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Effective Handling of Employee Complaints

By Jonathan Krol and Catherine Sturik


Managing a workforce can present a number of challenges. While it is often difficult to forecast employee issues, it is important to have a plan of action in place to ensure prompt and effective handling of complaints about potential harassment, discrimination, or retaliation. All employers have policies (whether written or not) against unlawful conduct. But having an "equal employment opportunity" mantra or a "zero tolerance" policy is only as good as the protocol used when such a policy is implicated.

When called upon, employers must investigate conduct and take appropriate corrective action to maintain a heathy work environment—and avoid unnecessary exposure to litigation. By adhering to a structured protocol when responding to employee complaints, an

employer can be sure to meet its legal obligations while also promoting proper workplace behavior. For employers who have yet to implement a formal policy, the following steps provide a helpful framework. For those with a policy, the following may serve as guidelines to improve your procedures.

1. Preventative Measures and Training

One of the best ways to prevent improper workplace behavior is to hold regularly-scheduled training for all employees. These training sessions need not be lengthy, but they should address and reinforce the employer's antidiscrimination and anti-harassment policies. Training is also an opportunity for the employer to promote the employer's values and highlight expectations for professionalism and mutual respect in the workplace.

Training sessions should be held at least annually and attendance of all employees should be required. Where feasible, all new employees should receive training upon hire. Employers may develop a separate enhanced program for supervisorial or managerial employees to focus on recognizing and addressing discrimination and harassment. Managers and supervisors must also be reminded they will be disciplined for failing to report instances of discrimination or harassment, and that retaliatory actions for a complaint are not permitted.

Helpful Tip: When conducting training sessions, employers should ensure that an experienced HR professional, employment counsel, or another neutral party conducts the training. At the conclusion of such training sessions, employees should sign a confirmation of attendance to document they attended the training and understood the material presented. Employers should consider video recording the training so new employees can view as part of orientation.

2. Establishing Policies and Protocols

An employer should have and distribute written policies that address unwanted or illegal behavior in the workplace. These policies must be clearly set out in the employer's handbook. If the employer's handbook is modified or amended, employees should be given prompt notice of the changes. Employees should be required to review and sign the employee handbook at hire or when amendments are made.

An effective written policy should include the following:

(1) a definition of harassment, discrimination, and retaliation;
(2) a zero-tolerance prohibition statement, which states the employer does not tolerate such behavior;
(3) language defining the scope of the policy's application and protections beyond the workplace; for example, "anywhere employees act on behalf of the employer" or "at an employer-sponsored event;"
(4) a description of the complaint procedure, including to whom and how the employee is to report;
(5) a description of disciplinary measures; and
(6) a prohibition against retaliation for engaging in protected activity.

Employer's policies should generally encourage employees to report harassing or discriminatory conduct through the appropriate channels. The policies should also make clear that employees can report concerning behavior without fear of retaliatory action.

Specific disciplinary actions for those who engage in harassing or discriminatory behavior are important. Employees must know the consequences of engaging in such behavior, and employers must strictly adhere to their written policies. "Letting one slide" or not enforcing the same policy for every employee perpetuates favoritism and opens the door to further complaints. Thus, the employer's disciplinary steps must be uniformly enforced.

Helpful Tip: It is good practice to highlight antidiscrimination and anti-harassment policies and practices in separate pages in the employee's handbook. To further guarantee that each employee has read, understood, and agreed to the policies, an employer may wish to have each policy signed by a new employee upon hire.

3. Receiving a Report and Interviewing Complainant

An employee's report of unlawful conduct, whether written or verbal, should be acknowledged upon receipt. All complaints must be taken seriously, regardless of how trivial or minor an issue may seem at the time. Again, it is important to follow the protocol outlined in the employment policies, regardless of the perceived merit or truthfulness to the allegations.

After the complaint is acknowledged, an individual should be selected take the lead in investigating the complainant's allegations. Ideally, the investigator of the complaint should be a neutral party, such as an HR professional. An outside consulting firm or employment counsel may also be retained, depending on the severity of the allegations.

Once an investigator is selected, the complainant should be interviewed. It is important to remind the complainant that his or her concerns are being taken seriously. Additionally, the investigator should reassure the complainant that no disciplinary or retaliatory actions will result from the complaint, so it is important to be truthful and honest about his or her allegations.

Helpful Tip: Confidentiality is important component when investigating a complaint. Allegations of discrimination, harassment, or retaliation often involve sensitive, personal, and emotional incidents. The complainant (and other interviewed employees for that matter) should be reassured that statements will remain confidential and protected from unnecessary disclosures to the extent possible. However, employees should be reminded that in order to adequately investigate the allegations, some information may be revealed on a need-to-know basis.

4. Engage in Reasonable Investigation

After interviewing the complainant, the extent of the investigation will vary depending on the severity of the complaint, the number of individuals involved, and whether the facts are in dispute. Speak to the alleged wrongdoer to hear his/her version of the events. Assure the accused that the employer is taking steps to fully investigate the complaint before any disciplinary actions are taken.

It is important to ask both the complainant and the alleged wrongdoer about other witnesses to the behavior at issue. Conduct separate interviews with each witness. Separating the witnesses will allow for a more honest and uninfluenced version of the events. Be sure to keep the parties' confidences and only reveal information as needed. Document and detail each interview—when it occurred, who was present, and generally what was said.

Finally, gather documents and other relevant tangible evidence. Review emails, phone records, video recordings, or other documentation of the alleged behavior. If necessary, consult with information technologies personnel to retrieve any communications or recordings of the alleged incident. Preserve the documents and evidence throughout the duration of the investigation.

Helpful Tip: When interviewing the complainant and other employees, it is often a good idea to have more than one neutral party present. Both interviewers should document the interviewee's statements and allegations, or at least both should sign off on the interview notes.

5. Take Prompt, Reasonable Remedial Action

After looking into the allegations, make a determination as to whether unlawful harassment, discrimination, or retaliation has occurred. If it has (and often even if it has not), an employer should take action to address the issue. Remedial action should be reasonably tailored to address the problem and prevent it from reoccurring. Disciplinary policies (including progressive and zero-tolerance) should be heeded. As mentioned above, making exceptions to these policies is imprudent: at best it suggests favoritism—at worst, it may be construed as unlawful discrimination.

An employer should discuss the remediation plan with the complainant and the accused to ensure that everyone is on the same page. The employer may ask the complainant what he or she would like to see done. An employer need not heed the whims of every complainant, but as a practical matter it makes sense for an employer to do what it can (within reason) to assuage the accuser and mitigate the situation moving forward. Sometimes a simple apology may resolve the situation.

