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.

SEVENTH CIRCUIT REVERSES COURSE ON EMPLOYER'S ADA REASONABLE ACCOMMODATION OBLIGATIONS

In *EEOC v. United Airlines*, the Court of Appeals for the Seventh Circuit held that an employer, as part of its reasonable accommodation obligations under the Americans with Disabilities Act ("ADA"), must reassign a disabled employee to an open and available position regardless of whether there might be a better or more qualified applicant for that job position. The Seventh Circuit's holding is a direct reversal of its previous decision on the same issue twelve years earlier when it held that an employer who has an open and available position is not required to provide a disabled employee seeking reassignment to that open and available position preferential consideration when there are better qualified applicants for the position provided the employer has a consistent policy to hire the best applicant for the particular job in question, rather than the first qualified applicant.

In a decision issued twelve years ago by then Chief Judge Richard Posner, the Seventh Circuit took the position that the ADA is not a mandatory preference act and that the ADA only requires an employer to consider the feasibility of reassignment. The Seventh Circuit also previously held that it was not Congress' intent when it passed the ADA that a reasonable accommodation should be used to provide a disabled employee an advantage or preference over non-disabled employees. Rather, it was Congress' intent to provide disabled employees a level playing field with non-disabled employees relative to job opportunities. In that case, the Seventh Circuit held that a "policy of giving the job to the best applicant is legitimate and nondiscriminatory."

In its United Airlines decision, the Seventh Circuit reversed its anti-preference interpretation of the ADA based upon a re-examination of the U.S. Supreme Court's decision in *Barnett v. U.S. Air, Inc*. where the U.S. Supreme Court arguably rejected that interpretation of the ADA noting that such an argument "fails to recognize what the Act specifies, namely, that

preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." The Seventh Circuit interpreted this language from the Barnett decision to mean that an employer is mandated under the ADA to reassign a disabled employee to a vacant position absent a showing of an undue hardship, regardless of whether there might be better qualified candidates for the position.

An argument can be made that the Seventh Circuit interpreted the U.S. Supreme Court's "preference" requirement in Barnett too broadly. That is, the ADA does in fact provide a preference to disabled employees – that preference is in the form of a reasonable accommodation as a means of leveling the "playing field" between disabled and non-disabled employees. However, the ADA does not expressly provide that employees with disabilities should be given "bonus points" relative to other qualified applicants or candidates when competing for the same position. As Judge Posner astutely questioned: Should the ADA provide preferential consideration to a 29-year-old white male with tennis elbow in providing that employee preferential treatment in reassignment to a vacant position over a 62-year-old black woman with no disability who also happens to be the more qualified and better applicant for the job? Under such a scenario, the ADA creates a hierarchy of protections against discrimination, placing an employee with a disability ahead of members of other groups also deserving protections, such as racial minorities. In our opinion, the U.S. Supreme Court in Barnett did not intend to signal such preferential treatment to employees with disabilities, but, rather, was addressing those preferences that may be necessary to level the "playing field" in the workplace for such employees. The question becomes how far does the duty of reasonable accommodation extend when it affects the legitimate expectations of other qualified applicants or employees. This was an important question that the Seventh Circuit did not address in its United Airlines decision and, perhaps, may be a question the U.S. Supreme may wish to address.

In *Huber v. Wal-Mart Stores, Inc.*, a case that followed the Barnett decision, the U.S. Supreme Court had the opportunity to address the issue of whether an employer who has an established policy to fill vacant job positions with the most qualified applicant is required to reassign a qualified disabled employee to a vacant position as a reasonable accommodation, although the disabled employee is not the most qualified applicant for the position. Unfortunately, this case was settled by the parties before the U.S. Supreme Court could rule on the case. A decision in the Wal-Mart case would have answered this important question regarding an employer's obligation to reassign a disabled employee who can no longer fulfill the responsibilities of his or her original job position when there are other better qualified applicants.

