collective bargaining agreement ("CBA") it entered into with the employee's union. However, the employee, an ordained Baptist minister, did not work any of the scheduled shifts. He called off, did not appear, or traded shifts with another employee in order to observe the Sabbath. After the employer terminated his employment based on unsatisfactory performance, the employee sued, claiming the employer violated Title VII of the Civil Rights Act of 1964 ("Title VII").

The Court found the employer did not violate Title VII by failing to accommodate the employee's religious belief. Reasonable accommodations eliminate conflicts between religious practices and employment requirements. According to the Court, the employer provided a reasonable accommodation through two mechanisms. First, the employer utilized a neutral, rotating shift schedule that spread weekend work among the employees. Second, the employer permitted employees to trade shifts. The opportunity to trade shifts eliminated any conflict the neutral schedule created with an employee's request for days off.

The Court also reasoned that any additional accommodation would impose an undue hardship on the employer. Employers do not have to incur more than a *de minimis* cost, in lost efficiency or higher wages, to accommodate an employee's religious practice. Here, the Court considered the following accommodations: 1) making an exception to the neutral, rotating schedule by never scheduling the employee on Sunday; or 2) moving the employee to third shift. According to the Court, these options imposed more than a *de minimis* cost. If the employer did not change the employee's schedule, the employer had to a) pay someone overtime to cover the shift (placing the burden on co-workers), b) work with one less employee (loss of productivity), or c) hire another employee (additional expense).

The CBA's neutral, rotating schedule and seniority system played a significant role in the Court's decision. Under the CBA, seniority determined shift selection. The employee worked second shift because he was one of the least-senior union members. Therefore, if the employer moved him to a different shift, it would violate the CBA and deny other employees their contractual rights. The employer had consulted with the union, but the union was unwilling to make an exception to the neutral, rotating schedule it negotiated.

Employers subject to CBAs should consider this decision when presented with requests for accommodations based on religious belief, particularly when those requests violate the CBA.

***George S. Crisci**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. If you have questions about the impact of religious accommodations on your workplace, please contact George (gsc@zrlaw.com) at 216.696.4441.

EEOC: Transgendered Employees Can Use the Restroom of Their Choice

By Andrew J. Cleves*

On April 1, 2015, the Equal Employment Opportunity Commission ("EEOC") ruled that a federal agency discriminated against a transgendered employee when it prohibited the employee from using the common women's restroom. *Lusardi v. McHugh, Dep't of Army*, Appeal No. 0120133395, (EEOC Apr. 1, 2015). The employee presented as female and had not undergone medical procedures to transition from male to female. According to the EEOC, when the employer required the employee to use a single-user restroom, the employer committed sex discrimination in violation Title VII of the Civil Rights Act of 1964 ("Title VII").

In its decision, the EEOC adopted a standard for determining the sex of transgendered individuals – how the employee identifies himself/herself. Specifically, the EEOC concluded "there is no cause to question that Complainant – who was assigned the sex of male at birth but identifies as female – *is female*." Here, after the employee began transitioning her gender presentation, she reached a mutual agreement with her employer regarding bathroom use: she would use a single-user restroom instead of the women's restroom until she had undergone surgery. The employer advocated this approach based on anticipated discomfort from other female employees. Subsequently, the employee used the women's restroom when her designated restroom was out-of-order. A supervisor confronted the employee about this use, claiming the employee must prove she had undergone "the final surgery" before she could use the women's restroom.

The EEOC concluded that the employer's act of prohibiting the employee from using the women's restroom constituted direct evidence of discrimination. Here, the employer admitted the employee's transgendered status was the motivating factor for its decision to prohibit the employee from using the women's restroom.

The EEOC also determined that restricting the employee from using the women's restroom was an adverse employment action. According to the EEOC, "equal access to restrooms" constitutes a significant, basic condition of employment. Therefore, where a transgendered individual has begun living and working as a woman (or man), the employer must allow the employee access to the women's (or men's) restroom.

