TENTH CIRCUIT SAYS EMPLOYEES MUST GIVE EXPRESS NOTICE OF RELIGION-WORK CONFLICT

Earlier this month, the U.S. Court of Appeals for the Tenth Circuit found that the EEOC failed to establish a prima facie case of religious discrimination where the EEOC could not show that a prospective employee expressly informed the employer of a conflict between the applicant's religious beliefs and the employer's dress code and of the applicant's desire for a reasonable accommodation from that dress code.

In *EEOC v. Abercrombie and Fitch Stores, Inc.*, the Tenth Circuit reversed the lower court's grant of summary judgment in favor of the EEOC on the EEOC's claim that the employer failed to provide a reasonable religious accommodation for a prospective employee who wore a "hijab" (headscarf) for religious reasons. The employer, a national retail clothing company, maintains a "Look Policy" or dress code that is intended to promote and showcase the company's clothing brand. The policy requires employees to dress in clothing that is consistent with the kinds of clothing that the company sells in its stores and prohibits employees from wearing black clothing and caps.

The employer rejected the prospective employee for employment after she wore a hijab to her job interview. The EEOC filed suit against the company, alleging that the company failed to provide the prospective employee a reasonable religious accommodation in violation of Title VII of the Civil Rights Act of 1964.

The Tenth Circuit recognized employers' obligation under Title VII to reasonably accommodate religious practices of an employee or prospective employee unless the employer demonstrates that the accommodation would pose an undue hardship on its business. The court found that, in this case, the EEOC had failed to establish one of the key elements of a Title VII religious accommodation claim – notice. The Tenth Circuit held that in order to succeed on such a claim, the employee or prospective employee must inform the employer that he or she engages in a religious practice that conflicts with the employer's policy and that the employee would, therefore, require an accommodation for that religious practice.

Because the prospective employee, in this case, did not inform the employer, prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the court found that the EEOC could not meet the requirements for a religious accommodation claim under Title VII.

As an employer, you should be aware of the general obligation under Title VII to reasonably accommodate religious practices of employees or prospective employees who inform you of a conflicting religious belief or practice and the need for such an accommodation.

Understand, however, that the reasonable accommodation obligation is implicated *only* when there is a conflict between an employee's religious practice and your neutral policy. If you are made aware of an employee's religious conflict, you should take steps to obtain additional information that would allow you to determine whether an accommodation can be made available to that employee to eliminate the religious conflict without posing an undue hardship on your business. If you have questions about religious accommodation under Title VII, please contact one of our Employment Law attorneys.

U.S. SUPREME COURT WILL DECIDE WHETHER TIME SPENT CHANGING CLOTHES IS COMPENSABLE WORK TIME

Generally, if an employee is required to change into work clothing as part of that employee's job, the Fair Labor Standards Act ("FLSA") requires an employer to pay the employee for the time it takes to do so. Section 203(o) of the FLSA, however, contains an exception to this general rule. The exception provides that any time spent "changing clothes or washing" at the beginning or end of each workday that is excluded from compensable time either by the express terms of or by a custom or practice under a collective bargaining agreement, is not compensable time under the FLSA.

On November 4, 2013, the U.S. Supreme Court will hear oral arguments in *Sandifer v. U.S. Steel*, a case arising out of the Seventh Circuit, to resolve disagreement among circuit courts as to what constitutes "changing clothes" within the meaning of Section 203(o). It is not clear whether the term "clothes" includes personal protective equipment or gear. In *U.S. Steel*, the employer and employees are parties to a collective bargaining agreement, which exempts changing clothing from compensable working time. The employees in *U.S. Steel* argue that they should be compensated for the time it takes to change into and out of their required work clothes because their work clothing is not actually clothing, but is more akin to personal protective gear and, therefore, does not constitute "clothes" within the meaning of Section 203(o).

Most circuit courts that have addressed this issue, including the Seventh Circuit, disagree with the employees' position and have upheld the collective bargaining exemption under Section 203(o), finding that it would be impossible to exclude all work clothing with a protective function from the Section 203(o) exemption.