Despite the Seventh Circuit's reliance on the Barnett decision, it less than clear whether the U.S. Supreme Court intended for the application of a best-qualified applicant policy to be a per se violation of the ADA when a disabled employee seeks reassignment as a form of a reasonable accommodation, especially when that reassignment is to the detriment of better

qualified applicants or candidates. Neither the ADA nor the corresponding regulations express that reassignment to a vacant position is mandatory when it is to the exclusion of other qualified applicants or that an employer has to provide a disabled employee preferential treatment. In fact, the ADA stops short of requiring that any particular group be afforded a competitive advantage over all others when it comes to hiring or other job placements decisions. Although the U.S. Supreme Court recently rejected the opportunity to review the Seventh Circuit's decision in United Airlines, it will hopefully be an issue that the Court will address in the near future when given the opportunity.

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.

WISCONSIN ELIMINATES BUILDING CONTRACTOR REGISTRATION PROGRAM

Effective July 2, 2013, Wisconsin eliminated its Building Contractor Registration Program.[1] The Building Contractor Registration Program was eliminated in connection with the passage of Wisconsin's Biennial Budget Act. A new statute was also enacted that prohibits the Department of Safety and Professional Services from creating or enforcing any administrative rule that would require any person engaging in the construction business to hold any license, except a license specifically required by statute.[2]

Under former law, no person or entity could legally work in the construction business in Wisconsin without being registered as a Building Contractor, unless the person or entity held a Dwelling Contractor Certification or some other Wisconsin construction license. The Building Contractor Registration requirement was therefore the "catch-all" credential requirement for those who held no other credential. In order to obtain the Building Contractor credential, the applicant was merely required to submit the appropriate application form, certify compliance with Wisconsin's statutory worker's compensation and unemployment compensation requirements, and pay the registration fee. The registration had to be renewed every four years. There was no requirement that an applicant possess any special skills or qualifications. The Building Contractor Registration Program had therefore been criticized as being little more than an excuse to charge a fee.

If you have any questions regarding this article, please contact Attorney Steve Slawinski at O'Neil, Cannon, Hollman, DeJong and Laing S.C. at 414-276-5000.

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[1] 2013 Wis. Act 20 § 1708e, repealing Wis. Stat. § 101.147.
[2] 2013 Wis. Act 20 § 1708f, enacting Wis. Stat. § 101.1472(2) (2013).

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:

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“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.

CONSIDERATIONS OF DURABLE POWERS OF ATTORNEY

Historically, if a person is no longer able to make decisions regarding their health or finances, one had to commence a legal proceeding to have the person declared incompetent. The court then appointed a guardian and, to some degree, played a supervisory role over the guardian's decisions and actions.

People often created Powers of Attorney which would deal with financial issues in particular. So for example, if I was trying to sell my house but then moved out of town, I could create a Power of Attorney to have someone else sign the papers on my behalf. In a more permanent way, I could also create a Power of Attorney to have someone else sign checks for me or engage in other identified financial transactions.

A Durable Power of Attorney is a useful tool chosen by many people to give competent individuals the ability to choose a person to manage their affairs and assets in the event of incompetency. As people age and, for example, as increasing numbers of individuals suffer various affirmaties of old age, the Durable Power of Attorney avoids public court proceedings and provides an individual to help make these difficult decisions.

A Durable Power of Attorney is intended to delegate authority to another even if the person signing the Durable Power of Attorney became incompetent in the future.

In a recent Wisconsin Supreme Court case, one of the justices wrote an opinion to put Durable Powers of Attorney in a larger societal and legal context:

> A Durable Power of Attorney, unlike the Common Law Power of Attorney, survives the principal's disability or incapacity.