Finally, the EEOC rejected the employer's arguments of 1) anticipated discomfort of female employees and 2) the employee-employer transition agreement. "Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity." The EEOC concluded an employer may not condition access to terms, conditions, or privileges of employment on completing certain medical procedures that the employer feels conclusively proves the individual's gender identity. Even though the employee originally agreed to use the single-user restroom, employees cannot prospectively waive their Title VII rights.

This EEOC decision is not an anomaly or new trend. Rather, the EEOC has begun pursuing these types of sex discrimination cases with increasing frequency. 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. Additionally, as Zashin & Rich previously reported, the EEOC filed two sex-stereotyping, gender-discrimination lawsuits in September 2014. In these cases, the EEOC alleged the employer discriminated against the transgendered employee because the employee failed to conform to the employer's "sex or gender-based preferences, expectations, or stereotypes." On April 21, 2015, one court concluded the EEOC sufficiently stated a claim under Title VII and allowed the case to proceed. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2015 U.S. LEXIS 52016 (E.D. Mich. Apr. 21, 2015) 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. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). On June 1, 2015, as Zashin & Rich recently highlighted, the Occupational Safety and Health Administration released a new best practice guide concerning transgendered workers' use of workplace restrooms.

Given the EEOC's increased emphasis on transgendered employees, employers must be cognizant of the protections Title VII and related state laws afford transgendered employees. In particular, employers should consider this EEOC decision when presented with employees transitioning their gender identity and employers should update their company handbooks and policies accordingly.

***Andrew J. Cleves**, practices in all areas of labor and employment law. If you have questions about the impact of transgendered issues on your workplace, please contact Andrew (ajc@zrlaw.com) at 216.696.4441.

Employee Performance Reviews Have Their Day in Court: How Employers Can Get the Most out of Employee Performance Reviews

By Sarah K. Ott*

Recently, the trial between Ellen Pao and her former employer, venture capital firm Kleiner Perkins Caufield & Byers ("Kleiner Perkins"), captivated the business and technology world. Pao, formerly a junior partner at the firm, sued Kleiner Perkins for gender discrimination and retaliation, seeking $16 million in damages. Pao argued that the firm's culture prevented women from advancing into the more lucrative senior partner positions and that the firm retaliated against her after she filed the lawsuit, eventually terminating her employment. Kleiner Perkins asserted that Pao's poor performance and inability to get along with colleagues prevented her from receiving a promotion and led to her discharge. On March 26, 2015, a California jury found for Kleiner Perkins on all counts. Since then, Kleiner Perkins has sought to recover close to $1 million in expenses incurred during trial from Pao, and a judge has tentatively ruled that Pao must reimburse Kleiner Perkins for about $250,000 in expenses. Pao recently filed a notice of appeal.

The lawsuit captured headlines in major newspapers and blogs because it pulled back a curtain on the inner workings of one of Silicon Valley's most respected venture capital firms (known for funding Google and Amazon in their start-up days). From an employment law perspective, the trial highlighted some of the benefits and pitfalls of employee performance reviews. Both sides used Pao's performance reviews as evidence, with Pao's attorneys claiming they showed Kleiner Perkins' bias against Pao, and the defense relying on them as records of her sub-par performance. In particular, Pao's attorneys' use of the performance reviews highlights the potential for reviews to backfire against the employer if not done well. Pao's attorneys pointed to the reviews as evidence of retaliation, since she received poor performance reviews in the year after she filed her lawsuit (despite receiving far more positive reviews the year prior). They also used the performance reviews as evidence of discrimination, noting that Pao received conflicting feedback (advising her to be both more and less aggressive) and that her male peers who received similar comments were later promoted.

The trial serves as a reminder to employers on how to best use employee performance reviews to encourage better work from employees – and how to avoid potential legal pitfalls. Performance reviews can help employers by motivating employees to improve in certain aspects of their jobs or continue good work in other areas. They also create a written record showing that the employer counseled an employee on poor performance and track improvements (or lack thereof).