The U.S. Supreme Court will be hearing the *U.S. Steel* case in the coming weeks. This is an

important case to watch, not only for all employers who may be exempt from compensating employees for donning and doffing activities by virtue of their collective bargaining agreement, but for any employer whose employees change clothes as part of their jobs. Any change to the definitions of "clothing" or "changing clothing" under the current donning and doffing rules could affect all employers' current compensation policies and practices.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C. PUBLISHES EMPLOYMENT LAW BLOG

The Employment Law Practice Group at O'Neil Cannon recently published an employment law blog in an effort to provide employers with the latest developments and meaningful insight into the ever-changing employment law landscape.

Employment law is one of the most rapidly changing and developing areas of the law, which can make it difficult for employers to navigate through even the most seemingly simple and everyday personnel matters. It is our hope that you will find the articles and resources on the Employment LawScene™ to be an asset in your day-to-day human resources management.

SMALL BUSINESS FINED "BIG BUCKS" FOR I-9 MISTAKES

Recently, the Circuit Court of Appeals for the Ninth Circuit upheld the imposition of a $173,250.00 fine against a small drywall installation company for failure to maintain complete and accurate Employment Eligibility Verification Forms ("I-9 Form"). You can find the court's decision at the following link: *Ketchikan Drywall Services, Inc. v. Immigration and Customs Enforcement*.

The court found that the employer violated its legal obligation under the Immigration and Nationality Act (the "Act") to verify that its employees were legally authorized to work in the United States through the following actions:

1. Failure to provide any I-9 form at all for certain employees;
2. Failure to complete certain sections of the I-9 form; and

3. Omitting necessary information from the I-9 form.

The employer argued that although some information was missing from its I-9 forms, it had substantially complied with the law by copying and retaining employees' verification documents and attaching them to the I-9 Forms, and that any omissions were either minor or could be filled in by reference to those documents. The court made it very clear, however, that failing to complete entire sections of the form despite maintaining the necessary information in a separate document was not sufficient to meet the statutory requirements and resulted in a violation of the Act.

Although the employer argued that transcribing the necessary information onto the I-9 forms was a "waste of time" when the information was already available on the attached copies of the relevant document, the court emphasized that "requiring that the parties take the time to copy information onto the I-9 Form helps to ensure that they actually review the verification documents closely enough to ascertain that they are facially valid and authorize the individual to work in the United States" and that the I-9 Form itself "provides concrete evidence that such review took place."

The Court also provided other specific examples of what it would consider I-9 deficiencies that could result in significant fines:

1. Failure by the employee to attest to one of the three specific categories of eligibility and instead attesting that he or she is authorized to work generally.
2. When relying on an employee's driver's license to verify eligibility, failing to provide the issuing authority on the I-9 Form, regardless of whether the issuing authority could be inferred from the format of the driver's license number.
3. When re-hiring a former employee, failing to ensure that the employee again attests to his or her eligibility to work in the United States and instead simply relying on the employee's former attestation.

This decision serves as an important reminder for all employers to make sure they are strictly complying with all I-9 requirements and paying careful attention that all 1-9 Forms are complete and accurate. Failing to maintain complete and accurate I-9 Forms could result in significant and unnecessary fines. Employers who have questions regarding I-9 compliance should contact us at (414) 276-5000.

DOL EXTENDS OVERTIME COVERAGE FOR DIRECT CARE WORKERS

The U.S. Department of Labor has extended minimum wage and overtime coverage for

certain domestic service employees who provide home health care services for the elderly, infirmed, and disabled. The Labor Department's new rule will go in effect on January 1, 2015.

The Fair Labor Standards Act (FLSA) covers individuals employed in domestic services in households. In 1974, Congress extended coverage to "domestic service" workers who perform household services in a private home, including those domestic service workers employed directly by households or by companies too small to be covered under the FLSA. "Domestic service employment" includes services performed in or about a private home by nurses, certified nurse aides, home health care aides and other individuals providing direct care services.

Currently, certain domestic service workers, also known as "direct care workers," who are employed to provide "companionship services," such as companions for elderly persons or persons with an illness, injury, or disability are generally not required to be paid minimum wage and overtime pay. The newly revised regulations attempt, however, to narrow this companionship service exemption so that many of these workers who are now exempt from minimum wage and overtime coverage under the FLSA, such as certified nursing assistants, home health aides, and other caregivers, would be protected under the FLSA once the new regulations go into effect. In addition, third-party employers will no longer be entitled to claim either the companionship services or live-in domestic service employee exemptions under the new regulations.