Helpful Tip: A common misconception of employers is to not take any action unless a violation of work policy has been identified. It is true that no disciplinary actions should be taken against an accused if no violations are found. But even where no unlawful conduct occurred, it is usually wise to take steps to prevent a potential escalation of the issue—whether it be a physical separation of workspaces, a face-to-face meeting, or even a simple reminder of about employment expectations and proper decorum.

6. Follow up and Adjust Remedial Measures as Necessary.

Keeping the peace is essential to an efficient workforce and a healthy workplace. In a fast-paced and frenetic work environment, employers are not accustomed to revisiting issues that have previously been investigated and (seemingly) addressed. It is rarely a bad idea to review remedial measures and fine tune them as necessary to prevent a complaint from resurfacing.

Helpful Tip: A review and discussion of remedial measures will serve at least two purposes: to reassure complainants and to remind (would-be) offenders.

7. Document, Document, Document!

Documenting complaints received, facts gathered, and remedial measures taken is important. This is particularly true because an employer's liability may hinge on the extent and reasonableness of its investigation and remedial measures. Documents make it much easier to prove during future litigation that reasonable steps were taken. Notes should be taken contemporaneously with, or shortly after, the information comes to light, whether by way of interview or other channels.

Employers often make the mistake of speaking with an employee without confirming the conversation in writing. An employer need not spend an inordinate amount of time drafting reports and memoranda, but even quick notes highlighting the important facts and details can be helpful. Without documentation to help establish what was said or done, a "he said, she said" situation may arise down the road—which is never an enviable position.

There are harsh consequences for failing to preserve evidence relating to potential or expected litigation. Thus, it is advisable to maintain all documents where litigation is reasonably anticipated, and even where litigation is not expected, documents should be maintained for at least a few years following an employees' separation from the company. Even then documents should only be purged in accordance with a formal document retention policy. When in doubt, it is always better to preserve and maintain documents then destroy them.

Helpful Tip: When documenting, it is important to note that privilege will not likely attach unless the discussion is conducted by or through legal counsel (and even then the attorney-client privilege and work product doctrines may only apply under narrow circumstances). Thus, an employer should be careful that an investigation not produce harmful admissions or details that give rise to liability if litigation ensues. This is not to say that relevant facts and details be ignored or distorted, but the investigation should focus on verifiable facts. Opinions, conclusions, and speculation, especially when exposing the company to liability, should be avoided where possible.

Mitigation of Damages Defense Against Title VII Wrongful Termination Claim and the Effect of Claimant's Termination from Interim Employer

By Joseph W. Borchelt & Ian D. Mitchell

When litigating employment cases involving a Title VII[1] claimant's allegations that he or she was wrongfully terminated, one of the key defenses at an When litigating When litigating employment cases involving a Title VII claimant's allegations that he or she was wrongfully terminated, one of the key defenses at an employer's disposal is that the plaintiff/former employee failed to mitigate his or her damages. Usually, this defense alleges that the plaintiff failed to make reasonable efforts to secure replacement employment after being discharged. In other words, a discharged employee, even when terminated on discriminatory grounds, may not sit back and watch his or her purported damages accrue rather than seek a new job. However, the failure to seek replacement employment is not the only context in which the defense may be raised. In particular, a more nuanced articulation of the "mitigation of damages" defense becomes necessary if the plaintiff ***did*** obtain replacement employment but was subsequently fired from that position for cause. Under these circumstances, the employer may still argue that the value of those interim earnings should be deducted from any back pay award because the claimant unreasonably failed to ***maintain*** his or her interim job.

This article provides defense counsel with a litigation tool when the issue of damages mitigation arises in factually similar employment cases. Unfortunately, the body of case law regarding the effect of subsequent terminations on back pay awards is relatively small, but several federal appellate courts have indeed held that employment plaintiffs have a duty to use reasonable diligence in maintaining interim employment. Thus, in cases where a plaintiff alleging wrongful termination is discharged by an interim employer, defense counsel should investigate not only the facts surrounding the primary claim, but also those of any subsequent discharge.

A Claimant's Duty to Minimize Damages under § 706(g) of Title VII

A Title VII claimant's duty to mitigate damages derives from § 706(g),[2] where it states "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." The statutory language cited thus provides that any amounts earned by a wrongfully terminated employee from subsequent employment act as a credit toward the employer in calculating the claimant's backpay award. The U.S. Supreme Court has interpreted this section of Title VII to "require[] the claimant to use reasonable diligence in finding other suitable employment."[3] Although a claimant need not seek or accept employment that is demeaning or constitutes a demotion, he or she will forfeit the right to back pay if a "substantially equivalent" job is refused.[4]

Title VII's remedial provision relating to back pay is equitable in nature and seeks to restore what the claimant lost as a result of the discriminatory discharge.[5] As a consequence, "[s]ince only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."[6] Logically, then, any amounts the claimant failed to earn as a result of not using reasonable diligence must be credited to the employer. This understanding thus leads to the three main questions which are the central focus of this article:

(1) Does a Title VII claimant alleging wrongful termination have a duty to use reasonable diligence to ***maintain*** substantially equivalent employment after it has been obtained?
(2) If so, what level of conduct by the claimant is required in order to meet the "reasonable diligence" standard in maintaining subsequent employment?
(3) What is the practical effect to a Title VII back pay award when a claimant is subsequently terminated for cause?

These questions are addressed in the sections below and implicated in the following factual scenario. Suppose an employee is discriminated against and discharged by employer #1 in January 2015. Claimant then looks for a new job and obtains a position with employer # 2 in July 2015 that is substantially equivalent to his previous job. Suppose, then, that the employee is fired for cause by employer # 2 in August 2015 and sues employer #1 for wrongful termination in January 2016, alleging back pay damages for all of 2015. Certainly, employer #1 is entitled to have the wages earned during July and August subtracted from any back pay award pursuant to black letter employment law. However, can employer #1 also defend against the back pay claim on the grounds that claimant failed to mitigate his damages from August 2015 to the time of litigation as a result of being terminated from the subsequent employer? And what would be the effect on the back pay award if claimant obtained another job following the second discharge?

