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Background Checks for Prospective and Current Employees

By Kimberly S. More

Background checks can be a useful tool for employers when making decisions regarding hiring, retention, promotion and reassignment. However, Employers can expose themselves to claims if they fail to follow state and federal laws regarding privacy and discrimination. The Equal Employment Opportunity Commission (EEOC) protects applicants/employees from discrimination based upon race, color, national origin, sex, religion, disability, genetic information and age (40 or older). The EEOC in its guidance has cautioned that credit checks and criminal background checks can be the basis of a discrimination claim. To safeguard against such a claim employers need to treat all applicants/employees equally by applying the same standards. Employers need to take special care when basing employment decisions on background problems that may be more common among persons of a certain race or other specific characteristic. Employers should not make a practice of excluding people with certain criminal records if that practice significantly disadvantages individuals in a protected class. The EEOC has been targeting employers in enforcement actions that utilize background checks (criminal history or credit checks) that have impact on African American and other protected groups.

Employers must comply with the Fair Credit Reporting Act (FCRA) if they choose to conduct background checks. Employers must make sure that the agencies they are using have the required licenses and are up to date on state and federal laws. The Employer must certify to the Consumer Reporting Agency that the information provided will be used solely for employment purposes, it will not use the information in violation of state or federal law and it will provide the appropriate notices in the event an adverse action is taken against an applicant based upon information contained in the report. Employers must make a written clear and conspicuous disclosure that it may request the report. This disclosure cannot be in the employment application. Employers must obtain the written consent of the employee or prospective employee before requesting the report. Before taking adverse action against the applicant/employee, Employers must give notice to the applicant/employee including a copy of the consumer report relied upon and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” provided to the Employer by the Consumer Reporting Agency. After taking adverse action, Employers must advise the applicant/employee of the following: she was

rejected because of information contained in the report; the name and address of the company providing the report; that the company selling the report did not make the hiring decision and cannot advise of the specific reasons for it; and she has the right to dispute the accuracy or completeness of the report and get an additional free report from the company within 60 days.

Employers face serious consequences if they fail to get permission before requesting the consumer report or fails to provide pre-adverse action disclosures and notices. The applicant/employee can sue the Employer in federal court for damages, including punitive damages and recovery of attorney's fees and costs. The Fair Trade Commission (FTC) and other federal agencies can also assert claims against Employers for non-compliance. Employers may dispose of background reports after recordkeeping requirements are met. The reports must be disposed of securely by burning, pulverizing or shredding paper documents and disposing of electronic information so that it cannot be read or reconstructed.

Employers can reduce their risk by establishing a documented, comprehensive, non-discriminatory and fair employment background check program. Employers should develop internal policies regarding: initiation of background checks; the manner in which information is collected and disclosed; denying or terminating employment based upon information contained in the background check; and an appeals process for the applicant.

Employer's Obligation to Engage in Interactive Process with Employee with Disability

by Shelby Ryann Dolezal

In a recent case, *Alexander v. Montana Developmental Center*, the Supreme Court of Montana addressed whether an employer successfully engaged in the interactive process to provide a disabled employee a reasonable accommodation where the interactive process broke down and the employee was not accommodated

Montana Developmental Center (MDC) employed Christopher Alexander (Alexander) as a shift manager since 2007. As a shift manager, Alexander was required to physically restrain clients. The physical nature of Alexander's job led to multiple injuries and resulted in shoulder surgery in 2014. Alexander returned to work in November 2014, but Alexander's physician restricted Alexander from contact with clients during his recovery.

In July 2015, Alexander's physician stated that the no-contact-with-clients restriction was permanent. MDC proposed that Alexander utilize a shoulder brace, but his physician determined that a shoulder brace would not prevent re-injury. Alexander then proposed that MDC provide Alexander with two direct support professionals at all times to eliminate the need for Alexander to physically engage with clients. MDC considered Alexander's request, but ultimately found it to be unfeasible and told Alexander to let MDC know if there were other accommodations that would allow Alexander to restrain clients.

