FALL 2015 NEWSLETTER

EMPLOYMENT LAW UPDATE

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U.S. SUPREME COURT

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. ___, 135 S.Ct. 2028 (2015)**

In a religious discrimination claim, the question is whether the potential need for an accommodation for a religious practice is a "motivating factor" in an adverse employment action, not whether the employer had actual knowledge of the underlying religious practice. In other words, an employer may be held liable for an adverse employment action, if the employer takes such action because it suspects that an employee's religious practices will require an accommodation and it does not wish to provide such accommodation, regardless of whether the employee has told the employer of a religious practice that will require an accommodation or has asked for an accommodation.

Samantha Elauf, a Muslim, applied to work at Abercrombie and arrived for the job interview wearing a headscarf, which she believes to be required by her religion. Though the interview rating given to her indicated that she could be hired, the interviewer was concerned that the headscarf would conflict with Abercrombie's "Look Policy." At no time did the interviewer ask Ms. Elauf if the headscarf was worn as part of her religious practice, nor did Ms. Elauf at any time indicate the need to continue to wear the headscarf for religious reasons. The interviewer, however, in conversations with superiors indicated that she *believed* that the headscarf was being worn for religious reasons. Ultimately, the interviewer was instructed not to hire Ms. Elauf, as the headscarf would interfere with the Look Policy which barred religious and non-religious headwear. Ms. Elauf sued claiming violation of her Title VII rights not to be discriminated against based on her religion.

Justice Scalia issued the majority opinion. His opinion is, essentially, a close reading of Title VII. Justice Scalia noted that Title VII prohibits religious discrimination, with the term "religion" being defined as including "all aspects of religious observance and practice, as well as belief." An employer could discriminate against an employee's religion, but only if it showed that no reasonable accommodation was possible without the business suffering undue hardship.

Abercrombie's primary argument before the Court was that it could not have discriminated against Ms. Elauf without having "actual knowledge" of the need for an accommodation, which it claimed it did not have. Justice Scalia disagreed, relying on Title VII's text, which requires only that the need for an accommodation be a "motivating factor" in the employment decision in question. Title VII prohibits adverse actions against an employee or a prospective employee "because of" the employee's religion. In other words, an employee's religious practice may not be a motivating factor for taking an adverse employment decision against an employee. Title VII lacks the knowledge requirement that Abercrombie argued the Court should impose, but instead proscribes motives.

The Court ended its decision by noting that Title VII gives favored treatment to religious practices, going beyond requiring employers to merely have neutral policies. With regard to religion, "[t]itle VII requires otherwise-neutral policies to give way to the need for an accommodation."

FIFTH CIRCUIT COURT OF APPEALS

***Nobach v. Woodland Village Nursing Center Inc.*, Nos. 13-60378, 13-60397, 2015 WL 4978749 (5th Cir. Aug. 20, 2015)**

In a religious discrimination claim under Title VII, a plaintiff must put on evidence, direct or circumstantial, that the employer's adverse employment action was *motivated* by the plaintiff's religion or religious beliefs. The Fifth Circuit clarified that the question is not what the employer *knew* about the employee's religious beliefs or whether the employer *knew* there would be a conflict between the employee's religious belief and some job duty, instead, the critical question is what *motivated* the employer's employment decision.

In this case, Nobach was employed by Woodland Village Nursing Center ("Woodland") as an activities aide. In September 2009, Nobach was told by a nurse's assistant that a particular resident had requested that the Rosary be read to her. This task fell under Nobach's job responsibilities. Nobach refused to perform the task, telling the nurse's assistant that she could not because it was against her religion. Nobach did not at that time, or at any time prior to her termination, tell anyone making the decision to terminate what her religious beliefs were or why she could not read the Rosary. After refusing to read the Rosary to the resident, Nobach was terminated for other write-ups and refusing to read the Rosary to the resident because it was one of her position's regular responsibilities.

Nobach filed suit against Woodland, alleging that she had been fired because of her religion in violation of Title VII. A jury returned a verdict for Nobach. The matter was heard by the Fifth Circuit, and it concluded that Nobach had not produced evidence that Woodland was motivated by Nobach's religious beliefs before it discharged her. As a result, the Fifth Circuit reversed and vacated the judgment of the district court and remanded for entry of judgment. Nobach petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted the writ and vacated and remanded the case for reconsideration in light of the Court's holding in *EEOC v. Abercrombie & Fitch Stores*. The Fifth Circuit requested and received additional briefing from both sides addressing the impact of *Abercrombie* on Nobach's case.