Federal Case Law and the Duty to Use Reasonable Diligence in Maintaining Replacement Employment

Ford Motor Co. v. EEOC

Any meaningful discussion of the "failure to mitigate damages" defense in the context of an employer's liability for back pay under Title VII includes the U.S. Supreme Court's 1982 case, *Ford Motor Co. v. EEOC*. In *Ford Motor Co.*, the Court considered the issue of whether an employer charged

with illegal gender discrimination during its hiring process could toll its liability for back pay simply by offering the claimants the previously denied jobs.[7] The EEOC countered that the employer's offer should have no effect on the accrual of back pay because the offers did not include retroactive seniority, which the claimants would have obtained had they been hired from the outset.

Ultimately the court held that, although the employer clearly engaged in unlawful sex discrimination, tolling its liability for back pay was consistent with the remedial principles of the statute because the duty to mitigate damages included the obligation "to accept an unconditional offer of the job originally sought, even without retroactive seniority."[8] The Court grounded its holding on the premises that the remedial purpose of § 706(g) was "to make the victims of unlawful discrimination whole by restoring them so far as possible … to a position where they would have been were it not for unlawful discrimination."[9] As a result, the Court delivered a major holding establishing the equitable purposes of Title VII's remedial scheme and held that the duty was broader than merely having to seek replacement employment.

Brady v. Thurston Motor Lines, Inc.

Following the principles set forth in *Ford Motor Co.*, the U.S. Court of Appeals for the Fourth District in 1985 further defined the reach of the "failure to mitigate" defense in *Brady v. Thurston Motor Lines, Inc.*[10] Specifically, in Brady, the court considered what effect, if any, subsequent terminations for cause would have on a Title VII plaintiff's claims for back pay.[11] In this case, the employer's liability for improperly terminating claimants on the basis of race was previously determined during the first stage of a bifurcated trial. The only issue on appeal, however, was the extent to which the employer could be required to compensate the claimants for back pay after a dismissal for cause from a ***subsequent*** employer.

Two of the *Brady* plaintiffs had obtained replacement work with other companies following their unlawful terminations from the defendant trucking companies. However, both of these substantially equivalent replacement positions ultimately ended in the claimants' discharge for cause. One claimant was hired by a warehousing company, only to be discharged when he violated a stated company policy for operation of the warehouse. The second claimant was hired by a different trucking company, but was subsequently terminated after an incident where he loaded freight on the wrong truck. Thurston argued that any liability it might have to the claimants for back pay was cutoff as a result of these discharges for cause.

In order to determine whether these subsequent terminations should have any effect on Thurston's liability for back pay, the Fourth Circuit looked to "the long-standing principle that a claimant who voluntarily quits comparable interim employment fails to exercise reasonable diligence in the mitigation of damages."[12] However, the court cautioned, "the rule that voluntary termination of interim employment tolls the back pay period is not unqualified."[13] Accrual of back pay ***would*** be tolled "when the voluntary termination is without compelling or justifying reasons."[14] As a consequence, the court held that "the rationale which supports the tolling of the back pay period following a voluntary quit should also apply to those terminations which result from violation of an employer's rules."[15] Therefore, the court concluded, because the subsequent terminations were justifiable for cause, they "amount[ed] to a lack of reasonable diligence in maintaining interim employment."[16] The Fourth Circuit then held that Thurston's liability for back pay was tolled by the terminations.

In so holding, the Fourth Circuit explicitly rejected the district court's determination that the claimants would not have failed to mitigate their damages absent a finding that they had "engaged in 'misconduct' within the meaning of [North Carolina's unemployment compensation statute]."[17] In its view, the court of appeals considered that standard far too narrow to comply with Title VII's requirement that all claimants use reasonable diligence to minimize their injuries. As a result of the Fourth Circuit's holding in *Brady,* a plaintiff's discharge for violating a subsequent employer's rules effectively tolls the accrual of back pay for which an employer in violation of Title VII would otherwise be liable.

Thurman v. Yellow Freight Systems, Inc.

The U.S. Court of Appeals for the Sixth Circuit reconsidered the issue of tolling periods for Title VII back pay in *Thurman v. Yellow Freight Systems, Inc.*[18] In that case, the court looked at whether the reasoning behind the employer's justified termination had any bearing on whether to toll the back pay accrual period. The plaintiff in Thurman, who was not hired by the company on account of his race, was then hired by a second trucking company but later terminated for cause after he got into an accident with the subsequent employer's truck.[19] In holding that the discriminating employer's liability for wrongful termination was not tolled, the court adopted the standard that only an employee's willful violation of the subsequent employer's rules or commission of "gross" or "egregious" conduct is sufficient to toll the back pay period.[20]

Obviously, this holding is somewhat at odds with the Fourth District's holding in *Brady* as that court expressly rejected using a standard that narrowed the "reasonable diligence" language in § 706(g) of Title VII to require "wanton or willful disregard for the employer's interest."[21] At minimum, however, the import of *Thurman* makes clear that accidental violations of a subsequent employer's rules or mere workplace negligence, albeit for cause, is likely insufficient to toll the accrual of back pay in Title VII cases.

Johnson v. Spencer Press of Maine, Inc.

In 2004, the First Circuit in *Johnson v. Spencer Press of Maine, Inc.* addressed the lingering question of whether the back pay period was permanently terminated by a termination from interim employment for misconduct or a voluntary quit.[22] In Johnson, the district court below had determined that the plaintiff, who was

wrongfully terminated from Spencer Press on account of his religion, had failed to mitigate his damages after he was fired from a subsequent employer for eating on the job.[23] However, the district court had gone on to conclude that this failure meant that "the possibility of back pay was permanently cut off."[24]

Citing *Brady* and a similar case from the Eighth Circuit, the court in Johnson held that a subsequent termination for misconduct merely tolled the employer's liability for back pay but could be reinstated if the claimant found a new job afterwards. Any amounts or wages earned at the third employer would still be credited to the first employer pursuant to § 706(g), but would satisfy the statutory requirement that the claimant use reasonable diligence to mitigate his damages. The First Circuit explained that the reason liability would not be permanently cut off was simply that "[h]ad there been no discrimination at employer A, the employee would never have come to work (or been fired) from employer B." Highlighting the equitable interests evinced in Title VII's remedial scheme of restitution, the court stated that "[t]he discriminating employer should not benefit from the windfall of not paying the salary differential when the employee is re-employed by employer C."[25]

Conclusion

As the above-cited cases bear out, an employee alleging wrongful termination under Title VII has a statutory duty to mitigate his or her damages, which includes the duty to use reasonable diligence to seek ***and*** maintain replacement employment. Although the differences in language cited by the Fourth Circuit and Sixth Circuit in their respective decisions on the issue vary slightly, it is clear that an intentional violation of a subsequent employer's rules is sufficient to toll the period during which the offending employer can be held liable for back pay. As the Sixth Circuit held in *Thurman*, workplace negligence or unintentional conduct, even if resulting in a discharge for cause, might not be sufficient for the initial employer to argue that the claimant failed to mitigate his damages.

