



OSHA TAKES CONTROVERSIAL POSITIONS ON TRANSGENDER RESTROOM ISSUES AT WORK



Mary M. Helms.....

"[I]t is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their 'gender identity'."

Many employers may not realize that the Occupational Safety and Health Administration (OSHA) regulates in some ways the use of toilet facilities at work. There are at least three important issues: the number of toilets, access to toilets, and now, the even more controversial issue of transgender bathroom access.

There are OSHA general industry requirements for the provision of toilet facilities at 29 CFR 1910.141(c). These requirements state that "toilet facilities, in toilet room separate for each sex, shall be provided in all places of employment in accordance with the below table of this section. The number of facilities to be provided for each sex shall be based on the number of employees of that sex for whom the facilities are furnished."

Number of Employees	Minimum Number of Water Closets
1 to 15	1
16 to 35	2
36 to 55	3
56 to 80	4
81 to 110	5
110 to 150	6
Over 150	Provide one additional toilet for each 40 employees

OSHA also weighs in on the controversial issue of access to the toilet facilities. In its most recent pronouncement on the subject, OSHA states that it ". . . has consistently interpreted this standard to require employers to allow employees prompt access to sanitary facilities. Further, employers may not impose unreasonable restrictions on employee use of toilet facilities." In the event employees are not provided reasonable access to the toilet facilities, OSHA can argue that those toilets have not been made "available" to employees, although OSHA cases challenging such denial of access are rare.

Editor's Note: The federal government is moving very rapidly on transgender issues. The latest OSHA guidance in transgender employees and toilet access is entitled "Best Practices - A Guide to Restroom Access for Transgender Workers." It states that authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their "gender identity." "Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out. . . ." It goes on to state: "For example, a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms."

The "best practices" advocated by OSHA also provide additional options, which employees may choose, but are not required, to use. These include:

- Single-occupancy gender-neutral (unisex) facilities; and
- Use of multi-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

OSHA also advises under the model practices that employers not require employees to provide any medical or legal documentation regarding their gender in order to access the restroom that corresponds to their gender identity.

It remains to be seen how active OSHA is going to be in enforcing these policies, particularly the new policy related to transgender employees.

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville, Chattanooga and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.



RECENT DEVELOPMENTS: RELIGION AND THE WORKPLACE



Edward H. Trent

“[T]he Court found that (an employer’s) decision based on a form of ‘perceived need’ for a religious accommodation was sufficient to establish religious discrimination.”

In the midst of a summer where there was debate on the scope and value of laws to protect the religious liberties of business owners and the potential conflict with the growing push for “marriage equality” and expanded protections for sexual identity, two other developments occurred that may have passed under the radar. The first concerns the Supreme Court affirming an employee and an applicant’s right to be free from discrimination because of religion. The second concerns the Department of Health and Human Services releasing its modified regulations related to the controversial “Contraception Mandate” under the Patient Protection and Affordable Care Act after last year’s historic decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 275 (2014), upholding a private business’ right to operate in accordance with its owner’s religious beliefs.

A. Religious Accommodation

In June, the Court was faced with the issue of whether a business could deny employment to an applicant because it did not want to accommodate a religious practice it believed the applicant would require. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 2015 WL 2464053 (June 1, 2015), the Court affirmed that “Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship.” In this case, the applicant was a practicing Muslim who wore a headscarf for a religious reason when she was interviewed for a job. Her wearing of the headscarf was not discussed during the interview and the applicant never made any mention of her religion or any inquiry about wearing a headscarf should she be hired. Although otherwise qualified for the job, she was rejected because her scarf violated the employer’s “Look Policy.”

The trial court granted summary judgment to the EEOC who brought suit on behalf of the applicant, but after a jury verdict that awarded \$20,000 in damages, the employer appealed. On appeal, the Tenth Circuit Court of Appeals reversed and directed that summary judgment be entered in favor of the employer because the employer did not “know” that the applicant would require a religious accommodation because the issue had not been discussed. Yet, there was evidence that the hiring manager inquired about the headscarf and the application of the “Look Policy” and that the hiring manager believed the wearing of the headscarf was for religious reasons. The hiring manager was told the headscarf would violate the prohibition on “caps” and to not hire the applicant. The Supreme Court reversed the Court of Appeals because “[a]n employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decision.” In short, the Court found that a decision based on a form of “perceived need” for a religious accommodation was sufficient to establish religious discrimination.

