BRYCE DOWNEY & LENKOV LLC

Labor & Employment Newsletter
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Transgender Employees: News and Tips for Employers

The transgender community has continued to receive tremendous attention. Several shows including, *Orange Is The New Black* and *Transparent*, highlight some of the issues faced by the transgender community. Sadly, there have been a number of headlines regarding transgender teen suicides. Just recently, Olympic gold medalist and reality TV star, Bruce Jenner, told the world that she is a transgender woman during a televised interview with Diane Sawyer.

As we reported in our January 2015 newsletter, the Equal Employment Oppurtunity Commision (EEOC) filed its first two lawsuits concerning alleged sex discrimination against transgender employees. The EEOC's first suit, against Lakeland Eye Clinic, settled in April 2015. In that case, employee, Brandi Branson, began working for Lakeland dressed in traditionally male clothing and used the name Michael. Approximately six months later, she began to wear makeup and traditionally female clothing. Branson alleged that co-workers snickered, rolled their eyes and would not interact with her due to her transition. She alleged that her bosses confronted her in a meeting regarding her appearance, at which point Branson notified Lakeland that she was transitioning from male to female and would be changing her name to Brandi. Two months later, Lakeland told Branson that her position was being eliminated, although Lakeland hired another employee to perform a similar role.

The EEOC took the position that Title VII applies to transgender status, relying on *Macy v. Holder,* EEOC DOC 0120120821, 2012 WL 1435995, which held that transgender discrimination is cognizable as sex discrimination under Title VII. Lakeland took the position that Title VII does not apply to transgender discrimination claims. The settlement requires Lakeland to pay $150,000 to Branson for back pay and other damages, including emotional distress, adopt and implement a transgender anti-discrimination policy and have its managers and employees undergo training.

The EEOC's second suit against R.G. & G.R. Harris Funeral Homes, Inc. is ongoing. There, after working for R.G. for six years, employee, Aimee Stephens, announced that she was transitioning from male to female and planned to present as female, and requested understanding of same. Shortly thereafter, R.G terminated Stephens because "what she was proposing to do was unacceptable." In April 2015, the district court denied R.G.'s motion to dismiss. Notably, the court rejected the EEOC's position that gender identity was protected under Title VII, but allowed the case to proceed on a theory of "sex stereotyping" under Title VII.

Additionally, in April 2015, the EEOC issued a significant decision, finding transgender discrimination in *Lusardi v. McHugh,* EEOC DOC 0120133395, 2015 WL 1607756. There, employee, Tamara Lusardi, talked to her employer about her gender transition and agreed to use a single-use bathroom, rather than the common women's restroom, until undergoing an undefined surgery. However, when the single-use bathroom was out of order for several days, Lusardi used the common women's bathroom and each time this was discovered, the Army confronted her and told her that she was making people uncomfortable and that she needed to avoid the women's restroom until she showed proof that she completed the "final surgery."

The EEOC found that any prior agreement regarding restroom usage did not waive an employee's right to assert discrimination at a later point. The EEOC also found that other employees' anxiety could not justify discrimination. The EEOC held that the restriction of bathroom choice was an adverse employment action in violation of Title VII, relying on its prior decision in *Macy v. Holder*. The EEOC noted that employees should not be required to provide proof of a medical procedure with respect to their transition. Notably, the EEOC's decision differs from the 2001 Minnesota Supreme Court decision which held that an employer's designation of employee restroom use based on biological gender is not transgender discrimination in violation of the Minnesota Human Rights Act. See *Goins v. W. Grp.*, 635 N.W.2d 717, 720.

Practice Tip:

In light of the courts' willingness to hear transgender discrimination claims under a theory of sex stereotyping prohibited by Title VII, employers should be cautious about the timing of taking any adverse employment action against transgender employees. Additionally, employers should consider updating their EEO, anti-harassment and non-discrimination policies to include gender identity as a protected class and consider incorporating same in EEO and harassment trainings. Employers should also use the name and pronoun preferred by the transgender employee to avoid discrimination or harassment claims. Similarly, dress codes should apply in the same manner to a transgender employee as they would apply to other employees of that gender. Further, employers should not disclose personal details about an employee's transition without the employee's prior consent.