ABIDING BY THE FOLLOWING TIPS WILL HELP EMPLOYERS MORE EFFECTIVELY USE EMPLOYEE PERFORMANCE REVIEWS:

- **Common standards:** create and adhere to the same standards so that every employee with the same job or role is evaluated based on the same criteria;
- **Set goals:** doing so sets a benchmark for the employer to evaluate that employee's performance;
- **Be specific:** specificity helps employees understand the employer's expectations and helps to prevent miscommunication;
- **Use deadlines:** informing employees of when they are expected to reach a goal creates a record of the employer treating the employee fairly; and
- **Avoid personality critiques:** rather than general criticism of an employee's personality traits, employers should focus on specific instances when that trait created a problem.

Finally, to the extent that the employer can identify objective criteria, the review will be all the better.

***Sarah K. Ott** practices in all areas of labor and employment law. For more information about conducting employee evaluations or other questions related to performance reviews, please contact Sarah (sko@zrlaw.com) at 216.696.4441.

Courts Have Little Sympathy for Employer Mistakes in Complying with the Fair Credit Reporting Act

By Drew C. Piersall*

The Fair Credit Reporting Act ("FCRA") regulates the collection and use of consumer information, including employee background and credit checks, and requires employers that rely on third-party companies to conduct background checks to follow certain procedures in notifying the individual being checked. The requirements include the following:

- The employer must notify the individual that the information obtained in the background report may be used in the employer's decision-making. The notice must be in a "stand-alone" format and may only have minimal additional information accompanying it.
- The employer must obtain the individual's written permission to perform the background check. The permission form may be part of the notification document.
- For permission to obtain background reports throughout the individual's employment, the employer must clearly state that intention on the permission form.
- In order to obtain an investigative report, including information on the employee or applicant's lifestyle, personality, and reputation, the employer must inform the individual of his or her right to a description of the investigation and its scope.

The FCRA requires additional action from employers who take an adverse action based on the information learned from a background check conducted by a third-party company, such as deciding not to hire an applicant, revoking a job offer, or termination. Before taking the adverse action, the employer must provide the individual with a copy of the report and a document summarizing the individual's rights under the FCRA and give the individual a meaningful opportunity to respond to the information.

Absent an adequate response and assuming the employer takes the adverse action, the employer must: (1) notify the individual of the adverse action; (2) provide the individual with specific credit score information from the report; (3) inform the individual of his or her right to obtain a free copy of the report within 60 days and dispute the information in the report; and (4) provide the contact information of the third-party company that compiled the report for the employer and explain that the third-party company did not make the decision to take the adverse action and cannot explain the reasons for the action. Employers also must destroy any background reports in a secure manner, such as by shredding them or permanently deleting electronic copies.

Despite the many requirements placed on employers by the FCRA, a spate of recent cases show that courts have little sympathy for employers who commit minor technical violations of the law, even when complying with the spirit of the law's requirements. For example, a federal court in Virginia recently denied summary judgment to an employer who allegedly violated the FCRA when it failed to provide "stand alone" notice that it would be conducting a background check by including a liability waiver on the same document. *Milbourne v. JRK Residential America, LLC*, No. 3:12cv861, 2015 U.S. Dist. LEXIS 29905 (E.D. Va., Mar. 15, 2015). Other cases involve employers rescinding job offers based on information discovered through a background report before providing the job applicants with a meaningful opportunity to respond to the information. In one case, the employer revoked a job offer to an applicant based on erroneous information in a background report without giving the applicant a chance to challenge the report. *Jones v. Halstead Management Co., LLC*, No. 14-CV-3125, 2015 U.S. Dist. LEXIS 12807 (S.D.N.Y., Jan. 27, 2015). In another case, the employer rescinded a job offer after its receipt of an unfavorable criminal background report on an applicant without giving the applicant time to correct the inaccurate information with the consumer reporting agency before filling the position. *Miller v. Johnson & Johnson*, No. 6:13-cv-1016, 2015 U.S. Dist. LEXIS 4448 (M.D. Fla., Jan. 14, 2015).