Attorneys that practice in employment law and deal with Title VII wrongful termination claims should be keenly aware of the standard that all courts apply to these claims, which is that the claimant use "reasonable diligence" to obtain interim earnings. Voluntary quits for personal reasons and willful violations of workplace rules clearly meet the standard under existing case law, however a myriad of other scenarios inevitably occupy the gray area waiting to be litigated and require the attorney to make compelling arguments based on the facts. As with all affirmative defenses, counsel should be aware that the defense may be waived if not specifically pleaded from the outset and that the defendant employer bears the burden of proving by a preponderance of the evidence that the employee failed to mitigate his damages. Nonetheless, the practical impact of a well-investigated and properly argued defense that the plaintiff failed to use reasonable diligence in maintaining interim employment represents a considerable weapon in the arsenal of the employment lawyer and can make all the difference between a sizeable damage award and a satisfied client.

[1] 42 U.S.C. § 2000e *et seq.*
[2] 42 U.S.C. § 2000e-5(g)(1).
[3] *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982).
[4] *Id.*
[5] *See id.* at 230.
[6] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98, 61 S.Ct. 845, 85 L.Ed. 1271 (1941).
[7] *Ford, supra* at syllabus.
[8] *Id.* at 234.
[9] *Id.* at 230 (citing *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975)) (internal quotes omitted).
[10] *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277 (4th Cir.1985).
[11] *Id.* at 1271.
[12] *Id.* at 1277 (citing several federal courts of appeals decisions, as well as the NLRB).
[13] *Id.* at 1278.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1279.
[17] *Id.* at 1277 (defining "misconduct" as "conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent").
[18] *Thurman v. Yellow Freight Systems, Inc.*, 90 F.3d 1160, 1169 (6th Cir.1996)
[19] *Id.* at 1169.
[20] *Id.*
[21] *Brady, supra* at 1277 ("We think the application of the North Carolina standard for eligibility for unemployment compensation benefits to a Title VII back pay claim is inappropriate. The purposes served by the provision of unemployment benefits and the duty to mitigate damages are unrelated.").
[22] *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 381 (1st Cir.2004).
[23] *Id.*
[24] *Id.*
[25] *Id.* at 382

Accommodations In The Work Place: Disability And Religion

By Holly Marie Wilson and Ronald Mingus

Employers have a duty to reasonably accommodate qualified individuals with a disability under the Americans with Disabilities Act (ADA) and employees religious beliefs under Title VII of the Civil Rights Act of 1964. But what constitutes a reasonable accommodation? Employers struggle with this question every day.

Employers need to evaluate each situation individually, looking at several factors including if an undue hardship would be imposed on it if an accommodation is provided. While there are no bright line rules for employers to follow, a well-educated and proactive HR department, improved training and a clear understanding of the current state of the law will assist employers in maintaining a diverse workforce.

A. Discrimination Based on Disability

Title I of the ADA prohibits an employer from treating an applicant or employee unfavorably in all aspects of employment -- including hiring, promotions, job assignments, training, termination, and any other terms, conditions, and privileges of employment -- because she has a disability, a history of having a disability, or because the employer regards her as having a disability. That means, for example, that it is illegal for an employer to refuse to hire a veteran because she has PTSD, because she was previously diagnosed with PTSD, or because the employer assumes she has PTSD.

The ADA prohibits employers from discriminating against qualified disabled individuals who are able to perform the essential job functions of the position, with or without reasonable accommodations. A person is considered a qualified disabled individual under the ADA if he is (1) substantially limited in at least one major life activity by a physical or mental impairment, (2) has a record of the impairment, (3) and is perceived as impaired. The ADA requires court construe the term "disability" to "the maximum extent permitted" under the law, so the definition of disability includes an impairment that is episodic or in remission. Therefore, a condition like cancer, that is not currently impairing the individual, would still be a disability if it would substantially limit a major life activity "when active."

B. Discrimination Based on Religion

Religious discrimination claims are fraught with contradiction. On the one hand, it is illegal to treat applicants or employees differently based on their religious beliefs or practices – or lack thereof – in any aspect of employment. On the other, employers must take an employee's religion into account when making certain workplace decisions and cannot deny a requested reasonable accommodation.

Title VII of the Civil Rights Act, gives some guidance in handling religious discrimination in the workplace. Title VII requires three things to establish a *prima facie* case for religious discrimination: (1) the employee holds a sincere belief that conflicts with a job requirement; (2) the employee informs the employer; and (3) employee was disciplined for failing to comply with the conflicting requirement. A sincere belief is generally not disputed, but it must be bona fide and deeply rooted in the person's nature, past history, and beliefs. The employee has the responsibility to affirmatively inform the employer of the bona fide belief and a request accommodation. The employee must also provide an explicit explanation of the religious observation. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 798 F. Supp. 2d 1272, 1287 (N.D. Okla. 2011). If all the factors are established, the analysis turns to whether the employer can reasonably accommodate the request without causing an undue hardship. *Webb v. City of Philadelphia,* 562 F.3d 256 (3rd Cir. 2009).

C. How A "Reasonable Accommodation" and "Undue Hardship" Differ Under the ADA and Title VII

An employer discriminates under the ADA when it does not make a "reasonable accommodation" for the qualified employee's known physical or mental limitations, unless the employer can show that the accommodation would impose an "undue hardship" on the employer's business. Similarly, an employee discriminates under Title VII when it does not make a "reasonable accommodation" for an employee's religious beliefs.

While both the ADA and Title VII require a "reasonable accommodation" unless it is an "undue hardship," the undue hardship threshold under Title VII religious accommodation claims is lower than the standard for undue hardship under the ADA. Under the ADA, an undue hardship is defined as an action requiring significant difficulty or expense. Factors that may be considered in determining if an undue hardship exists include: (1) the nature and cost of the accommodation; (2) the financial resources of the business; (3) the overall size of the business, including the number and location of the facilities; and (4) the operation of the business, including the composition of its workplace.