With respect to restroom usage, the EEOC's decision is not binding on the courts and the courts in Illinois have not yet addressed what employers' obligations are with respect to providing restrooms to transgender employees. Until this issue is decided by statute or case law, the safest practice for employers to prevent discrimination claims is to allow transgender employees to use the restroom corresponding to the gender with which they identify. Employers should also ensure *compliance* with local laws that *may* address these issues.

Supreme Court Weighs in on Pregnancy Discrimination

In our January 2015 newsletter, we reported on an amendment to the Illinois Human Rights Act (IHRA), which requires employers to accommodate employees' pregnancy-related work restrictions. Subsequently, on 3/25/15, the United States Supreme Court issued a much-anticipated opinion addressing pregnancy discrimination in the employment context in *Young v. United Parcel Serv., Inc.,* 135 S. Ct. 1338 (2015). While the IHRA amendment applies to Illinois employers the Young decision applies to employers across the nation.

While working for UPS, Young's doctor provided her with work restrictions due to her pregnancy and requested that UPS accommodate these restrictions. UPS declined to do so as its policies only provided for accommodations for those employees who were injured on the job, had temporarily lost their federal certificate to drive a commercial vehicle or had a condition that was covered by the Americans with Disabilities Act (ADA). Young brought suit against UPS, alleging that it discriminated against her in violation of the Pregnancy Discrimination Act.

The Court held that an employer could not treat a pregnant employee differently than a non-pregnant employee, unless the employer had a sufficiently strong non-discriminatory reason for doing so. The Court concluded that Young created a genuine dispute as to whether UPS provided more favorable treatment to employees whose ability to work cannot reasonably be distinguished from her ability to work. Accordingly, the Court vacated the Fourth Circuit's decision, which had affirmed the district court's grant of summary judgment in favor of UPS, and remanded the case back to the Fourth Circuit.

Practice Tip:

Young makes it easier for pregnant employees, or those with related conditions who have temporary physical restrictions, to pursue discrimination claims against employers. Employers should carefully review and revise their employment policies and practices to help avoid discrimination suits.

First, employers should consider ensuring that any light duty accommodations that are made for certain categories of employees are also available to pregnant employees; if not, employers should be prepared to articulate a strong justification for not doing so. Employers should also revise their employment handbooks accordingly. Second, employers should ensure that managers and human resources personnel know how to respond to a pregnant employee's request for an accommodation. Finally, many local laws provide for even greater protections for pregnant employees; employers should ensure that their policies and practices comply both with the *Young* decision and any local laws.

Job Applicant Criminal History Checks

In January 2015, the Job Opportunities For Qualified Applicants Act went into effect in Illinois. The Act limits employers' ability to inquire regarding job applicants' criminal history and is in line with similar legislation across the nation (often referred to as "ban the box" laws). Specifically, the Act prohibits employers from asking about, requiring disclosure of, or considering an applicant's criminal history until it has decided that the applicant is qualified for the job and has notified the applicant of his or her selection for an interview, or if there is no interview being conducted, until a conditional job offer is made. The Act permits employers to notify applicants in writing of the specific offenses that would disqualify an applicant from employment in a particular position.

The Act applies to employers with 15 or more employees and also covers employment agencies. However, the Act excludes (1) jobs that cannot be held by convicted criminals under state or federal law, (2) jobs that require licensing under the Emergency Medical Services System Act and (3) jobs that involve the use of fidelity bonds.
The Act does not provide a private cause of action for aggrieved job applicants and instead vests enforcement authority in the Illinois Department of Labor. Employers that violate the Act are subject to four tiers of penalties ranging from a written warning to civil penalties of $500.00 to $1,500.00 for every 30 days that pass without compliance.

Practice Tip:
Employers should review their job applications and application protocols carefully to ensure there are no questions inquiring regarding an applicant's criminal history, unless an exception applies.