Under the Department's new regulations, the definition of "companionship services" is more clearly and narrowly defined. Specifically, companionship services will be defined to include providing fellowship and protection (defined as engaging the person in social, physical, and mental activities such as conversation, reading, games, etc., and being present with the person to monitor his or her safety and well-being), and may also include assisting with activities of daily living (ADLs) (such as dressing, grooming, feeding, bathing, toileting, and transferring) and instrumental activities of daily living (IADLs) (tasks that enable a person to live independently at home such as meal preparation, driving, light housework, managing finances, and assistance with taking medication) as long as this assistance is not more than 20% of the time worked in any workweek. If a direct care worker meets this duties test, an individual, family, or household who employs such a person may claim the companionship services exemption under the FLSA. If, on the other hand, the direct care worker spends more than 20% of his or her workweek providing services that do not consist of fellowship and protection, such as grocery shopping, cooking, and other ADLs and IADLs, then the worker must be paid minimum wage for all hours worked and overtime for any hours worked over 40 in the workweek.

For additional information, see the Department of Labor's Fact Sheet: Application of the Fair Labor Standards Act to Domestic Services, Final Rule.

ATTORNEY CLAUDE KRAWCZYK HONORED FOR COMMUNITY SERVICE

In addition to practicing real estate, banking and transactional law for more than 27 years with O'Neil, Cannon, Hollman, DeJong and Laing, Claude Krawczyk has also volunteered hundreds of hours each year to various community organizations and efforts. Over the past several years, Claude has led two successful community projects, the restoration of the Kosciuszko monument on 9th and Lincoln in Milwaukee and the purchase, improvement and move by the Milwaukee Christian Center to a new building at 14th and National in Milwaukee. Claude is now being honored by two different organizations for his work on both of these projects. On September 23, 2013, the South Side Business Club will name Claude its "Person of the Year" and on November 3, 2013, Claude will be honored by the Polish American Congress-Wisconsin, which has named Claude the 2013 recipient of the Congressman Clement J. Zablocki Civic Achievement Award.

Congratulations Claude!

To learn more about the Kosciuszko monument project, see: http://www.rkmmilwaukee.org/ and to find out more about the Milwaukee Christian Center, see: http://www.mccwi.org/.

BEST LAWYERS® RECOGNIZES 12 ATTORNEYS FROM O'NEIL CANNON

Twelve attorneys from the law firm of O'Neil Cannon were selected for inclusion in the 2013 edition of T*he Best Lawyers in America*®. Nearly 1/3 of the firm's attorneys were listed in 16 distinct practice areas to include:

- James G. DeJong – Corporate Law; Mergers and Acquisitions Law; Securities/Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights; Insolvency and Reorganization Law; Litigation–Bankruptcy
- Peter J. Faust – Corporate Law; Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation; Construction Law; Corporate Law; Real Estate Law
- Dennis W. Hollman – Corporate Law; Trusts and Estates

- Dean P. Laing – Commercial Litigation; Personal Injury Litigation–Plaintiffs; Product Liability Litigation–Defendants
- Gregory W. Lyons – Commercial Litigation
- Thomas A. Merkle – Family Law
- Steven J. Slawinski – Construction Law

Since its inception in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. Because *Best Lawyers* is based on an exhaustive peer-review survey in which more than 39,000 leading attorneys cast almost 3.1 million votes on the legal abilities of other lawyers in their practice areas, and because lawyers are not required or allowed to pay a fee to be listed, inclusion in *Best Lawyers* is considered a prestigious honor. *Corporate Counsel* magazine has called *Best Lawyers* "the most respected referral list of attorneys in practice."

WISCONSIN MAY "BAN THE BOX" ON EMPLOYMENT APPLICATIONS

A recent **Employment LawScene™ article** discussed the EEOC's recent heightened efforts to crack down on employers' use of criminal background checks in making hiring decisions. As part of its efforts, the EEOC issued guidance to employers in April 2012, in which the EEOC endorsed the policy of removing questions regarding criminal conviction history from job applications as a best practice for employers.

Following the EEOC's lead, in what can only be described as a nationwide movement that has recently gained considerable momentum, 53 local jurisdictions and 8 states (including Minnesota) have enacted "ban-the-box" legislation that would prohibit employers from considering a job applicant's criminal conviction record before the applicant has been selected for an interview. Two other states, California and Illinois, have adopted "ban-the-box" policies through administrative directives rather than legislation. (Statistics courtesy of the National Employment Law Project).