After consideration of the Supreme Court's decision in *Abercrombie* and the parties' additional briefing, the Fifth Circuit reaffirmed its decision in favor of Woodland because Nobach did not present any evidence that the decision to terminate Nobach was motivated by Nobach's religion or religious beliefs. Of importance, Nobach did not produce any evidence that before her discharge anyone at Woodland knew that praying the Rosary was against Nobach's religion or that anyone involved in her discharge suspected that Nobach's refusal to pray the Rosary was motivated by religious beliefs. As a result, Nobach produced no evidence that Woodland knew, suspected, or reasonably should have known the cause of refusing the task of

reading the Rosary was her conflicting religious beliefs—and that Woodland was motivated by that knowledge or suspicion.

***Zamora v. City of Houston*, No. 14-20125, 2015 WL 4939633 (5th Cir. Aug. 19, 2015)**

In Title VII retaliation claims, the cat's paw theory for establishing liability remains a valid means of proving causation. The holding in *Nassar*, which clarified that a plaintiff asserting a Title VII retaliation claim must establish but-for causation, did not affect the applicability of the cat's paw theory of causation in retaliation claims.

In this case, Zamora, a Houston police officer, sued the City of Houston for unlawful retaliation under Title VII. Prior to the instant suit, Zamora participated in a lawsuit by several members of the Houston Police Department ("HPD") alleging race discrimination and retaliation. After joining the suit, Zamora was removed from the Crime Reduction Unit ("CRU"). During discovery in the first suit, several members of the CRU lied under oath, colluding to make up a reason for Zamora's removal from the CRU. This perjury was reported to the Department's Internal Affairs Department and an investigation was conducted. During that investigation, Internal Affairs determined that it was Zamora, not the members of the CRU that had violated the Department's policies for untruthfulness. That determination was largely based on Zamora's CRU supervisors harshly attacking his credibility and contradicting his factual assertions. As a result of these statements, a department disciplinary committee recommended that Zamora be suspended for ten days, and the Chief of Police approved the suspension.

Zamora amended his complaint to include not only the removal from the CRU, but the 10 day suspension. After a jury trial, a jury found the City liable for retaliation. The City appealed, asserting that Zamora did not produce sufficient evidence from which a reasonable jury could find a causal connection between his protected activity and the suspension.

On appeal, the City argued that Zamora did not sufficiently establish the but-for causation required for a retaliation claim under Title VII because he relied upon a cat's paw theory of causation. The City argued that since the holding in *Nassar* held that a plaintiff in a Title VII retaliation claim must meet a higher standard of causation by establishing that "his or her protected activity was a but-for cause of the alleged adverse action by the employer," that the cat's paw theory of causation was no longer a viable analysis of causation.

The cat's paw theory of liability is used when the plaintiff cannot show that the decisionmaker—the one who took the adverse employment action—harbored any retaliatory animus. Under the theory, the plaintiff must show that the person with retaliatory animus used the decisionmaker to bring about the intended retaliatory action.

In holding that the cat's paw theory of liability was still valid post *Nassar*, the Fifth Circuit pointed out that *Nassar* did not say anything about whether a supervisor's unlawful animus could be imputed to a decisionmaker. Instead, *Nassar* only requires that the supervisor's influence be so strong that it actually causes the adverse employment action. In so holding, the Fifth Circuit joined other circuits which have addressed the same issue and held that in the

context of Title VII retaliation claims, the cat's paw analysis remains a viable theory of causation.

***Goudeau v. National Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015)**

So-called "stray remarks" can be relevant evidence of discrimination sufficient to defeat summary judgment when presented as circumstantial evidence of discrimination, i.e. as just one piece of evidence in the overall evidentiary mix. The comments need only show: "(1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decision maker." This is a more flexible standard then when remarks are being presented as direct evidence, i.e. the only evidence of the alleged discrimination. Additionally, when a company uses a progressive disciplinary plan, including giving "warnings," the fact that the warnings were all drawn up on the same date, even though they pertained to alleged events on different dates, and the fact that the employee was never given the warnings prior to the date of termination can be evidence of pretext for an employee's age discrimination.

