

# THE ZAPPIA LAW FIRM

A PROFESSIONAL CORPORATION

— Labor & Employment Law —

## SPECIAL DOUBLE UPDATE

### PRIVATE AND PUBLIC EMPLOYERS

June 18, 2015

#### **\$228 Million Wage and Hour Class Action Settlement for FedEx Drivers**

FedEx is paying \$228 million to settle a class action brought by FedEx Ground drivers in California. The 2,300 drivers claim that the company misclassified them as independent contractors instead of employees, improperly deprived them of wages and benefits they would normally have received, and forced them to cover their own business expenses. The settlement was reached after the Ninth Circuit Court of Appeals found that the drivers were not independent contractors because the company had broad authority to dictate the way drivers carry out their job. The operating agreement between FedEx and the drivers allowed drivers to supply their own trucks and pay for their own uniforms, but then included specifications for the size and maintenance of the trucks as well as the condition of the uniforms. FedEx also required the drivers to pick up and deliver packages within certain geographic and time windows, and also provided training for on job performance and interacting with customers.

#### **LABOR LAW**

#### **DESIGNATION OF FEMALE-ONLY CORRECTIONAL POSITIONS IN WOMEN'S PRISONS IS NOT DISCRIMINATORY**

##### **Summary**

The Ninth Circuit Court of Appeals held that the Washington Department of Corrections did not discriminate against male correctional officers on the basis of sex when they designated a number of female-only correctional positions in women's prisons.

The panel concluded that the Department's individualized, well-researched decision to designate discrete sex-based correctional officer categories was justified because sex was a bona fide occupational qualification reasonably necessary to the normal operation of the women's prisons.

##### **Background**

The state of Washington faced problems common to most states in their women's prisons: sexual abuse and misconduct by prison guards, breaches of inmate privacy, and security gaps. The primary reason for these issues was the lack of female correctional officers to oversee female

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offenders and administer sensitive tasks, such as observing inmates showering and dressing and performing pat-down and strip searches.

After dealing with these issues and the gender gap for years, the state undertook a comprehensive assessment to deal with the problem. After receiving a \$1 million grant the Department hired two full-time investigators who substantiated 46 instances of misconduct over the course of 2.5 years. Shortly after their report was completed, the inmates filed a class action alleging misconduct. In response, the Department hired a consultant to investigate sexual activity and misconduct. After a four-month internal investigation, the consultant produced a 240-page report including interviews from 72 inmates who alleged they had had to deal with sexual advances and harassment from the male guards. Among the worst offenses, two different inmates had been impregnated by male guards, and multiple examples of contraband being smuggled into the prison in exchange for sexual favors.

The prison administrators next hired experts who made many recommendations, including ensuring that any double-staffed housing units had a least one female guard. The Department implemented multiple reforms to reduce sexual assaults and related behavior, including: aggressive recruitment of female prison guards, pre-hiring psychological testing training programs to enhance gender awareness; and the installation of privacy curtains, security cameras, and restricted access entry cards. The Department ultimately sought guidance from the Commission for the creation and designation of 110 female-only correctional positions. The Department submitted specific requests for each position and included an explanation of the job responsibilities and why the position needed a female officer.

The prison guards' union, Teamsters Local No. 117, which represents over 6,000 state correctional workers, challenged the designation of the female-only positions. The union claimed that the creation of the female-only positions discriminated against the male guards on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.

## **Analysis**

### Bona Fide Occupational Qualification (BFOQ)

Title VII prohibits employment practices that discriminate on the basis of race, color, religion, sex or national origin. Nonetheless, a facially discriminatory employment practice, such as positions being designated as female-only positions, may be permitted if sex (gender) is a bona fide occupational qualification.

To justify discrimination under the BFOQ exception, an employer must show, by a preponderance of the evidence:

1. That the job qualification justifying the discrimination is reasonably necessary to the normal operation of that particular business or enterprise; and

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2. That sex (gender) is a legitimate proxy for determining whether a correctional officer has the necessary job qualifications.

The Court stated that the because of this demanding legal standard, BFOQ exceptions are far and few between. However, the unique context of prison employment is one area where courts have found gender-based classifications justified.

Here, the Department produced evidence that it went through an exhaustive process of investigation, hiring of experts, consultations with other states, and a well-reasoned decision-making process in determining which positions would be female-only.

## **Holding**

Accordingly, the Ninth Circuit held that the Washington Department's creation of a narrow category of female-only job assignments is a "bona fide occupational qualification reasonably necessary to the normal operation" of the women's prisons.

*Teamsters Local Union No. 117 v. Wash. Dep't of Corr.* (June 12, 2015, Ninth Cir.) \_\_\_ F3d. \_\_\_.

<http://cdn.ca9.uscourts.gov/datastore/opinions/2015/06/12/13-35331.pdf>