EMPLOYMENT LAWSCENE ALERT: SUPREME COURT DECIDES RELIGIOUS ACCOMMODATION CASE

Today, the U.S. Supreme Court issued its ruling in *EEOC v. Abercrombie and Fitch*. Justice Scalia penned the majority opinion while Justice Alito wrote a concurrence and Justice Thomas concurred in part and dissented in part. The case, which centered around whether employers can be held liable for failing to accommodate a religious practice only after the applicant or employee has informed the employer of the need for an accommodation, was covered by our blog in January. The facts that brought the case to the Supreme Court are that a Muslim job applicant wore a head scarf to her job interview, but because the retailer's Look Policy stated that employees could not wear "caps," she was not hired. The retailer argued, and the Tenth Circuit agreed, that it was the applicant's duty to inform the employer that she was wearing the headscarf for a religious reason and would, therefore, need an accommodation from their policy, which she did not do. The Supreme Court reversed, stating that an applicant would only need to show that the need for a religious accommodation was a motivating factor in the employment decision to prevail.

The Supreme Court drew a distinction between an employer having "actual knowledge" of a need for a religious accommodation and having that need be a "motivating factor" in the employment decision. An employer cannot refuse to hire an applicant based on a desire to avoid providing an accommodation, even if they're only guessing that an accommodation would be necessary. The Supreme Court based this on Title VII's "because of" language, which means a motivating factor, not actual knowledge. Title VII, unlike other antidiscrimination statutes like the Americans with Disabilities Act, does not impose a knowledge requirement. The Court found this important in deciding that it is the employer's motive that is the essential factor in proving discrimination under Title VII. Although the Court stated that adding a knowledge requirement would be adding words to the law, which is the duty of Congress, not the courts, it did acknowledge that the employer's knowledge may make it easier to infer motive as it would be difficult to prove that motive unless an employee can prove that the employer at least suspects that the practice is a religious practice.

The rule that the Supreme Court came out with, and employers should take care to follow is "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." Additionally, the Court stated that Title VII requires employers to give accommodations from otherwise neutral policies to employees for religious reasons. Therefore, employers cannot take religious beliefs that they either know or suspect exist into account when making employment decisions, and they must accommodate religious beliefs unless such an accommodation would impose an undue hardship.

EMPLOYMENT LAWSCENE ALERT: ARE TRANSGENDER EMPLOYEES PROTECTED UNDER THE LAW?

In April 2015, the EEOC also settled one of the first cases in which it attempted to litigate that transgender discrimination is protected under Title VII. The EEOC filed an amicus brief in a previous case claiming that sex discrimination includes discrimination against those who do not conform to gender stereotypes and, therefore, would include transgender individuals who are either physically male and gender-identify as female or are physically female and gender-identify as male. In March, the U.S. Department of Justice also sued Southeastern Oklahoma State University and the Regional University System of Oklahoma for denying tenure to and eventually terminating an employee because of her gender identity. Although none of these cases have received decisions on the merits of the case, the EEOC has made its position clear, and employers need to take stock of their policies or prepare for litigation.

These and other cases that have been filed raise interesting and challenging questions for employers. Gender expression is not specifically covered under Title VII, but that doesn't necessarily mean that transgender employees can't be covered by the statute. The two Circuit Courts of Appeals that have addressed the issue, the Sixth and the Eleventh, have held that a transgender plaintiff can state a claim for sex bias if the defendant took an adverse action against them because the worker-plaintiff didn't conform to a sex stereotype or norm. However, this does not mean that the law is settled, and district courts across the country may be faced with interpreting the law in these cases sooner rather than later. Employers should also make sure to take state law into account.

With the backing of the EEOC, discrimination suits by transgender employees could be a rising trend that employers should be aware of. Employers should review their policies and practices as they relate to discrimination and harassment and take complaints of harassment and discrimination of any kind seriously and investigate them thoroughly.

ATTORNEY SLAWINSKI SELECTED AS VICE CHAIR OF STATE BAR'S CONSTRUCTION AND

PUBLIC CONTRACT LAW BOARD

Steven J. Slawinski, of O'Neil Cannon, has been selected to become Vice Chair of the State Bar's Construction and Public Contract Law Board, effective July, 1, 2015. This section is made up of attorneys who specialize in construction law and government contracts. He has been a member of this section for many years and has been a section board member since July of 2014.