FMLA: Who is a Spouse?

The Department of Labor (DOL) promulgated a final rule, modifying the definition of a "spouse" under the FMLA, effective 3/27/15. This new definition extends FMLA benefits to persons in same-sex and common law marriages that were valid in the state in which they were celebrated. This means that employers in states that do not recognize same-sex marriage or common law marriage must now extend FMLA protections to employees in same-sex or common law marriages, which were valid in the state in which they were celebrated, who are caring for their spouses.

While Illinois and Indiana recognize same sex marriage, both states have banned common law marriage (but do recognize common law marriages validly entered into in other states and Indiana recognizes common law marriages entered into in Indiana before 1958).

Practice Tip:
Employers should bear in mind that an employee still must be married under this new definition to be entitled to FMLA benefits; domestic partnerships and civil unions are not afforded the same protections as marriage. Employers should also update their handbooks and policies regarding FMLA benefits to ensure compliance with this new definition.

How "Well" is your Wellness Program?

Many employers offer wellness programs to encourage healthier lifestyles or help prevent disease. Some of these programs offer financial and other incentives for employees that participate to achieve certain health outcomes. Regulations under the Health Insurance and Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA) have provided employers with wellness program guidelines for years. However, more recently, the EEOC has taken an aggressive stance against various forms of wellness programs, voicing its concern that certain practices violate the Americans with Disabilities Act (ADA). Last year, the EEOC began suing employers for allegedly imposing excessive wellness program penalties, but did not articulate the limits for such penalties. Employers have been struggling to ensure that their programs comply with the ADA and urged the EEOC to adopt guidance regarding employer-sponsored wellness programs. In response, the EEOC recently issued proposed regulations describing how the ADA applies to employer wellness programs that are part of group health plans.

While the ADA limits employers' ability to ask employees about their health or require them to undergo medical exams, the proposed EEOC regulations allow such inquiries and exams if they are voluntary and part of an employee wellness program. The proposed regulations make clear that such programs must be voluntary, meaning that employees may not be required to participate in a wellness program, and they may not be denied health

coverage or disciplined if they refuse to participate. Under the proposed regulations, employers may only offer incentives of up to 30% of the total cost of employee-only coverage in connection with wellness programs; this applies to both health-contingent and participation-based programs.

If an employee wellness program seeks information about employee health and medical examinations, the proposed regulations require that the program be reasonably likely to promote health or prevent disease. The proposed regulations would also require employers to provide employees with notices regarding medical information collected through the wellness program; the notices would detail how the information will be used and explain the safeguards in place to protect its use or disclosure for unauthorized purposes. Under the proposed regulations, employers are limited to receiving aggregate medical data from the wellness program and cannot review individual employees' medical data.

The EEOC will accept comments on the proposed regulations until 6/19/15. Final regulations are expected later this year. We will keep you posted.

Practice Tip:
The key to employer-sponsored wellness programs is that they be voluntary. Employers should avoid disciplining employees for not participating in the wellness program as this may create possible exposure under the ADA.

Duty to Conciliate Subject to Judicial Review

Title VII of the Civil Rights Act requires the EEOC to first attempt to conciliate (attempt to resolve the charge through informal negotiations with the charged employer) in good faith before suing an employer. Employers often assert that the EEOC has failed to meet its duty to conciliate as a defense. In the much-anticipated case of *Mach Mining, LLC v. E.E.O.C.*, WL 1913911 (U.S. 2015), the Supreme Court addressed whether and how courts may review the EEOC's conciliation efforts. Mach Mining asserted a failure to conciliate defense in its answer. The EEOC countered that its conciliation efforts were not subject to judicial review. The district court denied summary judgment, but the Seventh Circuit reversed, holding that the EEOC's duty to conciliate is not subject to judicial review. The Supreme Court unanimously vacated the Seventh Circuit's opinion, holding that the EEOC's duty to conciliate is subject to judicial review. However, the Court held that the courts' scope of review is narrow, recognizing the EEOC's wide discretion over the conciliation process.

