EEOC CRACKS DOWN ON EMPLOYERS' USE OF CRIMINAL BACKGROUND CHECKS

Although having a criminal record in itself does not afford individuals protection under Title VII, it is the EEOC's position that the use of criminal records in making employment decisions has a disproportionate effect on certain racial and ethnic groups, which may have a discriminatory effect on those racial or ethnic groups who *are* afforded protections under Title VII.

In April of last year, the EEOC issued guidance to employers regarding the use of arrest or conviction records in making employment decisions. The EEOC makes clear in its guidelines that the law does not expressly prohibit the use of criminal background checks, however, urges employers to conduct an individualized assessment when utilizing criminal background information to consider the nature and gravity of the crime, the time elapsed since the conviction, and whether the circumstances of the arrest or conviction are substantially related to the nature or requirements of the particular job. Employers that disproportionately reject minority employment candidates as a result of criminal background checks may be subject to a discrimination claim based upon a disparate impact theory of discrimination.

Since the issuance of its criminal background check guidelines, the EEOC has stepped up its enforcement efforts and has begun to systematically crack-down on employers, alleging that employers' blanket policies regarding criminal background checks and arrest or conviction records constitute discriminatory hiring practices. In June 2013, the EEOC filed lawsuits against two large employers for their use of criminal background checks in making hiring decisions. The EEOC's district office in Charlotte, South Carolina filed suit against a large auto manufacturer alleging that it disproportionately screened out African Americans from jobs by implementing and utilizing a criminal conviction policy that denies facility access to employees and employees of contractors who have certain criminal convictions on their record. The EEOC's Chicago, Illinois office also filed a separate suit against a retailer alleging that its policy of conditioning all job offers on criminal background checks has a disproportionate impact on African-American applicants, and, therefore, is unlawful under Title VII.

The EEOC is not the only agency stepping up its enforcement efforts regarding employers' use of arrest and conviction records. A growing number of states and cities have recently enacted "Ban the Box" legislation that regulates the use of criminal background checks in employment decisions. The purpose of the "Ban the Box" laws is to prohibit covered employers from inquiring about a job applicant's criminal background and conviction record on a job application and delay background checks until later in the hiring process. Wisconsin has not yet enacted Ban the Box legislation.

So, what does this all mean for you?

The EEOC's guidance and the Ban the Box legislation trend can present challenges for employers who want to protect clients/customers and other employees from individuals with violent backgrounds or avoid placing people convicted of certain financial crimes in accounting positions or other positions where they are handling money. Certain employers, such as schools or health care providers, should also keep in mind the potential conflict between these laws and other legal requirements that prohibit the employer from employing individuals who have certain criminal convictions in these sensitive positions.

Employers must appropriately balance the EEOC's guiding principles with these practical considerations. Employers should carefully review their policies and practices regarding criminal background checks and the use of arrest and conviction records in making employment decisions to be sure that these policies do not contradict the EEOC's guidance or violate Title VII's prohibition against discrimination.

SUPREME COURT ADOPTS HEIGHTENED STANDARD FOR EMPLOYEE RETALIATION CLAIMS

Recently, the Supreme Court of the United States issued its decision in ***University of Texas Southwestern Medical Center v. Nassar***, which raises the bar for employees who file Title VII retaliation claims against their employers.

Title VII protects employees from discrimination based on race, sex or gender, religion, or national origin. Title VII also protects employees against certain forms of retaliation. Specifically, Title VII prohibits an employer from retaliating against an individual who has opposed, complained of, or participated in any complaint of unlawful employment practices by the employer. Retaliation can take many forms, including actions relating to terms and conditions of employment (*i.e.* hiring, firing, promotions, *etc.*), disciplinary actions and even discriminatory acts that occur outside the workplace.

For an employee to prevail under Title VII for a claim of retaliation, the employee must show some causal link between an adverse employment action and the employee's protected activity. Although federal district courts have been divided on just what type of proof an employee must establish in order to succeed on a Title VII retaliation claim, the key inquiry has always been the employer's motivation. Some courts have allowed employees to prove retaliation claims by establishing that the employer's action or decision was motivated by the

employee's complaint or other protected activity, even if the employer also had other lawful motives that caused the employer's action or decision. Other courts, however, have applied a more stringent standard that requires employees to prove that the employer would not have taken the challenged employment action "but for" the employee's complaint or engagement in other protected activity.

In *Nassar*, the Supreme Court clarified that in order to prove retaliation under Title VII, an employee must prove "but-for" causation – that the employee's complaint of unlawful employment practices was the "but-for" reason for the challenged employment action rather than just one of many reasons. Proving that a challenged employment action was motivated by discriminatory reasons, even if the employer's action was also motivated by other lawful reasons, is no longer sufficient to succeed with a retaliation claim.

What does the Court's decision mean for employers?