MDC then discussed alternative positions with Alexander as an accommodation. The Americans with Disabilities Act Coordinator and the Civil Rights and Equal Employment Opportunity Specialist for the Montana Department of Public Health and Human Services, Derrek Shepherd (Shepherd), offered to identify vacant positions for which Alexander was qualified if Alexander informed Shepherd of his qualifications, education, and training. Shepherd also advised Alexander to check online job bulletins for vacant MDC positions. Alexander never informed Shepherd of his qualifications, nor did Alexander propose a different accommodation. In November 2015, MDC terminated Alexander's employment because Alexander could not perform an essential function of his position, restraining clients, and Alexander did not work with MDC to find an alternative position.

Alexander filed a lawsuit against MDC alleging that MDC violated the Montana Human Rights Act (MHRA) by discriminating against Alexander on the basis of his disability. The Supreme Court of Montana held that an employer is not liable for failing to provide an employee with a reasonable accommodation where the employer

makes a good faith effort to engage in the interactive process to reasonably accommodate the employee and the interactive process broke down because of the employee's actions or inactions. In this case, MDC was not liable for its failure to provide Alexander with an accommodation because it engaged with Alexander in good faith to identify an accommodation and Alexander caused the breakdown in the interactive process when he failed to inform Shepherd of his qualifications.

Employer's Obligations under the MHRA: Discrimination based an employee's physical or mental disability is prohibited by the MHRA. MONT. CODE ANN. § 49-2-303(1)(a). Discrimination includes an employer's failure to provide the disabled employee with a reasonable accommodation necessary for the employee to perform his or her job functions. MONT. CODE ANN. § 49-2-101(19)(b). An employer must engage in an "interactive process" with the employee to identify potential accommodations. A reasonable accommodation largely depends on the particular situation, but can include job restructuring, specialized devices or equipment, or employee transfer to a vacant position for which that employee is qualified. MONT. ADMIN. R. 24.9.606(3)(b). "The interactive process requires (1) direct communication between the employer and employee to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective." *Alexander v. Montana Developmental Center* (citations omitted) (internal quotation marks omitted). Both the employer and the employee must communicate and share information with the other.

Employer Takeaway: *Alexander v. Montana Developmental Center* does not alter an employer's obligation to engage in the interactive process in good faith with an employee who requests an accommodation. However, this case clarifies that an employer is not liable for failing to provide an accommodation to an employee when that employee causes the breakdown of the interactive process.

Policies on Photos and Videos

By Carina Wilmot

The National Labor Relations Board ("NLRB") general counsel's office issued an opinion on October 15, 2018 regarding an employer's use and rules related to photographic or camera-enabled devises on work premises (NLRB Advice Memorandum, dated April 4, 2013, issued October 15, 2018).

First, the NRLB found that The Boeing Company's (the "Company") rule that employees could not use personal camera-enabled devices on Company premises violated Section 8(a)(1) of the National Labor Relations Act. The NRLB found that the rule was overbroad because employees photographing co-workers engaged in Section 7 activities (such as marching, picketing, or other concerted activity) is in itself a protected activity. However, the NRLB found that the employer could have a policy limiting the employee's use of **employer-issued** cameras to business-related purposes. Employers have the right to regulate and restrict employer property, provided the restrictions are not discriminatory. Employers also have the right to restrict non-employees from using camera-enabled devices on Company premises.

Second, the NRLB found that the employer, the Company engaged in unlawful surveillance when it photographed Union activity on Company property, because photographing such activity has "a tendency to intimidate." When an employer has the subjective belief that misconduct *may happen*, that alone cannot justify surveillance. In this case, the employer could not establish disruption or interference with operations, egress, or pedestrian and traffic safety violations, so the surveillance was not justified.

Best Practices: Based on this opinion, employers should review their photo and video policies to ensure they are not overly broad. Such a policy can limit the use of employer-owned camera-enabled devices on company premises and personal camera-enabled devices used by non-employees. The policy should specifically state that it does not apply to employee-owned devices used on company

premises. In addition, employers should not conduct unlawful surveillance of suspected or actual Union activity on Company premises unless there are clear violations of law or clear disruption of the Company's business..

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