Practice Tip:
As *Mach Mining* affirmed that employers may assert a failure to conciliate defense, employers and practitioners should carefully review the conciliation process conducted prior to the EEOC bringing suit to evaluate whether asserting such a defense is appropriate in all discrimination cases. To that end, employers and practitioners should meticulously document the conciliation process so that it may be reviewed if the EEOC later files suit.

EEOC Investigation After Individual Claims Dismissed

In May 2015, a federal district judge in *E.E.O.C. v. Union Pac. R.R. Co.*, WL 1954419 (E.D. Wis. 2015) held that the EEOC may enforce its subpoena for districtwide data from the charged employer even though the charging parties' underlying race discrimination and retaliation claims were dismissed by a federal court. The court held that the EEOC is free to investigate a possible class-wide pattern of discrimination even after a private suit is filed or concluded. The court noted that the EEOC represents both the charging parties and the public interests and may challenge any discrimination it discovers in its investigation.

Practice Tip:
Employers should be cautious about simply disregarding EEOC subpoenas after the underlying suits have been dismissed. Employers should seek counsel regarding responding to such subpoenas to properly respond to same and help reduce lengthy and expensive litigation regarding such subpoenas.

Think you Should Terminate an Employee That Calls you a "Nasty MF"? Think Again

In *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*, 362 NLRB 59 (2015), the National Labor Relations Board (NLRB) recently unanimously upheld an ALJ decision that Pier Sixty violated Section 8(a) of the National Labor Relations Act by terminating an employee who called his manager a "nasty mother f*****" on Facebook.

The employee was unhappy with his manager's treatment of himself and other employees. The employee posted the following message on his personal Facebook page: "Bob is such a NASTY MOTHER F***** don't know how to talk to people!!!!!! F*** his mother and his entire F***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!" Pier Sixty terminated the employee for violating an unspecified company policy. The employee brought an unfair labor practice.

The NLRB held that the Facebook post was protected concerted activity under Section 8(a) as it was directed at the manager's asserted mistreatment of employees and seeking redress through the upcoming union election (which was just two day away). Further, the NLRB found that the profanity was not qualitatively different from the profanity regularly tolerated by Pier Sixty because employees at the company regularly cursed and used obscenity; accordingly, the NLRB concluded that the comments were not sufficiently egregious that they lost Section 8(a)'s protection. The NLRB ruled that the employee was entitled to job reinstatement.

Practice Tip:

Employers should proceed with caution when considering terminating an employee because of his or her speech or social media posts, and carefully consider all of the facts to determine whether such speech could be construed as protected activity.

Firing Teacher for Undergoing IVF Results in $1.95 Million Award

In *Herx v. Dioceses of Fort Wayne-South Bend, Inc.*, No. 1:12-CV-122 RLM, 2015 WL 1013783 (N.D. Ind. 2015).., a jury found that the Diocese's refusal to renew an employee's contract as a Catholic school teacher because she had undergone *in vitro* fertilization (IVF) constituted sex discrimination.

Herx sued for sex discrimination under Title VII and the Pregnancy Discrimination Act. Defendant decided not to renew Herx's employment contract because undergoing IVF is considered gravely immoral by the Catholic Church. Defendant distributed a letter through the Diocese describing the decision and Herx's sinful conduct, which Herx testified caused her great emotional harm. Herx argued that male employees of the Diocese had never been fired for undergoing IVF treatment. Herx also submitted evidence that several male teachers at the school were thrown out of a strip club after groping a stripper (also a moral sin), but were not fired.

Herx also sued for disability discrimination under the Americans with Disability Act (ADA). However, the court granted summary judgment in favor of the Diocese on the ADA claim, finding that Herx did not lose her job because of her claimed disability, but rather because of her treatment.