The Court's decision in *Nassar* is of particular significance because the number of retaliation claims filed by employees has significantly increased in recent years and has nearly doubled from 1997 to 2012, according to EEOC statistics. Requiring employees to prove "but-for" causation in a Title VII retaliation claim should make it easier for employers to succeed at the early stages of litigation and will hopefully curb the filing of frivolous claims that cost employers time and money to defend. That is not to say that employers no longer need to apply or enforce anti-retaliation policies. Documenting performance problems and adhering to consistent disciplinary and termination practices continues to be of critical importance for employers as evidence of legitimate and non-discriminatory reasons for any challenged employment action.

ATTORNEY MAGER PRESENTS AT WISCONSIN STATE BAR'S FAMILY LAW WORKSHOP

Attorney Gregory S. Mager presented Child Related Financial Issues, Property Division, Maintenance on August 2, 2013 at the State Bar of Wisconsin's 32nd Annual Family Law Workshop in Sturgeon Bay, Wisconsin.

FIFTH CIRCUIT FINDS FIRING A WOMAN FOR EXPRESSING BREAST MILK IS SEX DISCRIMINATION

The U.S. Court of Appeals for the Fifth Circuit recently held that firing a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII of the Civil Rights Act.

Title VII of the Civil Rights Act prohibits discrimination on the basis of sex, which, until Congress enacted the Pregnancy Discrimination Act ("PDA"), did not include discrimination on the basis of pregnancy. The PDA made clear that discrimination based on or because of sex includes discrimination based on or because of pregnancy, childbirth, or related medical conditions. In *EEOC v. Houston Funding II Limited*, the Fifth Circuit has now held that lactation is a "related medical condition" of pregnancy for purposes of the PDA.

In the *Houston Funding* case, a female employee filed a charge of sex discrimination with the EEOC when her employer, Houston Funding, fired her after she asked whether she could use a breast pump at work. The employee took a personal leave of absence to have a baby. Shortly after giving birth, the employee told Houston Funding that she would return to work once her physician released her to do so. While she was on leave, the employee had communicated to her supervisor that she was breastfeeding her child and asked whether she would be able to use her breast pump at work. When the employee's physician finally released her to return to work, the employee again mentioned that she was lactating and wanted to know whether she could use a back room to express breast milk. Houston Funding told the employee that they had filled her position and that she was being terminated for job abandonment because she had not contacted her supervisor during her leave and had not attempted to return to work. The employee responded by filing a sex discrimination claim with the EEOC.

The Fifth Circuit found that Houston Funding discriminated against the employee based on a related medical condition of the employee's pregnancy – in other words, because she was lactating and wanted to express breast milk at work. The Fifth Circuit's holding in *Houston Funding* means that courts are beginning to recognize that employment decisions based upon whether a woman is lactating may be considered discriminatory in violation of Title VII.

What Should Employers do to Avoid These Types of Claims?

Be sure to follow best practices and applicable employment laws. For example, federal law requires employers to provide reasonable break time and a private place (other than a restroom) for female employees to express breast milk after giving birth to a child.

Additionally, Wisconsin law prevents employers from prohibiting a mother from breast-feeding her child, directing a mother to move to a different location to breast-feed her child, directing a mother to cover her child or breast while breast-feeding, or otherwise restricting a mother from breast-feeding her child. You should be sure to update your policies accordingly to ensure that you are in compliance with federal and state law.

If you would like more information about this topic or if you need advice on how to draft your personnel policies to ensure compliance with applicable laws, please contact Sarah C. Matt.

ATTORNEY VAN DE KAMP ELECTED TO THE BOARD OF DIRECTORS OF REAL ESTATE ALLIANCE FOR CHARITY

Attorney Timothy Van de Kamp of the law firm of O'Neil, Cannon, Hollman, DeJong and Laing was elected to the Board of Directors of Real Estate Alliance for Charity (REACH). REACH is the primary charity organization of Commercial Association of REALTORS® (CARW), and has raised hundreds of thousands of dollars from generous professionals in the commercial real estate industry and provides much-needed grants to local charities. The organization supports the hearing and visually impaired, the developmentally disabled, disadvantaged youth, and families in need throughout Greater Milwaukee.

Tim is a member of the firm's Corporate Practice Group and works on the firm's Real Estate and Construction and Banking and Creditors' Rights teams. He advises and

represents individuals, businesses, and banks on a variety of real estate, corporate, and banking related issues, including property acquisitions and dispositions; commercial, retail and office leasing; zoning and land use law; and creditors' rights.

RECENT LAWSUIT TESTS MINISTERIAL EXCEPTION

Generally, the "ministerial exception" allows religious employers to avoid liability for discrimination claims when making employment decisions concerning employees who qualify as "ministers." The exception is rooted in religious freedom principles found in the U.S.

Constitution. Specifically, the First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this amendment is known more commonly as the "Establishment Clause" and the second part is commonly known as the "Free Exercise Clause." The U.S. Supreme Court has held that a church's selection of its leaders is grounded in the Free Exercise Clause. The Free Exercise Clause recognizes that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."