The opinion does not fully answer the question of whether the motive requirement itself is met where there is no evidence the employer at least suspects that the practicing question is a religious practice. In the facts of the *Abercrombie & Fitch* case, however, the employer knew or at least suspected that the scarf was worn for religious reasons. The key factor for the majority of the Court was that the statute requires employers to provide a reasonable accommodation for religious practices, including the wearing of a headscarf, absent the accommodation causing an undue hardship to the business. Employers cannot simply avoid the reasonable accommodation requirement by failing to hire applicants the employer suspects might request a religious accommodation. This same rationale undoubtedly applies in cases under the ADA.

B. Contraceptive Mandate

The second development for employers concerns not the religious observances of its employees, but the religious practices of the owners of a business. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court upheld Hobby Lobby’s objection to providing certain forms of contraception and abortifacients as part of its company provided health care plan. In accordance with the federal Religious Freedom Restoration Act (“RFRA”), before infringing on a “person’s” religious free exercise, the government must establish that the law in question serves a “compelling governmental interest” and uses the “least restrictive means” available to achieve the government’s goal. The Court found first that a person does not lose his or her religious liberty simply by going into business and a closely held corporation was entitled to religious free exercise protections just as its owners were. The Court then found that forcing a closely held business

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Howard B. Jackson

"Under the new rules, prevention and preparedness are more important than ever."

FIRST MONTH'S EFFECTS OF QUICKIE UNION ELECTION RULE

The NLRB "quickie" or "ambush" election rule went into effect on April 14. Its effects are already being seen. The median time interval from the filing of an election petition to the holding of the election has been reduced to 23 days. Specifically, in the case of directed-election cases (as opposed to stipulated elections), the elections took place 23 days after the filing of the petition in two cases; 28 days in one case; and 30 days in one case, for a median interval of 26 days. In contrast, under the former election rules, the median time had generally been considered as approximately 38 days.

In essence, the effect of the new rules, at least for the first month, has been to reduce the time period from the filing of the petition to the election from a little over five weeks to a little over three weeks.

Wimberly & Lawson recently assisted an employer with an election held under the new rules. Fortunately, the employer prevailed, but much work was required in a short period of time. Under the new rules, prevention and preparedness are more important than ever.

Editor's Note: NLRB statistics indicate an increase in election petitions in the first month. In the first 30 days of the effective date of the new rules, the NLRB received 280 representation petitions, up 17% from the number filed during the same period a year ago.



Jerome D. Pinn

"[T]he U.S. Supreme Court has granted certiorari and will rule on a case involving the propriety of broad class/collective actions in wage/hour cases where broad back pay remedies are sought."

SUPREME COURT TO RULE ON CASE INVOLVING BROAD BACK PAY REMEDIES IN WAGE/HOUR CASES

In a case in which Wimberly & Lawson filed an amicus brief on behalf of the National Chicken Council, the U.S. Supreme Court has granted certiorari and will rule on a case involving the propriety of broad class/collective actions in wage/hour cases where broad back pay remedies are sought. *Tyson Foods, Inc. V. Bouaphakeo*, No. 14-1146. On Monday, June 8, the U.S. Supreme Court agreed to take up Tyson Foods Inc.'s challenge to a judgment for almost \$6 million in back pay allegedly due workers at an Iowa meat processing facility. The Court will likely address the propriety of the class or collective action method of proving such damages, at least where statistical techniques are used in the process.