The jury awarded Herx $1.95 million in compensatory damages. Her medical care was $125,000 and the jury added $75,000 for lost wages and $1 in punitive damages. In light of the damages cap in Title VII cases, the award for compensatory and punitive damages was reduced to $299,999 in compensatory damages and $1 in punitive damages. The award of lost wages was also reduced. An appeal to the Seventh Circuit is pending.

Practice Tip:

Employers should be cautious when terminating an employee who has recently disclosed that she is pregnant or undergoing related treatment. Employers should carefully consider whether they would take the same action against a male employee to help reduce the risk of a discrimination claim.

Also, even when liability is clear, it is important to consider statutory caps. In *Herx*, the statutory caps significantly reduced the $1.95 million award to $353,269.66. There are various statutory caps to consider. For example, Title VII limits the total award of compensatory and punitive damages to $50,000 for employers with 15 to 100 employees, $100,000 for employers with 101 to 200 employees, $200,000 for employers with 201 to 500 employees and $300,000 for employers with 501 or more employees.

OSHA "Willful Violation" Defined

In *Dukane Precast, Inc. v. Perez*, No.14-3156b, 2015 WL 1967405; the Seventh Circuit provided a working definition of a "willful violation" under OSHA. It is also factually significant in that the court elected to take it upon itself to conduct factual research into the occurrence which led to the OSHA citations, and incorporate those factual "findings" into the record.

The case arose when an injured worker was standing inside a cone-shaped bin attempting to scrape sand from the inside wall. The sand beneath his feet gave way causing him to sink and be engulfed by sand in the bin and buried up to his neck. Co-workers attempted to dig their injured colleague out of the sand-filled bin but were unable to do so. Sometime thereafter, a 911 call was made and the local technical rescue team of the fire department extricated the injured worker, who had been in the bin for 90 minutes.

It appeared to be unquestioned that the bin was a "confined space" with incumbent OSHA regulations that a facility have procedures in place for summoning rescue and emergency services for rescuing persons inside of those spaces. One of those regulations requires that rescue and emergency services are to be summoned immediately, and also forbids anyone not employed by services to attempt a rescue. Following an OSHA inspection on the day after this occurrence, the employer was cited for three "serious violations" and one "willful" violation. The willful violation was for failure to summon emergency services and prevent the co-worker rescue effort.

The employer appealed the OSHA determination to the Court of Appeals. In an interesting and rare occurrence, the Seventh Circuit appears to have conducted its own internet web check on various facts of the occurrence.

It is perhaps an understatement to suggest that factual research designed to supplement the record before it is something rarely done in federal or state court. In this case, the amount of time it took the fire department to reach the scene was relevant and noted further in the court's opinion. On appeal, the employer argued that even though the regulation called for it to "develop and implement" rescue procedures, it did not require them to actually make a 911 call. Judge Posner made short work of this argument finding that it was not sensible to require such a procedure and then allow the employer to do nothing at all pursuant to that procedure.

The court held that a willful violation required proof only that the Defendant be aware of the risk involved, know that it was serious, know that it could take effective measures to avoid it, but did not. The court further noted that the terms "recklessly" and "willfully" were essentially synonymous for OSHA purposes.

Practice Tip:
The Seventh Circuit clarified the standard of proof required for establishing a "willful" violation, but the standard permits room for argument both by the agency and the employer. However, it is clear, merely devising and implementing a rescue plan will not avoid a willful violation if the employer takes no action to utilize or enforce that plan.

New Indiana Law Allows Employers to Give Preference to Veterans

On 5/15/15, Indiana Governor, Mike Pence, signed Senate Bill 298 into law (now Public Law 205), permitting private employers to implement a policy that gives preference for hiring, promoting or retaining a veteran over another qualified applicant or employee. The policy must be in writing and applied uniformly to employment decisions. Additionally, any such policy cannot apply to or abrogate a collective bargaining agreement in effect prior to the adoption of the policy. Further, no such policy may interfere with an employer's obligations under the federal National Labor Relations Act, or the federal Uniformed Services Employment and Reemployment Act.

Practice Tip:
Indiana employers should consider whether they wish to adopt a policy that gives preference to veterans and if so, revise their policies and handbooks accordingly.