Determining whether a requested accommodation would rise to an undue hardship requires a fact-sensitive analysis, and each situation needs to be looked at individually. Under the ADA, an undue hardship would cause significant difficulty or expense. However, under religious discrimination claims, an undue hardship is a lower standard and requires only *"more than de minimus cost."* Even under the *"de minimus"* lower standard, however, disgruntled or jealous co-workers or customer preference do not create an undue hardship.

D. Types of Reasonable Accommodations

Under the ADA, reasonable accommodations may include, but are not

limited to, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the previsions or qualified readers or interpreters. *Hoskins v. Oakland County Sherriff's Dept.,* 227 F.37 719, 728 (6th Cir. 2000), 42 U.S.C. § 12111(9)(B). Similarly, light duty work, or giving the employee additional leave may both be reasonable accommodations. *EEOC: Technical Assistance on Title I of ADA*. 8 Fair Empl. Prac. Manual (BNA) § 9.4 at 405:7057-58 (1992). However, the employer is not required to create a new position or go against a non-discriminatory seniority system that is in place. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Tobin v. Liberty Mutual Ins. Co.,* 553 F.3d 121 (1st Cir. 2009).

Reasonable accommodations based on religion under Title VII generally can be classified into three primary areas: (1) claims concerning conflicts between work requirements and holy day or Sabbath observances; (2) religious clothing requirements; and (3) grooming claims to meet a religious obligation.

Under the first category, employers must generally give time off for the Sabbath or holy days except in an emergency. There are exceptions to this general rule when the employee works in key health and safety occupations, when the employee's presence is critical to the company on any given day, or when doing so would create an undue hardship. *TWA v. Hardison,* 432 U.S. 63 (1977).

Under the second category, whether an accommodation for religious dress is reasonable or would cause an undue hardship hinges on whether the accommodation creates a safety, security, or health risk. A religious accommodation that creates a genuine safety, security, or health risk to the employee, his co-workers, or the public at large undoubtedly constitutes an undue hardship. *EEOC v. Geo Group,* Inc., 616 F.3d 265, 273 (3rd Cir. 2009); *Webb,* 562 F.3d at 261-62 (allowing police officer to wear religious symbol on uniform undue hardship due to safety, uniformity to public, and neutral policies); *EEOC v. Oak-Rite Manufacturing Corp.,* No. IP99-1962-C-H/G, 2001 WL 1168156 (S.D. Ind., August 27, 2001)(pants only policy for factory workers was neutral and based on safety concerns, no discrimination). Conversely, if the request to wear a certain article of clothing only jeopardizes the image or aesthetics of the business then it is less likely to be found an undue hardship.

Finally, under the "grooming" category, many employers prohibit and employee to present with an unkempt, unclean, or unfriendly appearance. This may require an employee not having any visible tattoos, nose piercings, beards, and/or long hair. However, the tattoos or other things may be indicative of the individual's religion, and discrimination because customers or co-workers may be uncomfortable with that person's religion or national origin is illegal, and employers may have to accommodate such things. For example, employers may request that an employee place band-aides over facial piercings, or wear long sleeves to cover tattoos. *Cloutier v. Costco Wholesale Corp.,* 390 F.3d 126 (1st Cir. 2004); *EEOC v. Red RobinR Gourmet Burgers, Inc.,* No. C04-1291JLR, 2005 WL 2090677 (W.D. Washington, August 29, 2005); *Riggs v. City of Fort Worth*, 229 F.Supp.2d 572 (N.D. Texas 2002).

E. Conclusion

Claims for failure to accommodate can cause great hardship on an employer, so it is important to guard against them. Unfortunately, there is no bright line rule for employers to follow. Rather, each depends on an individualized factual inquiry.

Overall, under both the ADA and Title VII, employers should implement neutral policies such as seniority systems for employees and ensure neutral, consistent application of all policies and procedures. A proactive approach to avoiding failure to accommodation claims requires employers to carefully draft (or review and, if necessary, revise) and enforce applicable Handbook policies that allow them to meet their increasing legal obligations without undermining their control over the workplace or negatively affecting their bottom lines. If the employer does not continually review its policies, and change them to be in conformance with the law, the result will be costly due to increased liability and/or litigation.

Additionally, employers should train HR personnel, supervisors and interviewers on accommodations under the ADA and Title VII and how they apply to their daily operation. For example, an employer cannot make a pre-employment inquiry about a disability or religion. It is also wrong to assume that just because a person wears a head dress in the interview that they will require a religious accommodation or days off for Sabbath. The employer, however, may ask questions about the ability to perform specific job functions and may, with limitations, ask an individual with a disability to describe or demonstrate how she/he would perform the job functions. Given the speed this landscape has changed, annual training is recommended.

Finally, employers are reminded to manage litigation risks proactively by consulting with your legal advisers when accommodation issues arise.

[1] Employers are reminded that under the ADA, an employee who needs to extra leave time beyond the employee's 12 weeks of FMLA leave, or who needs leave when the employee is not FMLA eligible, may be required to provide additional time under the ADA. Courts have generally held that an accommodation for an indefinite period of time is unreasonable as an undue hardship on the employer. Henry v. United Bank, 686 F.3d 50 (1st Cir. 2012); *Robert v. Board of County Commissioners of Brown County, Kansas,* 691 F.3d 1211 (10th Cir. 2012). An employer would be wise to document the employee's absences, the hardships created by such absences, and the hardships that would endure if the absences continued. Undue hardship have been found to exist when there are significant losses in productivity, a need for temporary workers, overburdened employees working overtime to cover shifts, lost sales, less responsive customer service, deferred projects, and lower morale.

An Employee's Willful Underreporting of Hours Worked Is Not a Defense to a Claim under the FLSA, But The Determination of Hours Worked Cannot Be Based On Generalized Testimony

By James O'Connor, Taylor Knight and Stephanie S. Hathaway

In today's economy, ever limited budgets combined with increasing expectations of productivity have led many employees to work "off the clock," either by extending their traditional workday without reporting additional hours worked or working during their personal time on evenings and weekends. Not surprisingly, this economic climate has led to a rise in the number of wage and hour claims under the Fair Labor Standards Act ("FSLA"), wherein employees allege that they were required to work off the clock to get their job done because: (1) the employer only permitted a certain number of hours to be reported; or (2) the employer refused or strongly discouraged overtime. Because employees rarely report these off the clock hours, however, it is often the case that an employer's first notice of an alleged FSLA violation is when a state or federal lawsuit is filed. In fact, oftentimes the employer's reaction is: "I didn't even know the employee was working off the clock." While understandable, such a response will not typically be successful in defending a wage and hour claim.

