EMPLOYMENT LAWSCENE ALERT: TRANSGENDER EMPLOYEES AND BATHROOMS—WHAT SHOULD AN EMPLOYER DO?

A few weeks ago, we posted a blog about the protection of transgender employees under Title VII. Since then, Caitlyn Jenner has graced the cover of Vanity Fair, the EEOC has further solidified its position on the matter, and OSHA has weighed in on the issue.

One matter that has come up in many of the transgender discrimination lawsuits that have been filed to date is the use of bathrooms. This is the situation in the most recent lawsuit by the EEOC. It alleges that a Minnesota company discriminated against a transgender employee by not letting her use the women's restroom and subjecting her to a hostile work environment.

Likely in response to these issues, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued "A Guide to Restroom Access for Transgender Workers." OSHA requires, among other things, that employees are provided with sanitary and available restrooms. It is estimated that 700,000 adults in the United States are transgender, and OSHA stated that restricting employees to restrooms that do not conform with their gender identities or by requiring them to use a segregated gender-neutral or other specific restrooms singles transgender employees out and potentially makes them fear for their safety. Therefore, OSHA recommends that all employees should be permitted to use the facilities that correspond to their gender identity, and each employee should determine the most appropriate and safe option for him or herself. OSHA proposed two other optional solutions: 1) single occupancy, gender-neutral facilities for all employees; or 2) use of multiple-occupant, gender neutral restrooms with lockable single occupant stalls for all employees. Further, OSHA's best practices recommend that employees should not be asked to provide any medical or legal documentation of their gender identity in order to have access to appropriate facilities.

Based on the EEOC's current litigation trend and OSHA's best practices recommendation, employers should permit all employees to use the facilities that correspond with their gender identity. For now, the stance of the federal government is that employees should have unrestricted access and use of restrooms according to their full-time gender identity. Employers will need to deal with these situations on a case-by-case basis to find solutions that are safe, convenient, and respectful.

KILLORAN RE-APPOINTED TO THE MERITAS U.S./CANADIAN LITIGATION GROUP STEERING COMMITTEE

Grant Killoran, the Chair of the O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, recently was re-appointed to serve on the Meritas U.S./Canadian Litigation Group Steering Committee.

O'Neil, Cannon, Hollman, DeJong and Laing is a member of Meritas, a global alliance of over 7,000 lawyers from 170 full-service law firms across more than 70 countries. For more information about Meritas, please visit the Meritas website at www.meritas.org or contact us at 414.276.5000.

ATTORNEYS MAIER AND NASH PRESENT TO THE PRINCIPAL FINANCIAL GROUP

On June 8, 2015, Joe Maier, a shareholder in the Estate Planning Group, and Randy Nash, a shareholder in the Litigation Group, collaborated to present to the Appleton office of the Principal Financial Network a series of real life estate planning facts situations that have led to inheritance litigation.

The Principal Financial Group–Wisconsin Business Center is a client-focused financial services organization working with employers and individuals to help them establish priorities and develop strategies to achieve financial success.

ATTORNEY MAGER PRESENTS DURING THE "FAMILY LAW 101" PORTION OF THE WISCONSIN SUPREME COURT'S FAMILY LAW

SEMINAR

On June 4, 2015, Gregory S. Mager spoke during the Family Law 101 portion of the Wisconsin Supreme's Family Law Seminar, a continuing education program for Judges and Court Commissioners throughout the state of Wisconsin.

If you have any family law related questions, please contact Attorney Gregory Mager at O'Neil Cannon at 414-276-5000.

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.

TAX AND WEALTH ADVISOR ALERT: UNITED STATES SUPREME COURT DECLARES MARYLAND TAX SCHEME UNCONSTITUTIONAL

On Monday, May 18, 2015, in *Comptroller of the Treasury of Maryland v. Wynne*, the United States Supreme Court declared Maryland's income tax scheme unconstitutional. The Supreme Court justices voted 5 to 4 to affirm a Maryland Court of Appeals ruling that Maryland's income tax scheme results in improper double taxation on income earned in other states and creates an incentive for taxpayers to opt for intrastate versus interstate economic activity.

Like most states, Maryland imposes a personal income tax on income earned both within the

state of Maryland and in other states. Maryland's income tax is imposed on its residents in the form of both a state income tax and a so-called "county" income tax. Because income is also taxed in the state where it is earned, state tax laws usually give residents a full credit for income taxes paid on their out-of-state earnings to prevent double taxation. Maryland, however, allows its residents a credit against state income taxes, but not "county" income taxes. As a result, some of the income earned by Maryland residents outside the state of Maryland is taxed twice; once in the state where it is earned, and again in Maryland where the credit is withheld.

The Commerce Clause of the Federal Constitution gives Congress the power to regulate commerce among the states. The United States Supreme Court reasoned that the dormant Commerce Clause prohibits a state from taxing a transaction or incident more heavily when it involves commerce across state lines than when it occurs entirely within the boundaries of one state, and further prohibits a state from imposing a tax which discriminates against interstate commerce by, among other things, subjecting interstate commerce to multiple taxations.

Maryland argued that it has the right to tax the income of its residents, regardless of where it is earned, under the due process clause of the Constitution. It argued that withholding the credit from the "county" income tax would require all residents to pay an equitable share for local government services. The Court rejected this argument, stating that states have historically offered a similar credit for out-of-state taxes paid by corporations, which are also beneficiaries of such government services.

The Court notes that the Maryland tax scheme fails what has been termed the "internal consistency test." The test analyzes whether interstate commerce would be at a disadvantage as compared with intrastate commerce if every state adopted the tax scheme in question. Because residents earning income from outside state would pay more in income taxes than residents who earned income solely within the state, the Court found such tax scheme to be "inherently discriminatory" and operating as a tariff.

According to the Court, by giving less than a full credit to its residents for income earned and taxed in other states, Maryland's income tax scheme violates the dormant Commerce Clause.

In addition to significant loss of future revenue as a result of the Court's decision, individuals who tried to claim the credit on their county income tax returns in the last several years may be entitled to refunds, which could cost several million dollars. Additionally, other states, such as New York and Pennsylvania, have schemes similar to the one ruled unconstitutional in Maryland. The Court's decision will doubtless have significant and far-reaching economic consequences.

If you have any questions, please contact Attorney Megan O. Harried at O'Neil Cannon at

414-276-5000.

TAX AND WEALTH ADVISOR ALERT: THE SEVEN DEADLY SINS OF ESTATE PLANNING

The statistics are surprising. Only 3 in 10 American adults have a Will, and a much lower percentage have the right estate plan for their situation. Many reasons have been offered for this phenomenon, including fear of death and fear of attorneys. But when we consider what a good estate plan really is–a strategy to take care of the people you care about by making sure two things happen: 1) the right property gets to the right people at the right time; and 2) the right people are making your decisions when you cannot–an estate plan becomes just part of what intelligent, thoughtful, selfless people do for their loved ones.

Over the next several weeks, this blog will highlight the mistakes people make in estate planning. Some of those mistakes are due to inaction, some are due to misstep. Hopefully, as you read these sins, you will find that you have committed none of them. But if you have, this is an opportunity to build your strategy and take control of what happens to the people you love rather than leaving their future to chance.

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.