Workers at the Tyson pork processing facility in Iowa filed suit in 2007, claiming they were entitled to overtime pay and damages because they were not compensated for time they spent donning and doffing protective equipment and walking to work stations. Tyson argued that it not only paid workers additional minutes that fairly compensated them for these activities, but also that the method the trial court approved improperly included workers who, according to their own lawyers' calculations, were not entitled to any back pay in the class that was awarded money damages. The National Chicken Counsel (NCC) through Wimberly & Lawson filed a brief in support of Tyson, arguing that resolving the issue of back pay for donning and doffing was of the utmost importance to the industry, where dozens of such claims have resulted in tens of millions of dollars of damages awards.

Editor's Note: Wimberly & Lawson argues that using a few dozen dubious statistical samples to determine liability and back pay damages for a class of thousands of employees tramples individual class members' rights, as well as the employer's right to assert defenses that may vary as to the circumstances of individual employees. The brief contends that such methods violate due process, the wage/hour laws themselves, and the Rules Enabling Act, a federal law which states that procedural rules cannot be used to change substantive rights. Such erosion of defenses is of great concern as employers could be exposed to legalized extortion by the unprincipled assertion of class and collective claims, and asked the Court to determine whether class and collective actions are being misused to secure the award of damages to individuals who are entitled to no relief.



TARGET: OUT OF RANGE
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to provide contraception and abortion inducing drugs contrary to their religious beliefs violated RFRA. In doing so, the majority noted that the regulations included an “accommodation” for religious employers whereby they can “opt out” of providing the offending drugs through a self-certification to the insurance carrier. The carrier would then be responsible for providing all FDA approved contraception methods at no cost to the employee.

In spite of significant and on-going litigation surrounding the alleged “accommodation,” and in light of the temporary injunction issued in the case of *Wheaton College v. Burwell* shortly after the *Hobby Lobby* decision (as it concerns the “accommodation” and religious employers) the Department of Health and Human Services has updated its rules regarding the “Contraception Mandate.” In the new regulations, closely held corporations who object on religious grounds to providing some or all of the mandated contraception drugs or devices may self-certify in one of two ways that they object to providing and paying for such coverage. As before, the onus will then fall to the insurance carrier to provide the contraception coverage to the employer’s employee, but at no cost to the employer or to the employees.

The new “accommodation” now applies to both religious nonprofit organizations, and to an “organization [that] is organized and operates as a closely held for-profit entity . . . and the organization’s highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization’s applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owners’ sincerely held religious beliefs.” 45 C.F.R. § 147.131(b)(2)(ii).

A closely held corporation is limited to those organizations that are (1) for profit, (2) have “no publicly traded ownership interests,” and (3) have “more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals.” When determining the “directly or indirectly by five or fewer individuals” requirement, the regulations state that “an individual is considered to own the ownership interest owned, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.” 45 C.F.R. § 147.131(b)(4). Accordingly, businesses where the majority is owned by a single family will qualify, but those businesses where more than five “individuals” own more than 50 percent of the business will not qualify.

The regulations state the ownership interests “owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity’s shareholders, partners, or beneficiaries,” so if a partnership made of six unrelated individuals owns a majority of a business, that business will not qualify for the accommodation regardless of the shared religious convictions of the six owners.

For those for-profit businesses that qualify and now for all religious nonprofit organizations, there are two means for certifying a religious objection to the provision of some or all forms of contraception. The first is a certification (EBSA Form 700) provided to either the health insurance insurer (for insured health care plans) or to the third party administrator for self-insured plans. The alternative is to submit notice directly to the Secretary for Health and Human Services containing the scope of the religious objection (either all or a subset of the required contraception coverage), the name of the organization with contact information and whether the organization is a religious nonprofit or “other eligible organization,” and then the plan name, service provider with contact information, whether the plan is an insured plan or self-insured plan, and if applicable, a church plan or student plan. In either event, the insurer or third party administrator will then become responsible for providing or arranging for the required coverage directly to the objecting employer’s employees, but at no cost to the employer. Whether this accommodation satisfies the religious objections of qualified employers remains to be seen as this issue remains hotly contested by a number of religious employers, including the well-publicized case involving the *Little Sisters of the Poor*.