The FLSA requires an employee to be paid at least one and a half times his/her regular wage for every hour worked in excess of forty hours per week. See 29 U.S.C. §207(a)(1). If an employee works overtime without pay (that is "off the clock"), the employee may recover damages if he/she can show that the employer knew about the overtime work. Further, an employee is permitted to argue that an employer had "constructive knowledge" by showing that the employer ***should have known*** the employee was working above and beyond the hours actually reported.

In response to a claim of constructive knowledge, an employer will often assert equitable defenses, such as "unclean hands," that is, the assertion that it was the employee's knowing violation of company policies that caused his/her alleged injury. Nevertheless, in *Bailey v. Titlemax of Georgia, Inc.*, 776 F.3d 797 (11th Cir. 2015), the United States Court of Appeals for the Eleventh Circuit recently rejected the unclean hands defense, holding that an employee may pursue an overtime claim under the FLSA even when the employee knowingly violated company policies by working off the clock.

In *Bailey,* the employee alleged that his supervisor informed him that the employer did not pay overtime, encouraged him to work off the clock, and altered his time cards to decrease the number of work hours reported to the employer. Notwithstanding, the employer had policies requiring employees to accurately report all hours worked, to verify time entries and, more importantly, to inform higher-level management or call an anonymous employee hotline if there was a problem with a supervisor. Despite these policies, however, the employee failed to notify anyone of his supervisor's actions, choosing rather to regularly work off the clock and to underreport hours worked on his time cards. After resigning his job, the employee filed suit under the FLSA, alleging that the employer had constructive knowledge of his overtime hours because his supervisor instructed him to work off the clock and modified his time cards to reduce the number of hours worked. In response, the employer asserted the defense of "unclean hands," claiming the employee knowingly violated the employer's policies by underreporting hours worked and failing to notify high-level management that his supervisor was altering his hours and forcing him to engage in off the clock work.

The Eleventh Circuit rejected the employer's defense of unclean hands. In so doing, the court noted that the purpose of the FLSA is to "aid the unprotected, unorganized and lowest paid of the nation's working population," that is, the employees who lack sufficient bargaining power to secure for themselves a minimum subsistence wage. To permit the defense of unclean hands "would allow the employer to wield its superior bargaining power to pressure or even compel its employees to underreport their work hours, thus neutering the FLSA's purposefully reallocation of that power." The court found that the supervisor's awareness that the employee was working overtime hours and not reporting those hours could be imputed to the employer, making it liable to the employee under the FLSA.

The *Bailey* decision is significant because it imputes knowledge to employers based on the unsanctioned actions of their supervisors, thereby making them potentially liable under the FLSA. Additionally, under Bailey, an employee's willful non-compliance with the employer's policies is not a defense to an FLSA claim. Thus, while it is important for employer's to have policies in place regarding the reporting of hours, it is equally important for employers to routinely audit their employees' time reporting and the practices of all supervisory personnel to ensure that their actions are in compliance with the employer's policies.

However, an employer's constructive knowledge of FLSA violations, and the number of hours worked and not paid, must be based on specific evidence rather than on generalized testimony. In *Holaway v. Stratasys, Inc.,* 771 F.3d 1057 (8th Cir. 2014), the United States Court of Appeals for the Eighth Circuit reasoned that an "employee who sued for unpaid overtime has the burden of proving that he performed work for which he was properly compensated.'" Where the employer failed to keep ***accurate*** records of hours worked (for example, where the employer did not allow the employee accurate report the hours s/he worked or where the employee was misclassified as exempt and did not keep time records), a plaintiff needs not prove "the precise extent of uncompensated work." Rather, "once the employee has shown work performed for which the employee was not compensated and 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference' the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference."

However, despite the relaxed evidentiary standard, the Eighth Circuit held that ***a plaintiff's generalized testimony was inadequate to support an FLSA claim.*** In *Holaway*, the plaintiff failed the put forward any evidence of the amount and extent of his work in excess of 40 hours. The "base assertions of his overtime hours worked" and "vague testimony" was insufficient. He offered no specific evidence regarding the amount and extent of his overtime work. Specifically, he failed to provide a meaningful explanation of how he arrived at his final estimate of 60 hours a week, failed to check his hours worked against business records, and failed to take into account any paid holidays, any paid vacation, or any days he was on duty at home yet never called out to install or service a printer. Thus, the Eighth Circuit held that the plaintiff's testimony was insufficient evidence to allow a fact finder to determine the amount of any overtime hours, and affirmed summary judgment in favor of the employer.

The takeaway from these two decisions cannot be minimized. Courts often determine that employers have constructive knowledge that an employee worked overtime. An employer cannot assert the equitable defense of "unclean hands" and argue that the employee knowingly misrepresented the hours worked on his or her timesheet. Rather, an employee may pursue an overtime claim under the FLSA even when the employee knowingly violated company policies by working off the clock. However, generalized testimony of hours worked is insufficient when determining the number of unpaid hours.

Employee or Independent Contractor? Crucial Determinations in the Age of FLSA Class Actions and the Affordable Care Act's Employer Mandate

By Pat Kasson and Carlen Zhang

2015 will continue the era of pressure on employers to be cautious in classifying individuals as independent contractors. On one hand, tax specialists warn that the Internal Revenue Service (I.R.S.) will start emphasizing the distinction between employees and self-employed independent contractors, in part because of the Employer Mandate.[1] On the other, plaintiffs are increasing litigation on wage-hour issues, which means more actions under the Fair Labor Standards Act ("FLSA"). This perfect storm threatens fees and penalties on the I.R.S. front, and exorbitant attorney fees from FLSA litigation for employers.