Case Results

Storrs Downey obtained dismissals from the EEOC Indianapolis branch on two separate individuals' claims involving charges of sex discrimination and harassment and sex and natural origin discrimination and harassment respectively.

Publications

Maital Savin's article entitled "After *Young v. UPS*: What Employers Need To Know To Help Prevent Pregnancy Discrimination Claims," was published in the Defense Research Institute's 4/27/15 issue of *The Job Description*.

Organization Updates

Maital Savin has been appointed as a co-chair of the Chicago Labor & Employment Committee of the CBA Young Lawyers Section.

Giving Back

Legal Prep 3 on 3

On **3/7/15**, Teams BDL Ballers and BDL Ball Don't Lie played in the Chicago Legal Prep 3 on 3 Tournament. Ex-Chicago Bear Jerry Azumah co-hosted this event where players, supporters, students and faculty gathered together for fun competition and supported their athletic program. The final game score was a close 15-13!

Chicago Legal Prep Charter Academy is Chicago's first and only legal-themed charter high school. Bryce Downey & Lenkov was proud to sponsor this event and support Chicago Legal Prep. For more info, Click Here

Chicago Polar Plunge Benefitting Special Olympics Chicago

On **3/1/15**, the BDL Left Sharks took the Polar Plunge into 32-degree Lake Michigan. This was our third year braving freezing temperatures at North Avenue beach to raise funds and awareness for the Special Olympics Chicago. Special Olympics is the world's largest program for sports training and athletic competition for children and adults with intellectual disabilities. This year, 9 Sharks raised over **$3,000** for the Chicago Special Olympics. Congratulations Team BDL!

Hustle Up The Hancock

On **2/22/15**, Team BDL joined more than 4,000 others in the American Respiratory Health Association's Hustle Up The Hancock. Full climbers (94 flights of stairs) and half climbers hustled and raised $3,550 for lung disease research, advocacy and education. Our best times were Robert Olszanski, Clerk, 9:49 for the half climb, and Jason Klika, Marketing Coordinator, 17:01 for the full climb. Congratulations Team BDL!

Free Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics

Here is what attendees had to say about our "10 Tricky Employment Termination Questions Answered" webinar

"Very good!."

"I found the hypotheticals extremely helpful."

"I liked that practical examples of theories discussed."

"Good content and delivery of the same."

Recent

10 Tricky Employment Termination Questions Answered

Spills, Thrills & Bills: The True Story Behind Illinois & Indiana Premises Liability Law

Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace

If you would like a copy of any of our prior webinars, please email Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Contributors to the May 2015 Labor & Employment Newsletter

The Bryce Downey & Lenkov attorneys who contributed to this newsletter were Storrs Downey, Maital Savin, Frank Rowland, and Suzanne Kleinedler.

Other Newsletters

Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

General Liability

- The "Open and Obvious" Defense- Restored By the Illinois Supreme Court
- Indiana Court of Appeals Affirms Admission of Testimony of Naprapath

Corporate & Construction

- Mechanics Lien Refresher: Are You a Contractor or a Subcontractor?
- Seventh Circuit Confirms Insurer Has No Obligation to Defend Construction Defect Claim

Workers' Compensation

- Does TTD Retire After Retirement?
- Commission Gets It Right: Bending Over Not Compensable

Free Seminars!

Our attorneys regularly provide free seminars on a wide range of labor and employment law topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Some of the topics we presented are:

- 10 Tricky Employment Termination Questions Answered
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace
- An Overview of Employment Law Claims: Investigation and Defense
- Top 10 Employer Mistakes
- Insights Into Employment Law
- An Overview of Employers Liability
- Employment Landmines in Workers' Compensation

If you would like us to come in for a free seminar, Click Here Now
or email Storrs Downey at sdowney@bdlfirm.com
We can teach you a lot in as little as 60 minutes

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Crown Point, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

- Business Litigation
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- Insurance Litigation
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- Medical Malpractice
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- Transportation
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