In this case, Goudeau was employed as a mechanic and millwright at ReedHycalog from 1993 until 2008, when ReedHycalog was acquired by National Oilwell Varco ("NOV"). In August or September 2010, a new supervisor, Perkins, was assigned to oversee Goudeau. Perkins made several ageist comments to Goudeau, including: (1) "there sure are a lot of old farts around here;" (2) asking about the age of two older employees whom he also supervised and saying that he planned on firing them; (3) referring to the smoking area as the place "where old people meet;" and (4) commenting that Goudeau wore "old man clothes." Goudeau reported Perkins comments and plans to fire the older employees to HR. After the HR complaint, Perkins stopped socializing with Goudeau and reduced Goudeau's managerial authority. During this time, Perkins also issued Goudeau a "First Warning" and gave Goudeau a below-standards rating on his performance evaluation. On August 11, 2011, Goudeau was called into a meeting with Perkins and terminated. During the meeting, Goudeau was presented with four additional write-ups, which he had not been presented with prior to the meeting. Three of the four write-ups were signed by Perkins and HR on July 15, 2011, even though the described alleged violations occurred on different dates. They were not signed by Goudeau. The fourth write-up was dated August 10, 2011, and was similarly unsigned by Goudeau. Goudeau was not replaced, instead, his duties were absorbed by other existing employees. Additionally, at some point after the "old farts" comments the two other older employees were also terminated.

Goudeau brought suit asserting claims of age discrimination and retaliation in violation of the ADEA and the TCHRA. The district court granted summary judgment for NOV on both claims, finding that Goudeau did not establish that the reasons given for his termination were not pretext for discrimination or retaliation. Goudeau appealed.

Although the district court found that Goudeau established his *prima facie* case of discrimination, the Fifth Circuit addressed the issue because NOV challenged that finding. NOV argued that Goudeau did not have evidence of the fourth prong of an age discrimination *prima facie* case, i.e. that he was "otherwise discharged because of his age." In determining that the ageist remarks made by Goudeau's supervisor could be evidence that he was discharged because

of his age, the Fifth Circuit rejected NOV's argument that the comments were insufficient evidence of the fourth prong because they did not meet the four-part "stray remarks" test articulated in *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996).

Under *CSC Logic*, in order to be sufficient evidence to withstand summary judgment, the: (1) ageist remarks; (2) must be proximate in time to the termination; (3) made by an individual with authority over the employment decision; and (4) related to the challenged decision. The Fifth Circuit articulated the reason behind the four-part test stating that when comments are being relied upon to prove the entire case of discrimination, such comments are only allowed to defeat summary judgment only if the comments are "not stray, but instead are tied to the adverse employment action at issue both in terms of when and by whom they were made." However, in this case, the Fifth Circuit found that the ageist remarks were not being presented as direct evidence, but instead, as only a piece alongside other circumstantial evidence. As a result, they were subjected to a much more flexible standard. The Fifth Circuit found that Perkins comments such as "old fart," "old man clothes," and referring to the smoking area as "where the old people meet," when coupled with other evidence, were sufficient to establish the fourth element of his *prima facie* case.

Turning to the argument that Goudeau did not meet his burden in showing that the reasons given for his termination were pretext for age discrimination, the Fifth Circuit found that the district court incorrectly failed to weigh the ageist comments made by Perkins in determining if Goudeau had produced sufficient evidence of pretext to withstand summary judgment on his age discrimination claim. The Fifth Circuit found that the comments, coupled with the fact that two other older employees were terminated after Perkins made the ageist comments, could lead a jury to find that the reasons for termination were pretext for age discrimination. The Fifth Circuit also found significant the fact that Goudeau was never given the four "warnings" prior to his termination. The Court found that the fact that he was never given the warnings essentially undermined the purpose of a "warning," i.e. to warn the employee so that he could take corrective steps to avoid losing his job, and could give rise to an inference of pretext. On the issue of age discrimination, the Fifth Circuit reversed and remanded for further proceedings.

***Bodle v. TXL Mortgage Corporation*, 788 F.3d 159 (5th Cir. 2015)**

The FLSA's general prohibition of waiving overtime payment rights makes a settlement agreement unenforceable with regards to a waiver of FLSA claims for overtime payment where there is no mention or factual development of any claim of unpaid overtime in either the underlying matter or the settlement agreement.