Many people now will create Durable Powers of Attorney and name their spouse as a person who can make financial decisions should that become necessary in the future. As the State Supreme Court said:

> [D]urable Powers of Attorney are intended to give competent individuals the ability to delegate to an agent broad power to manage their affairs and assets in the event of incompetency.
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> The Durable Power enhances the autonomy of the principal by enabling a principal to make decisions for himself or herself while competent that will continue to be effective if the principal becomes incompetent.
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> The Durable Power of Attorney can improve the living conditions of the elderly and provide security for their future care. A Durable Power of Attorney can help a competent principal to handle his or her financial and legal affairs and living arrangements and then can enable the attorney-in-fact, the agent, to handle the principal's finances and day-to-day quality of life without having to declare the principal incompetent and without having to seek court supervision.

Many people would not object to asking their spouse or other trusted family member or friend to serve as a Durable Power of Attorney. Having said that, by merely signing a Durable Power of Attorney, a principal is potentially giving the agent very significant power over one's finances and can even be authorizing the emptying of bank accounts. Further, as time goes by, things might change and the spouse's health might become questionable such that one would want to terminate the Durable Power of Attorney. In that case, one might consider naming an adult child to serve in that capacity.

While Wisconsin has a statute to address some of these issues, there is very little case law interpreting the statute or developing a body of law to assist individuals and attorneys with respect to Powers of Attorney. People considering these issues should contact an attorney who handles elder law issues to explore whether this type of document is appropriate for any individual's situation.

If you have any questions regarding this article, please contact Attorney Randy Nash at O'Neil Cannon at 414-276-5000.

RECORD RETENTION POLICY: A START TO BEING LITIGATION-READY

Almost 99% of today's information created by businesses is generated and stored electronically. The ability to easily and conveniently store large amounts of data has created a hidden liability that did not exist in the age of when companies maintained its information primarily in paper format. The effect of this hidden liability is twofold. First, companies create more information then they know what to do with. Second, companies sometimes delete or destroy data and information that they actually do need.

For the unwary, these hidden liabilities may become exposed when your company is faced with a lawsuit. In today's litigation, the age of electronic data has generated a paradigm shift away from traditional paper documents to digital information. This shift has changed the discovery process in litigation by changing what attorneys are looking for; how they are looking; and where they are looking for relevant information. Companies can expect in today's litigation that the way it stores and preserves electronic information will be a central topic during the discovery process that will involve not only your record custodians, but also your information technology department. How well a company manages and preserves its electronic information may be an outcome determinative factor for it in litigation.

Today, companies that find themselves involved in a lawsuit oftentimes are faced with attacks through the discovery process as to how they typically store and delete electronic information. The purpose of this inquiry is to set the expectation as to what electronic information, such as e-mails, the company should or should not reasonably have at its disposal for discovery purposes. Companies that do not have a well-drafted record retention plan that addresses electronic information and which incorporates a comprehensive litigation hold policy may find themselves at a significant disadvantage in trying to defend what might otherwise be a winning case. That is why it is more important than ever for all companies, both large and small, to effectively manage their electronic information. This means that **companies must be litigation-ready** by taking affirmative actions that allow the company to effectively manage and retain electronic information. It is simply too late to start thinking about the manner and method of retention and destruction of electronic data after you have been served with a lawsuit.

The best tools to avoid these hidden liabilities is a **record retention policy** that addresses electronic information as well as a **litigation hold policy** that is designed to preserve electronic data once litigation is reasonably anticipated. A record retention policy should be designed so that your company does not destroy information that it is obligated to maintain and at the same time the policy should be designed to destroy or delete information that the company no longer needs and/or is no longer mandated to maintain. Most companies have

some sort of document retention policy. These retention policies were originally implemented to manage the volume and space occupied by paper documents. Companies have been less diligent, however, in applying their retention policies to the electronic information that they store on their servers and individual computer hard drives. This lack of diligence in managing electronic data has created a treasure trove for plaintiffs' lawyers looking for the proverbial "smoking gun," such as that e-mail that explains exactly what motivated the company's decision to terminate that troublesome employee.