Wisconsin could become the next state to "ban the box" on employment applications. On August 27, 2013, a bill that would prohibit employers from asking for information regarding an applicant's criminal conviction record before the applicant has been selected for an interview, was introduced to the Wisconsin legislature and referred to Committee. Wisconsin Assembly Bill 342 provides that requesting an applicant for employment to supply information regarding his or her conviction record on an application form or otherwise

inquiring into or considering an applicant's conviction record before the applicant has been selected for an interview, constitutes employment discrimination under Wisconsin law. The bill would not, however, prohibit an employer from notifying applicants for employment that individuals with certain conviction records may be disqualified by law or the employer's policies from employment in particular job positions.

Understandably, a number of employers use criminal background checks to identify job applicants who might present a risk to the employer's business, its employees, and its customers or clients. Wisconsin employers should pay close attention to Assembly Bill 342 as it makes its way through the State legislature, as passage of this bill could result in a number of employers having to make significant changes to their hiring processes and job applications.

KILLORAN NAMED FELLOW OF THE WISCONSIN LAW FOUNDATION

Grant Killoran, Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, recently was named a Fellow of the Wisconsin Law Foundation.

The Fellows organization was created in 1999 to honor members of the State Bar of Wisconsin who have achieved significant accomplishments in their careers and contributed leadership and service to their communities. Membership in the Fellows is limited to 2.5% of the State Bar of Wisconsin's members.

The Fellows aims to energize its members to continue their efforts in the promotion of justice, advancement of the legal profession and improvement of legal education. For more information on the Fellows click here.

WILL WISCONSIN BE NEXT TO BAN EMPLOYERS FROM ACCESSING EMPLOYEE SOCIAL MEDIA ACCOUNTS?

Wisconsin may soon join fourteen other states that have adopted laws prohibiting employers from requesting usernames and passwords to access an employee's or job applicant's social

media accounts, including Facebook® and Twitter®.

On Tuesday, August 20, 2013, the Wisconsin Senate Committee on Judiciary and Labor held a public hearing to discuss a bipartisan bill that would prohibit employers from accessing and monitoring the personal internet accounts of employees and job applicants. The bill would make it unlawful for employers to ask employees and applicants for their personal social media account passwords and would permit employees and applicants to file a complaint against their employer for violations of this law with the Wisconsin Department of Workforce Development in the same manner as an employment discrimination complaint. Besides restricting access to employees' personal social media accounts, Senate Bill 223 would also make it unlawful for an employer to discharge or otherwise discriminate against any person for exercising the right to refuse a request for access to such accounts.

Although seen as a prohibition, Senate Bill 223 provides a number of protections for employers. The bill would not prohibit employers from accessing electronic communications devices, accounts, or services that the employer provides to its employee by virtue of the employment relationship or that are paid for by the employer and used for business purposes. Senate Bill 223 would also permit employers to restrict employees' access to certain internet sites and monitor, review, or access electronic data stored on the employer's own network and on devices provided by the employer. The bill would also afford employers certain protections to permit discipline or discharge of employees who transfer the employer's proprietary or confidential information or financial data to the employee's personal internet account without the employer's authorization. Finally, Senate Bill 223 provides employers with a shield to legal liability against claims that an employer should have known, or should have monitored, an employee's social media account in relation to claims for negligent hiring or negligent retention.

According to the National Conference of State Legislatures, similar laws have been introduced or are pending in at least 36 states. Eight states, including Arkansas, Colorado, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington, have enacted legislation so far in 2013.

A federal law prohibiting employers from requesting or requiring employees and applicants to provide usernames, passwords, or any other form of access to personal social media accounts, is also being pushed through Congress. The Social Networking Online Protection Act was initially introduced in April 2012, but never made it to the House or Senate. The Act was re-introduced and assigned to the Congressional committee on February 6, 2013. If the Act passes committee, it will be passed on and considered by Congress.

Stay Tuned . . .

Employers should stay tuned to both the state and federal legislation that could potentially

change the way employers conduct background checks for prospective employees and investigate allegations of misconduct regarding current employees. Please continue to check the Employment LawScene® for updates on these important anticipated changes in state and federal law.