In this case, Bodle and Meech filed an FLSA claim against their former employer TXL Mortgage Corporation and its President, Couch, ("defendants") alleging that the defendants failed to compensate them for overtime work. The suit was filed on the same day as the parties filed a joint motion for entry of agreed final judgment pursuant to a settlement agreement in a different case involving the same parties in state court. Examining the settlement agreement relating to the state court case, the district court granted summary judgment to the defendants on the FLSA claim, finding that based on the plain language of the settlement agreement, that the plaintiffs were banned from their subsequent FLSA claim. The settlement agreement stated in

pertinent part: "[Bodle and Meech] hereby fully and completely release and discharge [defendants]…from any and all actual or potential claims…in any way arising from [Bodle's and Meech's] employment with TXL, whether based in…federal, state or local law, statute, or regulation. This is meant to be, and shall be construed as, a broad release."

The Fifth Circuit reversed and remanded, finding the settlement agreement unenforceable with regards to Bodle's and Meech's FLSA claims, because the FLSA generally bans the waiver of claims for unpaid overtime. While there is an exception to this general ban—parties may reach private settlement compromises involving FLSA claims, but only where there is a bona fide dispute as to the amount of hours worked or compensation due—in this instant case, the parties' settlement agreement in the state case had nothing to do with the FLSA and the parties never discussed overtime compensation or the FLSA in the settlement negotiations. Because there was no factual development of the number of unpaid overtime hours or of compensation due for unpaid overtime, there was no guarantee that Bodle and Meech were compensated for the overtime wages they were allegedly due under the FLSA. The Fifth Circuit found that the general prohibition against waiver of FLSA claims was applicable and the state court settlement agreement could not be enforced against Bodle and Meech to ban their instant FLSA suit.

TEXAS COURT OF APPEALS

***Lopez v. Tarrant Cnty, Tex.*, No. 02-13-00194-CV, 2015 WL 5025233 (Tex. App.—Fort Worth Aug. 25, 2015, no pet. h.)**

In a claim under the Texas Whistleblower Act, section 554.0047(b) of the Texas Government Code provides an affirmative defense against a claim, if the employer can show that it would have taken the questioned action against the employee based solely on some other information, observation, or evidence that is not related to the employees protected report or a violation of law.

In this case, Lopez was employed as Executive Secretary to Tarrant County Administrator Maenius. Lopez alleges that in April 2010, she was assaulted by another employee. Lopez reported the assault to HR, Maenius, and the Fort Worth Police Department. Two independent investigations, one by the Tarrant County Sheriff's Office and an internal investigation, concluded that there was insufficient evidence to support Lopez's allegation that she was assaulted. On the morning of June 30, 2010, Lopez confronted Maenius accusing him of providing her personal telephone number to the press, arranging for reporters to call her the night before, and coming to her home uninvited. During the confrontation, Maenius requested that the Assistant County Administrator and Assistant Director of Human Resources come to his office to witness the exchange. Both witnesses stated that Lopez's behavior was unprofessional, confrontational, inappropriate, and unacceptable from an employee. Based on her behavior and baseless accusations, Maenius decided to terminate Lopez's employment. Aside from her behavior and accusations, Maenius also said that the decision to terminate Lopez's employment was also based on the fact that he no longer had the trust in Lopez that is critical to her position as the Executive Secretary to the County Administrator. Maenius stated that the trust was irreparably damaged by Lopez's actions.

Lopez brought a claim under the Texas Whistleblower Act alleging that she was terminated due to her reporting an assault by another employee. Tarrant County sought summary judgment asserting the affirmative defense that Lopez's employment had been terminated independently of her assault allegation. The trial court granted Tarrant County's motion for summary judgment and this appeal followed.

The court of appeals found that Tarrant County conclusively established its affirmative defense that it terminated Lopez's employment for a reason unrelated to her assault allegations, finding that there was sufficient evidence that Lopez's behavior and accusations towards Maenius were the independent reason for her termination. The court went on to state that once the defendant establishes its affirmative defense that the employee was terminated for an independent reason, that this tends to negate the plaintiff's ability to show the causation element of her whistleblower claim, because to show causation in a whistleblower case, "a public employee must demonstrate that after she reported a violation of the law in good faith to an appropriate law enforcement authority, the employee suffered discriminatory conduct by the employer that *would not have occurred* when it did if the employee had not reported the illegal conduct." The court found that based on the summary judgment evidence brought forth by the County, and the fact that Lopez failed to counter the County's assertion that she would have been fired based on her conduct on June 30, 2010, Tarrant County conclusively proved that they were entitled to summary judgment based on their affirmative defense under section 554.004(b) of the Texas Government Code.

