THE PASCHOS LAW UPDATE NEWSLETTER

June, 2015

I. EMPLOYMENT LAW

An Employer May Not Make an Applicant's Religious Practice, Confirmed or Otherwise, a Factor in Employment Decisions

In *In Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc*, 201 U.S. LEXIS 3718 (U.S. Jun. 1, 2015), Samantha Elauf, a practicing Muslim, applied for a position at an Abercrombie & Fitch Stores, Inc. ("Abercrombie") store. Elauf wore a headscarf, or hijab, every day, and did so in her interview. She did not mention her headscarf during her interview and did not request an accommodation from Abercrombie's "Look Policy," which prohibits "caps" as too informal for Abercrombie's image. Although the interviewer believed that Elauf wore the headscarf for religious reasons, she never asked Elauf. Following the interview, the interviewer asked her district manager whether the headscarf would be a forbidden "cap," expressing her belief that Elauf wore it "because of her faith." The district manager told the interviewer to lower Elauf's rating on the appearance section of the application, which lowered her overall score and prevented her from being hired.

The Equal Employment Opportunity Commission ("EEOC") sued Abercrombie on Elauf's behalf claiming that the company had violated Title VII of the Civil Rights Act of 1964 by refusing to hire Elauf because of her headscarf. Abercrombie argued that Elauf had a duty to inform the interviewer that she required an accommodation from the Look Policy. The district court granted summary judgment for the EEOC. The U.S. Court of Appeals for the Tenth Circuit reversed and held that summary judgment should have been granted in favor of Abercrombie because there is no genuine issue of fact that Elauf did not notify her interviewer that she had a conflict with the Look Policy. The Court of Appeals held, as a matter of law, that employers cannot intentionally discriminate under Title VII based on a failure to provide reasonable accommodation unless they have "actual knowledge" of an applicant or employee's need for accommodation. Because Abercrombie lacked actual knowledge of Elauf's need for a religious accommodation, the 10th Circuit held that it had not violated the statute. The EEOC sought Supreme Court review.

The Supreme Court held that to prevail in a discrimination claim under Title VII a rejected applicant for employment must only show that his or her need for religious accommodation was a motivating factor in the employer's decision, not that the employer had actual knowledge of the applicant's need. The Court provided that the disparate-treatment provision of Title VII does not contain a knowledge requirement but rather forbids certain motives, regardless of the employer's knowledge about the applicant. If the applicant can show that the employer's decision not to hire an applicant was based on a desire to avoid having to accommodate a religious practice, then the employer has violated Title VII.

II. CYBER LAW

Pennsylvania Trial Court Does Not Recognize Data Breach Negligence Claims

In *Dittman v. UPMC*, No. GD-14-003285 (Pa. Ct. Com. Pl., Allegheny Cnty., May 28, 2015), a complaint was filed on behalf of over 62,000 plaintiffs against the University of Pittsburg Medical Center ("UPMC") after names, birthdates, social security numbers, confidential tax information, addresses, salaries, and bank account information pertaining to current and former employees was stolen from UPMC's computer systems. The plaintiffs alleged that "UPMC had a duty to exercise reasonable care to protect and secure [the class members'] personal and financial information within its possession or control from being compromised, lost, stolen, misused, and/or disclosed to unauthorized parties." The plaintiffs also alleged that because they are, or were, employees of UPMC, the relationship between plaintiff and UPMC is governed by an implied contract whereby UPMC agreed "to safeguard and protect" the plaintiffs' "personal and financial information."

The court held that there is no common law cause of action for data breaches. Specifically, the court found: (1) Pennsylvania's economic loss doctrine precludes a negligence cause of action for economic loss stemming from a data breach; (2) public policy considerations mitigated against the creation of an affirmative duty of care in connection with data breach cases; and (3) the Pennsylvania General Assembly's prior actions evidenced an intent not to impose such a duty.

In dismissing the class action, the court ruled that Pennsylvania law does not recognize a private right of action to recover actual damages as a result of a data breach. The court stated that creating such a cause of action would overwhelm the state courts and require businesses to spend substantial resources to respond to these claims.

The court also noted that, to date, the only obligation imposed upon businesses by the Pennsylvania General Assembly is to provide notification of a data breach. The court refused to interfere with the legislature's direction in this area of the law.

III. INSURANCE LAW

Insurer's Employees Metal Impressions Protected from Discovery in Bad Faith Litigation

In *Lane v. State Farm*, No. 3-14-CV-01045 (M.D. Pa. May 18, 2015), a discovery dispute arose involving allegations of bad faith handling of an uninsured motorist (UM) claim. The insurer, State Farm submitted a privilege log that listed redactions of certain communications by its employees subsequent to the filing of the complaint. Plaintiff moved to compel the production of the redacted materials. Plaintiff claimed, in part, that he could not confirm whether the portions redacted by the carrier constituted privileged information. State Farm asserted the work product privilege as the materials were prepared in anticipation of litigation or trial and contained the employees' mental impressions, conclusions, and legal theories concerning the litigation. Plaintiff argued that the post-complaint communications are relevant to his bad faith claim, stating "the insurer had a continuing duty to investigate the insured's claim even after suit was filed. Since State Farm is still evaluating the UM claim, plaintiff is entitled to discovery of records and materials post-dating the litigation."

The court ruled that the redacted portions did not have to be produced because the privileged nature of the documents were adequately described in the privilege log by defense counsel. The court provided "the hypothetical possibility that representations made by a duly licensed attorney and officer of this court could be found to be utter fabrications is insufficient to carry plaintiff's burden in overcoming the privilege." The court further provided, "Nor does this court believe it is appropriate to order the defendant to submit these redacted materials for in camera inspection simply because the plaintiff does not trust counsel's representations. In the absence of any evidence that the statements made before this court are fraudulent, we shall accept them as true."

The court held that the mere existence of a bad faith claim in a Complaint "does not make

otherwise privileged information per se discoverable." Rather, a party seeking such discovery must meet its burden of persuading the court that such documents are not protected from discovery under the particular facts of the case.

Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.