Bugbee & Conkle, LLP

THE EMPLOYER

June, 2012 Volume 05, No. 3

405 Madison Ave., Ste. 1300
Toledo, Ohio 43604
(419) 244-6788

www.Bugbee-Conkle.com

Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Janelle M. Matuszak
Carl E. Habekost
Carolyn A. Davis

Employers, It's Time to Review Policies Regarding Transgender Workers.

On April 30, 2012, the EEOC issued its decision in the case of Macy v. Holder, holding that the ban against sex discrimination includes discrimination because of an employee's transgender status. The case involved a claim brought by a transgendered woman (a man still in the process of becoming a female) who while still presenting as a man applied for a position as an agent with the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives. When she disclosed her transgendered status, her application for hire was denied, prompting the suit on the basis of "sex" discrimination.

While this decision represents the first time the EEOC has expanded the definition of "sex" to include transgendered status, its decision is, however, consistent with some federal court decisions. Perhaps most notable among those decisions for Ohio employers is the 2004 decision of the Sixth Circuit in Smith v. City of Salem, which held that it is unlawful "sex" discrimination to harass or otherwise criticize as not being "masculine enough" an employee who is in the process of transitioning from a male to female. Other courts have also concluded that gender stereotypes can be illegal under the prohibition against sex discrimination.

In light of the fact that the EEOC has now officially adopted this position, employers should review their existing non-discrimination policies with this recent development in mind. This decision also comes at a time when there are legislative efforts at both the federal and state level to enact laws making transgendered discrimination, and other forms of sexual orientation discrimination, unlawful. Although sexual orientation discrimination is, at the moment, not unlawful under federal law or Ohio law, those days could be ending soon.

OSHA Memorandum Critical of Employer Safety Programs

OSHA recently issued a Memorandum to all of it Regional Administrators and Whistleblower Program Managers. In that Memo, OSHA signaled its resolve to thoroughly scrutinize many safety incentive and workplace safety programs commonly used by many employers. For example, programs that award employees or supervisors a monetary bonus for injury-free work over a period of time would, according to OSHA, discourage employees from reporting injuries. In the eyes of OSHA, that could constitute unlawful "retaliation" by denying a monetary award (the bonus) to employees who engage in the protected activity of reporting injuries.

The Memo also cited inconsistent enforcement of workplace safety rules and disciplinary practices as potentially discriminatory. The Memo noted that such discipline can be seen as discrimination and/or retaliation against employees who are exercising rights protected under the OSHA Act. The Memo concludes this part of its directive by saying that in such situations, "A careful investigation (of the employer's practices and motives) is needed."

The Memo, which criticizes other aspects of traditional safety policies and programs, should alert employers to expect OSHA to aggressively review such areas as employee discipline, both the content and enforcement of work and safety rules, and safety incentive programs. Moreover, employers should be prepared for an increase in the number of "whistleblower" investigations and complaints, as well as longer and more invasive on site investigations by OSHA.

If you have any questions concerning how the EEOC's Title VII Decision or the OSHA Memorandum affect your company, please contact a member of our Labor and Employment Law practice group at (419) 244-6788.

Tybo Alan Wilhelms (twilhelms@bugbee-conkle.com)
Carl E. Habekost (chabekost@bugbee-conkle.com)
Carolyn A. Davis (cdavis@bugbee-conkle.com)

THE EMPLOYER is not intended to provide legal advice, but is intended as a service to the clients of Bugbee & Conkle, LLP and to alert them to recent developments affecting the employment relationship, with a particular emphasis on the perspective of the employer.

405 Madison Ave., Ste. 1300
Toledo, Ohio 43604
(419) 244-6788

www.Bugbee-Conkle.com

Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Janelle M. Matuszak
Carl E. Habekost
Carolyn A. Davis