***City of Houston v. Smith*, No. 01-14-00789-CV, 2015 WL 4967020 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, no pet. h.)**

The trial court lacked subject-matter jurisdiction over the Plaintiff's Whistleblower Act claim because the plaintiff did not report a violation of law by a public employee. Plaintiff's reports of alleged violations of law were by an independent contractor and independent contractors are explicitly not covered by the Whistleblower Act.

In this case, Smith was employed by the Houston Police Department ("HPD") in the Identification Division. In December 2008, HPD hired an outside company, Ron Smith and Associates ("RS & A") to handle parts of the fingerprinting identification process. In September 2010, Smith reported to his HPD supervisors and Assistant Chief in a detailed memorandum, concerns with the way that RS & A was performing its support services to HPD. In October 2010, Smith was reassigned to the Property Division. Smith filed a grievance regarding the transfer and sued the City alleging that the transfer was an adverse personnel action that violated the Texas Whistleblower Act. The City sought summary judgment, arguing that the trial court lacked subject-matter jurisdiction, claiming that Smith's summary-judgment evidence failed to raise a fact issue regarding three of the elements of his whistleblower claim, that Smith: (1) reported a violation of law in good faith; (2) to an appropriate law enforcement agency; and (3) suffered an adverse personnel action. The trial court denied the City's motion for summary judgment, and the City appealed.

The appellate court found that Smith was unable to meet his burden of showing that he

reported a violation of law by "the employing governmental entity or another public employee." The Act defines "public employee" as "an employee or appointed officer *other than an independent contractor* who is paid to perform services for a state or local governmental entity." (emphasis added). The court found that the reports of alleged violations of law were against RS & A, an independent contractor, and the Whistleblower Act did not apply. In finding that RS & A was an independent contractor, the court focused on who had the right to control the details and means of the work RS & A performed, and found that it was not within the control of HPD. In so finding, the court rejected Smith's argument that HPD had the requisite control over RS & A because they corrected errors and supervised RS & A's employees. The court held that Smith failed to bring forth any evidence of specific instances where HPD exercised actual control over the details of RS & A's work. The court pointed out that just because an entity has the right to ensure that an independent contractor properly performs its work, it does not make it an employee. The court vacated the trial court's order denying the City's motion for summary judgment and dismissed the case.

***El Paso Indep. Sch. Dist. v. Kell*, Cause No. 08-14-00056-CV, 2015 WL 3630712 (Tex. App.—El Paso June 10, 2015, pet. filed)**

An educator seeking to bring a whistleblower claim must first initiate the grievance procedures as laid out in Chapter 21 of the Texas Education Code, in order to exhaust the administrative prerequisites to bringing a claim under the Texas Whistleblower Act.

In this case, the court was faced with the question whether Kell, an assistant principal who was proposed for termination, who did not request a Chapter 21 (of the Education Code, Subsection F) administrative hearing to challenge her termination, who was terminated by the district, but then filed a DGBA grievance within 90 days of the notice of termination, initiated the district's grievance procedures.

In deciding the question, the court noted that Chapter 21 appears to be the only way that a teacher proposed for termination can challenge the termination. The legislature created a highly formalized, quasi-independent hearing proceeding that is similar to a bench trial. The court wrote that "[t]his comprehensive procedure strongly suggests that the legislature intended for teachers to use this process to challenge terminations." Importantly, however, the court noted that even if Chapter 21 hearings are not the exclusive method to challenge proposed terminations, El Paso ISD's policy itself "specifies that it applies only when no other proceedings are available." In other words, the policy states that before teachers who believe they are whistleblowers who suffered retaliation can file suit, they "must initiate action under the District's grievance or appeal procedures relating to ... termination of employment...." The court held that "EPISD's grievance procedures relating to termination of employment are those set out by statute in Chapter 21, Subsection F. Simply put, the terms of the policy itself redirect Kell to the Chapter 21 process, and Kell has not shown that any alternate processes exist." Because Kell never attempted to invoke the Chapter 21 hearing process, the court found that she lost the right to judicial review of her whistleblower claim. Kell is appealing the decision to the Supreme Court of Texas.