C. Conclusion

Religion and the workplace were once thought to be two separate things, but as these two recent developments show and the news of the last 12 months as it relates to the scope of religious free exercise protected by the First Amendment continues to be debated in the context of ever changing social and cultural dynamics, the interplay will only become more pronounced over time. Employers need to be aware of their employees’ rights to not just maintain religious beliefs, but also their right to religious observance and practice. The same is true for employers in how they operate their business, but the line between protected and unprotected conduct for the employer is not so clearly defined. This development is only getting started in light of the Court’s *Hobby Lobby* decision and the courts will be forced to balance religious free exercise with a host of interests being asserted by across the political and cultural spectrum. It can certainly be said that we do indeed live in interesting times.



Wimberly Lawson

Attorneys & Counselors at Law

We invite you to attend our 36th Annual Labor and Employment Law Update

TARGET OUT OF RANGE



THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott Downtown
500 Hill Avenue, Knoxville, Tennessee
November 5 & 6, 2015



KEYNOTE SPEAKER

Vallie Smith Collins

“Miracle on the Hudson”

Vallie shares life lessons learned from being on board US Airways Flight 1549

SPECIAL GUESTS

From the EEOC:

Sarah L. Smith, *Director*, and
Sylvia Hall, *Supervisory Enforcement
Federal Investigator for the EEOC’s
Nashville, TN office*

From the Tennessee Human
Rights Commission:

Beverly L. Watts, *Executive Director*

A FEW COMMENTS FROM LAST YEAR

“Great selections and topics”

“Very thorough — can’t think
of anything you missed!”

“Always fun and informative”

“It’s my favorite of
all seminars — great job!”

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Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US!**

Our day-and-a-half program covers **important legal decisions and societal trends affecting employment**. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. A few of the thirty-five or more topics are:

- Cyber Security, Cyber Crime and Employee Data
- The Importance of Effective Hiring (Background Checks, Pre-employment testing, and Drug Testing, Including Medical Marijuana and FCRA Compliance)
- Healthcare Reform: A Look Behind and the Road Ahead
- NLRB (Quickie Elections, Employee Handbooks, etc.)
- Records Retention: The Devil is in the Details
- Impact of Social Media in the Workplace
- Common Mistakes When Handling Leaves and Other FMLA Issues – FMLA Lawsuits Are Epidemic
- NLRB, Joint Employers & Franchise Issues
- What's New with the EEOC and Enforcement Initiatives
- Handbooks: Helpful or Harmful?
- ADAAA, Including the Pregnancy Discrimination Act: Why is it so Difficult?
- Discipline and Discharge: Handling the Tough Calls With Confidence

Join us in Knoxville on November 5th and 6th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member



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AGENDA

(Note: These are Pre-Conference Topics, Titles and Times.
They may Change – Please Check Final Conference Program on Day of Conference.)

Thursday, November 5, 2015 (9:00 a.m. - 5:00 p.m.)

8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast

9:00 a.m. - 10:45 a.m. - General Session

The Year in Review

Strategies for Minimizing the Negative Effects of Unconscious Bias
in Employment Decision-Making

Cyber Security, Cyber Crime and Employee Data

Lessons Learned From Year 1 of the TN Court of Workers' Compensation Claims



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11:00 a.m. - 12:00 p.m. - Breakout Sessions

Opportunities and Challenges in Recruiting and Retaining Veterans

The Importance of Effective Hiring (Background Checks, Pre-employment testing, and Drug Testing, Including Medical Marijuana and FCRA Compliance)

Healthcare Reform: A Look Behind and the Road Ahead

Violence in the Workplace/Crisis Management: Effective Preparation and Response

Out of Bounds: Bullying versus Harassment - How to Prevent and Respond to Both

Department of Labor's Proposed New Regulations on Exemptions

NLRB (Quickie Elections, Employee Handbooks, etc.)

12:00 p.m. - 1:15 p.m. - Lunch (As Guests of Wimberly Lawson)

1:30 p.m. - 2:30 p.m. - General Session

Keynote Speaker, *Vallie Smith Collins*, "Miracle on the Hudson"

2:45 p.m. - 3:45 p.m. - Breakout Sessions

Mental, Emotional and Psychological Issues in the Workplace

Records Retention: The Devil is in the Details

Impact of Social Media in the Workplace

Sex, Gender, Same-Sex Marriage and Transgender Employees: What Does it All Mean?