Mr. Slawinski has been representing clients in complex construction, business, and real estate litigation for nearly 30 years and was named one of the "Wisconsin's Top Construction Attorneys" by the *Wisconsin Law Journal/Daily Reporter*.

Learn more about Attorney Slawinski by visiting his full profile.

ATTORNEY SLAWINSKI PRESENTED AT THE WLTA SPRING CONFERENCE

Steven Slawinski presented at the Wisconsin Land Title Association's Spring Conference in Madison on May 13, 2015. He discussed the recent opinion of the United States Court of Appeals for the Seventh Circuit in *BB-Syndication Services, Inc. v. First American Title Insurance Co.* Mr. Slawinski had represented the prevailing party, First American, in that litigation. Attorney Slawinski is a member of the Litigation and Real Estate Practice Groups at O'Neil Cannon, and may be contacted by telephone at 414-276-5000, or via e-mail at steve.slawinski@wilaw.com.

LAING RECOGNIZED BY THE NADC AS ONE OF THE FINEST LAWYERS IN THE COUNTRY

Dean P. Laing, of O'Neil, Cannon, Hollman, DeJong and Laing S.C, has been selected to the 2015 list as a member of the Nation's Top One Percent by the National Association of Distinguished Counsel. NADC is an organization dedicated to promoting the highest standards of legal excellence. Its mission is to objectively recognize the attorneys who elevate the standards of the Bar and provide a benchmark for other lawyers to emulate.

Members are thoroughly vetted by a research team, selected by a blue ribbon panel of attorneys with podium status from independently neutral organizations, and approved by a judicial review board as exhibiting virtue in the practice of law. Due to the incredible selectivity of the appointment process, only the top 1% of attorneys in the United States are awarded membership in NADC. This elite class of advocates consists of the finest leaders of the legal profession from across the nation.

EMPLOYMENT LAWSCENE ALERT: CONTINUED EMPLOYMENT IS RULED VALID CONSIDERATION FOR NON-COMPETES IN WISCONSIN

On April 30, 2015, the Supreme Court of Wisconsin issued its long-awaited decision in *Runzheimer International Ltd. v. Friedlen*, in which it came to the conclusion that the promise of continued at-will employment is valid consideration for a restrictive covenant.

In *Runzheimer*, the employee had worked for his employer for fifteen years when the employer required all employees to sign restrictive covenants or be terminated. The employee signed the restrictive covenant, but after he was terminated more than two years later, he went to work for a competitor in breach of that agreement, and the employer sued. The employee then claimed that the agreement was invalid because it lacked consideration.

In Wisconsin, forbearance in exercising a legal right is valid consideration. The Court reasoned that, because Wisconsin is an employment at-will state, companies have a legal right to terminate employees at any time for a good reason, a bad reason, or no reason at all, as long as it does not violate existing law or public policy. Therefore, giving up the legal right to terminate an employee at that moment in exchange for the employee signing a covenant not to compete is valid consideration.

The court emphasized that its holding in *Runzheimer* is consistent with its 1994 holding in *NBZ, Inc. v. Pilarski* where the Wisconsin Supreme Court held that the promise of continued employment did not provide sufficient consideration to support a restrictive covenant entered into by an existing employee. The Wisconsin Supreme Court distinguished its holding in *NBZ* by finding that, in that case, the employee's employment had not been conditioned upon her signature and the employer did not promise to do anything else in exchange. Without these elements, there can be no consideration to support enforcement of the agreement under Wisconsin law.

Therefore, under the Wisconsin Supreme Court's holding in *Runzheimer*, in order for

continued at-will employment to be valid consideration for a restrictive covenant agreement, employers must condition the employee's continued employment upon the employee actually signing the agreement. In order to maintain that position in any action that might challenge the issue of consideration, an employer must actually terminate any employee who refuses to sign the restrictive covenant for it to validly assert that continued employment was conditioned upon the employee's signature to the agreement.

Wisconsin has now joined the majority of jurisdictions, which hold that a promise to continue an at-will employee's employment is lawful consideration for a restrictive covenant. The *Runzheimer* decision now permits Wisconsin employers to require their existing employees to sign new or modified restrictive covenant agreements without promising employees anything more than continued at-will employment.