***Ward v. Lamar Univ.*, Cause No. 14-14-00097-CV, 2015 WL 2250900, (Tex. App.—Houston**

[14th Dist.] May 12, 2015, no pet. h.)

In order to proceed with a claim under the Texas Whistleblowers Act, a plaintiff must have initiated a grievance against the employer and must have suffered a material adverse employment action.

In this case, the court found that a fact issue existed as to whether Ward initiated a grievance as required by the Act. Ward sued both Lamar University and the Texas State University System. Neither entity appears to have an established grievance procedure system. Ward, however, sent communications to a superior, the President of the University, and to the Vice Chancellor of the System, apparently asking for relief from retaliatory acts. The court held that, when the steps of a grievance process are unclear, Ward's request to ranking officials to invoke the procedure (whatever it is) cannot be denied effect.

The court also found a fact question as to whether Ward had suffered material adverse employment actions from Lamar University. Ward alleged that she lost procurement responsibility, 15 people from her supervision, and her authority over her department, though her pay and job title remained the same. The court also noted that "she no longer reported directly to the Vice President for Finance; instead, she reported to the new Senior Associate Vice President, an individual with no previous finance experience. Such an action is some evidence that she lost job prestige." The loss of the procurement duties meant losing the duties which allowed her to discover the questionable transactions she reported. "Removing the very authority that allowed a whistleblower to find wrongdoing in the first place is some evidence of an action that would likely dissuade a reasonable, similarly situated worker from making a report under the Act."

The court, however, found that she had not suffered a material adverse employment action from the Texas State University System. Ward claimed that implied threats of termination were adverse employment actions, but she was never terminated. Citing a Texas court of appeals case from 2000 and a case from the federal Seventh Circuit, the court held that "[u]nfulfilled threats to fire do not constitute actionable adverse employment decisions." This is a categorical holding that seems ripe for a challenge.

***Bastrop County v. Montie*, No. 03-14-00424-CV, 2015 WL 1611944 (Tex. App.—Austin April 9, 2015, no pet. h.)**

Reports of animal cruelty by an employee of a county animal shelter to two members of a County Commissioner's Court was not a report to an appropriate law enforcement authority for purposes of the Texas Whistleblowers Act because the County Commissioner's Court did not have the authority to regulate or enforce ordinances on its own or to investigate or prosecute criminal violations.

In this case, Montie asserted that she had been terminated from her job as a manager for a county animal shelter in violation of the Texas Whistleblower Act because she had reported her supervisor for cruelty to animals. Montie made her reports to two members of the Bastrop County Commissioners' Court, and asserted that she believed the Commissioners' Court had

authority to enforce a county ordinance implementing the prohibition against animal cruelty found in the Texas Penal Code.

The court held that Montie could not, either objectively or subjective, reasonably have believed that the two commissioners were an appropriate law enforcement authority because: 1) although the Commissioners' Court may have oversight over the shelter, it does not have authority to "regulate under or enforce" ordinances on its own or to investigate or prosecute criminal violations; and 2) Montie's years of experience working with animal shelters rendered her belief all the less reasonable.

The court noted that Montie had claimed in her deposition that she reported to an appropriate law enforcement authority when she complained to her supervisor about her supervisor's own conduct because her supervisor was in charge of employees vested with authority to enforce animal control laws. The court declined to address the substance of this claim because Montie had not included this argument in any pleading. However, because the court remanded the case to allow Montie an opportunity to replead, the district court may soon address this argument.

FEDERAL REGULATORY ACTION

In April 2015, in *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (April 1, 2015) the EEOC decided that a male employee who was in the process of transitioning to a female suffered sex discrimination by not being allowed to use the common female restroom facilities without first undergoing a surgical procedure. Additionally, the EEOC determined that Lusardi had been the victim of sexual harassment due to various reasons including a supervisor's continuing to refer to Lusardi using Lusardi's former male name and male pronouns to refer to Lusardi. The EEOC's decision follows its *Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) decision which held that discrimination against an individual because that individual is transgender is sex discrimination under Title VII. Nationwide, litigation asserting sex discrimination on the basis of transgender discrimination is on-going. http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf

In June 2015, the Department of Labor issued "A Guide to Restroom Access for Transgender Workers" which recommends as a best practice that all employees should have access to a restroom corresponding to their gender identity. http://www.dol.gov/asp/policy-development/TransgenderBathroomAccessBestPractices.pdf