In a more employer-friendly decision, a federal court in Massachusetts recently granted summary judgment for an employer despite the plaintiffs' argument that the employer's notice and request for authorization to conduct a background check did not limit itself "solely" to the disclosure because it included a short preamble regarding customer safety. *Goldberg v. Uber Techs., Inc.*, No. 14-14264-RGS, 2015 U.S. Dist. LEXIS 44675 (D. Mass., Apr. 6, 2015). The court held the employer did not violate the FCRA by including "a few sensible words" about why the company chose to use background checks

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(i.e., customer safety). The court also found that the employer did not violate the FCRA by failing to notify the job applicant that it intended to make an adverse decision based on information included in the background report. The court found that the statute does not require advanced notice that the employer intends to take an adverse action – it merely requires providing the individual with the background report and a document stating the individual's rights under the FCRA.

With FCRA cases seemingly on the rise, employers who use third-party companies to compile background information should review their background check policies and procedures. Failure to strictly comply with FCRA requirements can lead to costly litigation, including class action lawsuits brought on behalf of employees and applicants subject to the employer's non-compliant background check policies and procedures.

***Drew C. Piersall** works in the firm's Columbus office and practices in all areas of labor and employment law. If you have questions about conducting background and credit checks or the FCRA in general, please contact Drew (dcp@zrlaw.com) at 614.224.4411.

FAILURE TO STRICTLY COMPLY WITH FCRA REQUIREMENTS CAN LEAD TO COSTLY LITIGATION, INCLUDING CLASS ACTION LAWSUITS

Z&R SHORTS

Congratulations!

CBA Columbus Bar Association

Drew C. Piersall was selected to serve as the Chair of the Columbus Bar Association's Labor & Employment Law Committee for 2015–2016. The Labor & Employment Law Committee meets on a monthly basis in the fall, winter and spring. In an effort to better serve clients and the legal profession, the Committee shares ideas and provides information on topics of concern to all who participate in the field of labor and employment law.

The College of Labor and Employment Lawyers
LEADERSHIP FOR GREATER PURPOSE

Jonathan Downes was inducted as a Fellow into the College of Labor and Employment Lawyers. The College of Labor and Employment Lawyers is an intellectual and practical resource for the support of the legal profession and its many audiences. The primary purpose of the College is recognition of individuals, sharing knowledge, and delivering value to the many different groups who can benefit from its value model.

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Z&R SHORTS

Seminars

Thursday, July 16, 2015 at 10:30 am

Patrick M. Watts presents *"2015 Legal Update"* at the Lake/Geauga Area Chapter of the Society for Human Resource Management luncheon.

Tuesday, September 22, 2015 at 1:00 pm

Jonathan J. Downes presents *"Risk Management for Supervisors"* for the Ohio Association of Chiefs of Police beginning at 1 p.m. at the Crowne Plaza Columbus North.

Crowne Plaza Columbus North | 6500 Doubletree Avenue, Columbus, OH

Thursday, September 24, 2015 at 10:00 am

Jonathan J. Downes and **Drew C. Piersall** present *"Negotiations – Post Recession and Impact of The Affordable Care Act"* for the Ohio GFOA – Annual Conference & Membership Meeting to be held at the Hilton Netherland Plaza in Cincinnati.

Hilton Netherland Plaza | 35 West Fifth Street, Cincinnati, OH

Friday, November 6, 2015 at 10:15 am

Patrick J. Hoban presents *"Affordable Care Act"* at 10:15 a.m. at the Ohio Conference for Payroll Professionals (OCPP) to be held at the Embassy Suites Hotel in Dublin, Ohio.

Friday, November 6, 2015 at 10:15 am

Michele L. Jakubs presents *"FLSA/Time and Attendance Best Practices"* at 10:15 a.m. at the Ohio Conference for Payroll Professionals (OCPP) to be held at the Embassy Suites Hotel in Dublin, Ohio.