I. An Improper Independent Contractor Classification Can Cost Thousands Under The FLSA.

The thrust of FLSA litigation comes from employers' failure to pay independent contractors minimum wage or overtime. For the FLSA's minimum wage and overtime provisions to apply, the worker must be an "employee" of the employer—an employment relationship must exist between the two entities.[2] "Employ," per the FLSA, is to "suffer or permit to work," which covers work that the employer directs or allows to take place.[3] The fact that a worker has signed an agreement that he/she is an independent contractor is not controlling, because the reality of the working relationship is determinative.[4] Thus, even though an employer may have a written document stating that a worker is an independent contractor, in an FLSA action the worker may be classified as an employee, in which case minimum wage and overtime provisions would apply. The Supreme Court has said that there is no one definition that resolves all problems relating to this issue.[5] The Supreme Court has also found that determination of the relation is not based on isolated factors, but rather on the circumstances of the whole activity.[6] The goal is to determine the underlying economic reality of the relationship between the employer and the individual, and whether the individual is economically dependent.[7]

The reclassification of employees results in coverage under the FLSA. The FLSA generally requires that covered employees receive overtime "not less than one and one-half times" the regular rate of pay for all hours worked over forty. 29 U.S.C. 207(a)(1). FLSA violations have a two-year statute of limitations. 29 U.S.C. § 255. If the violations are willful, a three-year statute of limitations period applies. Id. Further, unless an employer acts in good faith, a plaintiff is entitled to double damages. *Reich v. Lapatisserie, Inc.,* 1994 U.S. App. LEXIS 6608 (6th Cir. 1994). To utilize the three-year statute of limitations period and recover statutory damages, plaintiffs must prove that the employer had actual or constructive knowledge of the alleged off-the-clock work. *Id*. All this can apply if an employer erroneously categorizes an employee as an independent contractor, and wages were not as paid as required by the FLSA.

Per the FLSA, a prevailing employee is usually entitled to unpaid back wages, overtime, and "liquidated damages," which is double the amount of back pay. 29 U.S.C.A. § 260. An employer can avoid paying liquidated damages if it demonstrates that it acted in good faith, and had reasonable basis to believe that his act or omission did not violate the FLSA. *Id.* An employer acts in "good faith" under the FLSA when it makes a specific investigation of the application of the FLSA to specific types of employees.[8] However, even if an employer demonstrates this, an award of liquidated damages is subject to the court's discretion. 29 U.S.C.A. § 260. All in all, employees are usually entitled to liquidated damages. For those employees near retirement, back pay awards might increase pension benefits.[9] The employer must also reimburse out-of-pocket litigation expenses and pay an additional attorneys' fee award—this forms the real thrust of FLSA litigation.[10]

There is no proportionality requirement for attorney fees won under the FLSA, unlike other actions that generally award attorney fees (i.e. §1983 actions). While any employer who violates the FLSA must pay the employee(s) in the amount of unpaid minimum wages or overtime compensation, there may be an additional equal amount as liquidated damages, and "reasonable attorney's fees."[11] The amount of attorneys' fees sought by a plaintiff can exceed the amount of any overtime owed. That is, an employee could only be owed $15,000 in overtime wages, but the attorney fees could ring in at $350,000. The FLSA does not define "reasonable," and thus the amount lies within the court's discretion.[12]

This can all be avoided by proper independent contractor and employee classifications at the outset—this allows employers to avoid costly

lawsuits. If you are unclear about how to do so, please contact Reminger Co., L.P.A., and we will conduct a thorough analysis on your workers.

II. The Beginning of the ACA's Employer Mandate: The Beginning of Heightened I.R.S. Scrutiny

Employers often prefer to hire independent contractors because this allows the employer to avoid paying certain federal and state employment taxes, federal and state unemployment insurance taxes, employee benefits, and workers' compensation premiums.[13] That is, contractors are responsible for paying their own Social Security and Medicare taxes.[14] Employees, on the other hand, only pay about half these payroll taxes.[15] Employers cover the other half, and if these employers have fifty employees or more, the Affordable Care Act (ACA) also requires employers to cover health insurance.[16]

The I.R.S. is now concerned that the increasing use of independent contractors in the workplace is causing a tax gap in lost payroll tax revenue. Throw in the ACA's Employer Mandate ("the Mandate"), and it becomes more important for companies and businesses to correctly classify employees and contractors. One slip-up could have far-reaching consequences. The Mandate requires that all businesses with fifty or more full-time equivalent employees provide health insurance to at least 95% of their full-time employees and dependents up to age twenty-six, or pay a fee.[17] Employers with one hundred or more full-time equivalent employees need to insure at least 70% of their full-time workers by 2015.[18] The ACA defines a "full-time employee" as someone who works thirty hours or more a week on average during a one month period.[19] So, while it may currently seem profitable to label someone as an independent contractor, employers should think twice before doing so. The risks of misclassification include liability for unpaid federal, state, and local income tax withholdings, Social Security and Medicare contributions, unpaid workers' compensation, and unemployment insurance premiums.[20]

Deciding whether someone is an employee or an independent contractor is still a challenging task. If you are an employer and are still concerned about misclassification, there is a potential relief option. The I.R.S.'s Voluntary Classification Settlement Program ("VSCP") permits some employers to correctly reclassify independent contractors as employees.[21] In exchange for voluntarily reclassification, the employer pays a penalty of only 10% of the employer's tax liability and will not be liable for any interest or penalties.[22] The employer must, however, agree to treat the worker as an employee in the future and pay the proper taxes.[23] In order to qualify for the program, the employer: (1) must have consistently treated the worker as an independent contractor; (2) must have filed all required Form 1099s for the preceding calendar year; and (3) must not currently be under audit by the I.R.S., the Department of Labor, or any state government agency.[24] Employers must file Form 8952 at least 60 days before they want to start treating workers as employees.[25] Employers will not be audited on payroll taxes related to these workers for prior years.[26] These procedures are complicated and important—if you are at all unsure about how to proceed, please contact a Reminger attorney to have an analysis completed on your workers.

[1] http://www.nytimes.com/2015/02/15/business/yourtaxes/employee-or-contractor-health-care-law-raises-stakes.html?_r=0
[2] http://www.dol.gov/whd/regs/compliance/whdfs13.pdf
[3] http://www.dol.gov/whd/regs/compliance/whdfs13.pdf
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[26] http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program

Criminal and Credit Background Checks Must Be Carefully Utilized By Employers

By Stephanie S. Hathaway and Riannon A. Ziegler

Most experts anticipate an increase in employer hiring rates in 2015, which makes now a good time for companies to evaluate their hiring practices. Companies are increasingly required to work through federal and state rules that limit what information can be considered in the hiring process. Since issuing revised guidance on the issue in 2012, the Equal Employment Opportunity Commission (EEOC) has devoted more attention to the issue of employer requests for criminal records, financial history, and protected information on initial job application forms.

Running Criminal Background Checks on Applicants

92% of employers conduct criminal background checks on some segment of job applicants.[1] Criminal background checks seem reasonable and, if uniformly applied to all applicants, clearly seem legal.