Common Mistakes When Handling Leaves and Other FMLA Issues - FMLA Lawsuits Are Epidemic

Top Ten Tips on Defending TN Work Comp Claims under the New Law

Best Practices for Public Employers

4:00 p.m. - 5:00 p.m. - General Session

Saving the Bacon (Employee Contracts and Severance Agreements)

Strategies for Defying the Odds of I-9 and E-Verify Noncompliance

NLRB, Joint Employers & Franchise Issues

5:15 p.m. - 6:45 p.m. Reception (please join us for scrumptious hors d'oeuvres)

Friday, November 6, 2015 (8:30 a.m. – 12:15 p.m.)

8:00 a.m. - 8:30 a.m. - Continental Breakfast

8:30 a.m. - 9:30 a.m. - General Session

TN Employee Online Privacy Act

OSHA Update

HR Audits: What's the Big Deal?

Affirmative Action / OFCCP Update

9:45 a.m. - 10:45 a.m. - Breakout Sessions

What's New with the EEOC and Enforcement Initiatives

Handbooks: Helpful or Harmful?

ADAAA, Including the Pregnancy Discrimination Act: Why is it so Difficult?

Wage & Hour Issues (Independent Contractors/Hours Worked)

Internal Investigations: Walking the Fine Line for Successful Resolutions

Avoiding the Pitfalls in Premises/General Liability

11:15 a.m. - 12:15 p.m. - General Session

Discipline and Discharge: Handling the Tough Calls With Confidence

Diversity and Inclusion

A Look at What's Coming from the NLRB

Looking Forward to the 2016 Elections

12:15 p.m. Conclusion

Approval of this program for 8.5 recertification credit hours toward PHR, SPHR and GPHR recertification through the Human Resources Certification Institute (HRCI) will be requested. For more information about certification or recertification, please visit the HRCI home page at www.hrci.org.

Accreditation of this program for 8.5 general credit hours by TN, VA, GA, and KY CLE for attorneys will be requested.



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Thirty-Sixth Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee

November 5-6, 2015

COST:

Early Bird (registration AND payment received by Sept. 21st)

\$359 per person

\$349 for each additional person from same company

\$319 each for eight or more from same company

Registration and payment received AFTER September 21st

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REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch, and evening reception on Thursday, November 5, 2015

REFUND POLICY:

Please note that a 50% cancellation fee will be incurred for cancellations after October 9, 2015. Cancellations made after October 23, 2015 will forfeit the registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted through Thursday, November 5, 2015.

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FIVE WAYS TO REGISTER

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Special Needs? If you should have any special needs, such as wheelchair access or special dietary requirements, please contact Laura Reeves at 865-546-1000 no later than 10 days before the event.



KEYNOTE SPEAKER

Vallie Smith Collins

"Miracle on the Hudson"

As a sales person, travel was a key requirement of the job. As a result, Vallie Smith Collins was a passenger on US Airways Flight 1549 that landed in New York's Hudson River on January 15, 2009. Vallie will share the details of her experience during the flight and rescue of the event that has become known as the 'Miracle on the Hudson.' In addition, she will share key learnings from the experience that will hopefully inspire and motivate all to treasure each and each day because 'everyday is a lucky day'!

Vallie Smith Collins resides in Maryville, TN with her husband and three children. She is a member of Maryville First Baptist Church. She serves on the Board of 147 Million Orphans and the Maryville City Schools Foundation. She is a member of Maryville Junior Service League, former Board Chair for A Secret Safe Place for Newborns of Tennessee, and an alumna of Leadership Blount. She is a graduate of the University of Tennessee with a degree in Biomedical Engineering. For over thirteen years she was employed as a Senior Account Manager for a contract manufacturer of medical devices, pharmaceuticals, and consumer products. Interests and hobbies include tennis, running, and spending time with family and friends.

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