More than one year ago, the U.S. Supreme Court confirmed that claims involving the employment relationship between a religious institution and its ministers exempt employers from liability under Title VII pursuant to the "ministerial exception" founded upon an employer's First Amendment rights. In Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, the Supreme Court held that:

Generally, the "ministerial exception" allows religious employers to avoid liability for discrimination claims when making employment decisions concerning employees who qualify as "ministers." The exception is rooted in religious freedom principles found in the U.S. Constitution. Specifically, the First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this amendment is known more commonly as the "Establishment Clause" and the second part is commonly known as the "Free Exercise Clause." The U.S. Supreme Court has held that a church's selection of its leaders is grounded in the Free Exercise Clause. The Free Exercise Clause recognizes that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."

More than one year ago, the U.S. Supreme Court confirmed that claims involving the employment relationship between a religious institution and its ministers exempt employers from liability under Title VII pursuant to the "ministerial exception" founded upon an employer's First Amendment rights. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court held that:

"Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such an action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."

The Supreme Court in *Hosanna-Tabor* refused to adopt a rigid formula for deciding when an employee qualifies as a minister. So, one of the primary questions that remains after the

Supreme Court's decision in *Hosanna-Tabor* has been how broadly the courts will interpret "minister" and which employees will be covered by the ministerial exception.

One of the first opportunities to test the Supreme Court's ruling in *Hosanna-Tabor* presented itself in *Dias v. Archdiocese of Cincinnati*, a case coming out of the U.S. District Court for the Southern District of Ohio. On June 4, 2013, a jury returned a verdict for Crista Dias, a former technology coordinator for two Catholic schools in the Cincinnati area. Dias filed a complaint against the Archdiocese alleging the Archdiocese terminated her for being pregnant and unmarried in violation of Title VII's ban on sex and pregnancy discrimination.

The Archdiocese moved to dismiss Dias' complaint by invoking the "ministerial exception," but the district court denied the motion. The court found that Dias was not a minister for purposes of the ministerial exception to Title VII because Dias taught computer classes and because she was a non-Catholic who was not permitted under church rules to teach religion to her elementary school students. If the Ohio Archdiocese appeals the jury's verdict, it will have an opportunity to pursue defense of the claim under the ministerial exception at the federal appellate court level, which will give the appellate court a chance to develop the standard for determining when an employee qualifies as a minister.

Religious-based employers should closely follow the developing case law of the ministerial exception for guidance as to which employees will be considered "ministers" within the meaning of the exception.

PETER WALSH WRITES AND SPEAKS ON MULTIJURISDICTIONAL PRACTICE OF LAW

Attorney Peter Walsh has published an article titled "Multijurisdictional Practice of Law Issues in Estate Planning," in the June, 2013 issue of the national estate planning magazine *Estate Planning* (an RIA Publication). The article addresses the complex issue of the extent to which an estate planning attorney may provide legal services to a resident of a state in which the attorney is not licensed. Peter has lectured on this subject to Milwaukee Bar Association (February, 2012) and the Estate Planning Section of Wisconsin State Bar (November, 2011).

Peter's interest in this area springs from his own multijurisdictional estate planning practice. As an attorney licensed to practice law in Wisconsin, Illinois, and Florida, Peter regularly provides legal assistance to residents of these states, and he has extensive experience with nuances of the laws of each state.

Peter is a member of the Trust and Succession Planning and Business Law practice groups of O'Neil, Cannon, Hollman, DeJong and Laing. Licensed in Wisconsin, Illinois, and Florida and with a Masters of Law degree in taxation, Peter assists clients in all areas of tax and estate planning.

ATTORNEY JIM DEJONG ELECTED CHAIR OF THE CARROLL UNIVERSITY BOARD OF TRUSTEES

James DeJong has been elected the next chair of the Carroll University Board of Trustees. He will serve as chairman for three years on the board, which oversees academic, financial, and operational decisions for the private Waukesha University.

James G. DeJong, a 1973 graduate of Carroll, is president of the Milwaukee law firm O'Neil, Cannon, Hollman, DeJong and Laing and has served as a member of the University's board since 2008.

...Read More »

ATTORNEY JIM DEJONG FEATURED IN MARQUETTE LAWYER MAGAZINE

Attorney Jim DeJong was featured in an article appearing in the 2013 Summer Edition of the *Marquette Lawyer Magazine*. Read the article about Jim here.

STATE BAR OF WISCONSIN RECOGNIZES MILWAUKEE JUSTICE CENTER VOLUNTEERS ON

2012 HONOR ROLL

The Milwaukee Justice Center, organized by Milwaukee County, Milwaukee Bar Association, and Marquette University School of Law provides legal assistance to individuals who cannot afford legal representation. In 2012, the volunteers of the Center served nearly 9,000 hours of *pro bono* service to 10,659 unrepresented civil litigants.

Sixteen attorneys from the law firm of O'Neil, Cannon, Hollman, DeJong and Laing contributed to the success of the Milwaukee Justice Center to include:

- Doug Dehler
- Megan Eisch
- Miles Goodwin
- Megan Heinzelman
- Grant Killoran
- Justinian Koenings
- Claude Krawczyk
- Gregory Lyons
- Sarah Matt
- Joseph Newbold
- Laura Now
- Jason Scoby
- Steven Slawinski
- Steven Strye
- Timothy Van de Kamp
- Peter Walsh