ATTORNEYS WITTENBERG AND KILLORAN CONTRIBUTE TO THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION HEALTH LAW LITIGATION NEWSLETTER

O'Neil, Cannon, Hollman, DeJong and Laing S.C. attorneys Christa Wittenberg and Grant Killoran recently contributed articles to the Spring 2015 Edition of the *Health Law Litigation Newsletter* published by the American Bar Association Section of Litigation.

Attorney Wittenberg, an associate in the firm's Litigation Practice Group, authored an article entitled "The Constitutional Framework for Public Health Responses to Disease Outbreaks," analyzing the role of federal and state government in responding to contagious disease outbreaks, such as the recent Ebola virus crisis.

Attorney Killoran, the Chair of the firm's Litigation Practice Group and one of the State Bar of Wisconsin's Delegates to the ABA House of Delegates, authored an article entitled "American Bar Association House of Delegates Update" discussing a number of resolutions passed by the ABA House of Delegates at the ABA Mid-Year Meeting in Houston in February.

A complete copy of the Spring 2015 Edition of the ABA Section of Litigation *Health Law Litigation Newsletter* can be found at americanbar.org.

THE WILAW CONNECTION QUARTERLY NEWSLETTER

- “Attack of the Zombie Property”
- “Electronic Signatures—The Law is Catching Up”
- Employment LawScene™ Alert: “How FMLA Leave Should—and Should Not—Affect Your Employees’ Performance Evaluations”
- Dean Laing Elected as President and Managing Shareholder
- Featured Tax and Wealth Advisor™ Alert: “The Second Sin—”Mistaking Fairly With Equally”
- Publication Watch: *Inside Counsel*, “Anticipating and Managing Wage and Hour Pitfalls”
- Pleased to Announce:
    - Tim Van de Kamp Elected as Shareholder
    - Attorney Joe Maier, Recognized as a Five Star Professional
    - Super Lawyers List
- Upcoming Events:
    - Join Us for the Fifth Annual MJC 5K Run for Justice at Veteran’s Park
    - Hot Topics for Small Firms and Solo Practitioners

EMPLOYMENT LAWSCENE ALERT: HONESTY IS THE BEST POLICY IN PERFORMANCE REVIEWS

On February 10, 2015, the *Wall Street Journal* published an article entitled “Everything Is Awesome! Why You Can’t Tell Employees They’re Doing a Bad Job” extolling the virtues of praising employees’ strengths and scaling back on criticism. Although this may be good for employees’ confidence levels, it is bad for companies when they have to defend a discrimination lawsuit or oppose a bid for unemployment benefits.For example, in September 2011, a New York woman sued in federal court claiming that her employer “mommy-tracked” her by attempting to demote her, refusing to promote her, and cutting her bonus after she took maternity leave, despite repeatedly earning positive performance ratings during her career with the company. The company argued that she was lawfully terminated because her reviews were done by an “easy grader” and she was not meeting the company’s other metrics. In January 2015, the federal judge overseeing the case stated that the case looked strong enough to go to trial due in part to the questions of fact presented by the positive performance reviews.

Performance reviews are valuable tools for employers. While they may be used to boost an

employee's self-esteem and confidence, employers should carefully train their supervisors and manager to give honest feedback and critiques when necessary. Problems should not be sugar-coated; the issue, the steps to correct the issue, and the consequences for failing to correct the issue need to be included in evaluations and reviews. These honest assessments on an employee's performance are essential to being able to discipline and terminate an employee if that becomes necessary, as well as defending the company from a lawsuit or claim for unemployment compensation.

ATTORNEY GUMINA PRESENTS TO THE HFTP GREATER MILWAUKEE CHAPTER

On March 25, 2015, Joseph E. Gumina, who leads the firm's labor and employment practice, spoke to the Greater Milwaukee Chapter of the Hospitality Financial and Technology Professionals. Attorney Gumina spoke about the latest developments in labor and employment law affecting the hospitality industry, including the latest developments before the NLRB and the EEOC. Attorney Gumina also spoke about wage and hour compliance and workplace harassment issues in the hospitality industry.