A litigation hold policy has long been an important concept in litigation. In simple terms, it means that once you are sued, you have to stop destroying documents. It is an easy concept to understand when applied to paper documents, but it becomes a much more complicated task when dealing with electronic information. Electronic evidence can easily disappear, be altered or destroyed if not properly preserved. For example, some companies' computer systems provide for automatic deletion of e-mails and documents, so stopping that process takes an affirmative effort on behalf of management. When implementing a legal hold, a company needs to approach the hold requirement with a coordinated team effort. Business units, IT, records management and custodial personnel, and either in-house or outside counsel need to be involved and work together in the process of implementing the hold.

The failure to have a properly drafted record retention policy as well as a litigation hold policy may result in serious and adverse consequences for your company and may compromise your company's ability to defend itself in a lawsuit. For example, failure to have these policies in place can result in court-imposed sanctions, adverse jury instructions and significant monetary awards.

For example, a federal district court in Illinois recently agreed to permit the jury to be instructed that it can assume computer data destroyed by an employer would be unfavorable to its defense in an employee's lawsuit under the Americans with Disabilities Act when the employer permitted a software program to automatically overwrite computer data relevant to the claims in the case. It made no difference that the employer did not act intentionally in deleting the information, rather, the district court found that the employer's failure to prevent the automatic deletion made it "at fault" relative to its duty to preserve evidence that was discoverable pursuant to the Federal Rules of Civil Procedure. Consequently, thinking ahead and addressing the hidden liabilities created by your electronic information can save your company time and money, and, more importantly, potentially prevent your company from having to incur an unfavorable judgment as the result of electronic information being inadvertently deleted.

EEOC SEEKS DETERMINATION FROM SEVENTH CIRCUIT THAT ITS PRE-SUIT CONCILIATION EFFORTS CANNOT BE REVIEWED

The EEOC is statutorily obligated to enter into confidential conciliation efforts with an employer prior to commencing a lawsuit. Only if the EEOC is unable to secure a conciliation agreement acceptable to it may it bring a civil action, as conciliation is a condition precedent to the EEOC's power to sue. The purpose of this requirement is to encourage settlement of discrimination cases through voluntary compliance, rather than litigation. If the EEOC commences suit against an employer without first engaging in a good faith effort to conciliate the case, the employer may seek dismissal of the lawsuit because conciliation raises a quasi-jurisdictional issue.

Despite case law to the contrary, the EEOC has now attempted to argue that a federal district court is without authority to review the EEOC's pre-suit conciliation efforts. In *EEOC v. Mach Mining*, the EEOC has argued that an employer cannot challenge the EEOC's pre-suit conciliation efforts because Title VII prohibits disclosure of conciliation efforts in a subsequent proceeding. The federal district judge, however, was not persuaded by the EEOC's argument as he found that the prohibition was in conflict with Title VII's mandate that the EEOC must attempt to conciliate with the employer prior to bringing a civil action. Moreover, the federal district judge also held that Title VII's prohibition regarding disclosure of conciliation efforts goes to the introduction of such evidence relative to the merits of the case and not to introducing such evidence for the purpose of determining whether the EEOC first satisfied its prerequisite to bringing suit.

Nevertheless, the federal district judge granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit because there exist a split between the federal circuits as to the scope of a court's review of the EEOC's conciliation efforts – an issue that the Seventh Circuit has not yet addressed. Some circuits employ a "deferential standard" inquiring only whether the EEOC made an attempt to conciliate whereas other circuits apply a "heightened scrutiny standard" which requires the EEOC to make a sincere and reasonable effort to negotiate by providing the employer with an explanation as to the reasonable cause for its belief that Title VII has been violated and an adequate opportunity to respond to all charges and negotiate a possible settlement.

The federal district court certified the following two questions for the Seventh Circuit on appeal: (1) Is the EEOC's conciliation process subject to judicial review?, and (2) if so, is that level of review a deferential or heightened scrutiny level of review? It would be anticipated that the Seventh Circuit will hold that the EEOC's conciliation is subject to judicial review and will most likely find that a district court's scope of review will include a determination as to

whether the EEOC in fact engaged in conciliation and whether that effort was made in good faith. We will update this blog article when the Seventh Circuit issues its decision.