The EEOC's position is less clear. The EEOC issued *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*[2] on April 25, 2012, which prohibited employers from baldly implementing these neutrally applied criminal record exclusions for convicted felons. In June 2013, the EEOC entered into a five-year conciliation agreement, including a monetary settlement and an ongoing monitoring, with JB Hunt after finding that it failed to comply with the EEOC's April 2012 guidance.[3] There is no doubt this issue is on the EEOC's radar.

The EEOC's position has left employers in a dilemma – run a criminal background check and risk an expensive lawsuit with the EEOC, or ignore criminal history and risk an expensive lawsuit due to potential liability for criminal acts committed by employees? How can employers best protect themselves from the EEOC, and still utilize criminal background checks?

First, apply the same standards to applicants, regardless of race, gender, national origin, color, religion, disability, age, etc. If you check the background of one applicant, in a certain position, check the background of all applicants. Also, be consistent in your grounds for rejection. For example, if you do not reject applicants of one ethnicity with a specific criminal background, you must reject applicants of other ethnicities because they have similar criminal pasts.

Second, be cautious when basing employment decisions on background problems that may be more common amongst people of a certain national origin or race, age, gender, etc. Employers should eliminate *per se* exclusion policies and focus on narrowly-tailored policies for screening applicants. Employers should also familiarize themselves with the EEOC Guidelines, which require companies to conduct an Individualized Assessment of the applicant's risks before excluding any applicant.

Under this individualized assessment, employers should consider the nature of the job sought; the nature and gravity of the offense of which the applicant/employee was convicted; the time that has lapsed since the conviction (including employment history and evidence of rehabilitation); the facts and circumstances surrounding the offense; the number of prior convictions; and the age at time of conviction.

Employers should only consider convictions, not arrests and charges that did not result in a conviction. The EEOC has long held that an arrest, by itself, is never job-related and consistent with business necessity because it does not establish criminal conduct has occurred. Further, employers are reminded that they may have to make exceptions for problems revealed during a background check that were caused by a disability.

Employers should only consider convictions that are relevant to the job itself. For example, a DUI may be relevant for a school bus driver position, but it is probably not relevant for a data entry position. An assault conviction may be more relevant when the job is performed in a customer's private home than when an employee works from his or her own home, or who reports to work and is carefully supervised. A drug conviction may be more relevant for a job that involves access to prescription drugs than a job as a TV salesman. This consideration matters because the EEOC has determined that a criminal conviction should disqualify a job applicant only when there is a connection between the nature of the conviction and the nature of the job and that creates a greater risk. Thus, the employer should be able to demonstrate the connection between the nature of the crime and the applicant's position before disqualifying an application.

Ultimately, if after conducting an individualized assessment, the employer decides to disqualify the applicant because of his or her criminal convictions, the employer must give the applicant notice that she has been screened out because of a criminal conviction, and give the applicant an opportunity to demonstrate the exclusion should not be applied due to a particular circumstance, and provide an explanation.

Running Credit Checks on Applicants

In addition to criminal background checks, 60% of employers conduct credit background checks on some segment of their applicants.[4] While this practice can provide an employer with insightful information regarding potential employee's personal responsibility and character, employers must be mindful of the Fair Credit Reporting Act's (FCRA)[5] requirements when doing so. The EEOC has recently begun monitoring how employers handle running credit checks on potential applicants, ensuring that they do so in an equal and nondiscriminatory manner.

Again, employers must to apply the same standards to all applicants, regardless of race, national origin, color, sex, religion, disability, or age. Additionally, under the FCRA, employers must:

1. Provide written notice to the applicant or employee stating that you might use credit information obtained for decisions regarding his or her employment. <u>This must be a stand-alone document separate from the employment application.</u>
2. Get the employee or applicant's written permission to perform the background check.
3. Certify to the company from which you are obtaining the report that:
   a. You notified the employee or applicant and received their permission to get the credit report;
   b. You complied with all FCRA requirements;
   c. You will not discriminate against the

applicant or employee, or in any way misuse the information obtained in violation of federal or state equal opportunity laws or regulations.

If the employer decides to take adverse action based upon the information revealed before taking the adverse action, the FCRA requires the employer to provide the employee with: (1) notice that includes a copy of the consumer report relied upon; and (2) a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which should be received from the company that provided the report.

After taking the adverse employment action, the employer must tell the applicant or employee (either orally, in writing, or electronically): (1) That he or she was rejected because of information in the report; (2) the name, address, and phone number of the company that provided the report; (3) that the company providing the report did not make the adverse decision, and cannot provide specific reasons for it; and (4) that he or she has a right to dispute the accuracy of the report, and to get an additional free report from the company within sixty (60) days. [6]

Employers should also be aware that some creative employees have argued that employers consulting LinkedIn Reference Searches constitutes a background check under the FCRA.[7] Only one court – a federal court in California – has ruled on this issue and has found that LinkedIn was ***not*** a background check under the FCRA. Nonetheless, due to the potential liability, employers should be cautious if denying employment based on LinkedIn Reference Searches until this area of law is better fleshed out.

Finally, employers are reminded that each state can have its own background check laws. When hiring an out-of-state candidate, employers are bound by its own state (i.e., the state where the applicant is applying) ***and*** the state where the applicant is a resident.

Ultimately, employers are cautioned when conducting background checks – whether criminal or credit – to follow this ever-changing law. If you decide to do a background check, be sure to get the appropriate consent, in writing, and stick to the information that is relevant to the specific position for which the applicant applied.

[1]Society of Human Resources Management (SHRM), Background Checking: conducting criminal background checks (Jan. 22, 2010).
[2]http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
[3]http://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm
[4]SHRM, Background Checking: conducting credit background checks (Jan. 22, 2010).
[5]15 USC § 1681 et seq.
[6]http://www.eeoc.gove/eeoc/publications/background_checks_employers.cfm
[7]*Sweet et al. v. LinkedIn Corporation*, 2015 WL 1744254 (N.D. Cal. April 14, 2015).

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Our Employment Practices Defense Group not only includes regular practice with the Equal Employment Opportunity Commission, the Ohio Civil Rights Commission and OSHA, but frequently defending jury trials in both Federal and State Courts. This not only includes practice in all areas of discrimination law, such as gender discrimination, racial discrimination, age discrimination, religious discrimination, and sexual harassment cases (to name only some of the issues contemplated by both federal and state statute), but also the myriad of common-law and statutory claims that the courts have recognized. Our extensive jury trial practice in this area allows us to evaluate potential jury exposure at an early phase.

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