

Union Cards Will Be Crucial

“Employee Free Choice Act” Promises New Environment

Now that the November 4 election is behind us, we know that Democrats will enjoy a majority in Congress for at least two years, and will have control of the White House for at least four years. As of this writing, however, it is unclear whether there will be a 60-seat filibuster-proof majority in the Senate. Nonetheless, it is likely that employers will be faced with the impact of the euphemistically named “Employee Free Choice Act” in 2009 and thereafter.

The EFCA, which no lesser Democrat than George McGovern has called “un-American,” would require (1) union recognition based on a card check (effectively doing away with NLRB-supervised secret ballot elections); (2) an initial collective bargaining agreement to be settled through interest arbitration; and (3) punitive measures if an employer violates certain basic provisions of the National Labor Relations Act. These are enormous statutory amendments which, if passed by the new Congress and signed by the new President (who committed to do so), will drastically change the organizing approach of unions, and quite possibly the status of employers who desire to remain union free.

In the past, unorganized employers who wished to remain so, and who encountered union organizational activity, often first noticed a union’s presence on the scene when a petition seeking an election was filed with the NLRB. While some unions made it their practice to file only if they had obtained authorization cards signed by well over 50 percent of the employees in an appropriate unit, only 30 percent was required for the filing of an NLRB election petition. A campaign then followed the petition, with the employer stating its case and frequently prevailing in the election because many employees who had signed authorization cards had done so

under pressure, real or imagined, or without being informed of all the pertinent facts. When the employees were permitted to cast their ballots in the secrecy of the NLRB voting booth, following a two-sided campaign on the merits, they were able to vote their choice and often responded favorably to their employer’s explanations why a union was not needed.

Employers who in the past had not learned of organizational activity until the union had signed up a majority with authorization cards will now find that they are required to negotiate immediately with a union. And the union may very well engage in “surface” bar-

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gaining so as to obtain a first contract through the fiat of interest arbitration. What, then, should employers do if they wish to remain union free under this likely new statutory regime?

In effect, the EFCA will require that an employer’s campaigning occur at an earlier point, *i.e.*, at a “preventive” stage, and that this campaigning must be ongoing and constant. The only realistic chance of avoiding unionization (under circumstances where the majority of the employees really do not wish to be organized) is to fully explain the extreme import of signing a union authorization card to the employees in advance, and to tell them, factually, why they should choose not to do so.

At the same time, though, the risk of missteps has materially increased. Under the EFCA, an employee allegedly terminated for engaging in protected union activity would be able to obtain back pay plus an additional two times back pay as liquidated damages. Moreover, the NLRB could impose civil penalties against an employer found to have willfully or repeatedly violated the law of up to \$20,000 for each violation.

It behooves employers who wish to remain union free to educate themselves about the impact of the mislabeled “Employee Free choice Act,” should it become the law next year, and to seek counsel regarding steps that should (and should not) be taken in light of the new labor law environment American businesses will be operating in.

Thomas G. Kienbaum

Beware The Discharged Employee’s “Retaliation” Claim

More often than not, a grand jury witness is not prosecuted for the underlying inquiry that caused his appearance to begin with, but rather the way he responded to the government’s investigation. So it seems with “retaliation,” the claim *du jour* of plaintiffs’ employment counsel. The underlying job discrimination claim — frequently a trivial matter — is often forgotten in favor of the charge that the employer retaliated against the employee for asserting the discrimination claim. Defending such lawsuits presents special difficulties, perhaps because jurors, while reluctant to assume that discrimination occurred, readily identify with the notion that being accused of wrongdoing (even when there is no actual wrongdoing) will likely draw a negative reaction from an employer.

The arsenal for plaintiffs’ lawyers in the “retaliation” realm has grown significantly in recent years. Recall the U.S. Supreme Court’s 2006 decision in *Burlington Northern & Sante Fe Railway Co. v. White*, in which the Court confirmed that a Title VII retaliation claim may be asserted without an “adverse employment action” being involved, and even without work-related events in the picture.

While the Michigan courts have not followed suit (the most recent holdings have affirmed the “adverse employment action” requirement), some federal court decisions suggest a growing tendency to endorse a broader

KOHP Honored As “21st Century Innovator,” Top Labor Firm In Michigan

Michigan Lawyers Weekly and the Women Lawyers Association of Michigan recently honored Kienbaum Opperwall Hardy & Pelton as a 21st Century Innovator for its commitment to retaining top legal talent and providing its lawyers opportunities to balance work and family life through technology, excellent benefit programs, flexible billing structures, and challenging work.

Once again this year, KOHP has also been designated by Chambers USA as the top labor and employment law practice in Michigan — a ranking the firm has had for a number of years. The Chambers Guide to Business Lawyers is the only comprehensive client- and peer-based evaluation of U.S. law firms.

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range of retaliation claims, even in favor of someone other than the employee responsible for the underlying inquiry.

In *Crawford v. Metropolitan Government of Nashville County*, the U.S. Court of Appeals for the Sixth Circuit (which covers Michigan) rejected the retaliation claim of an employee who had been fired soon after being interviewed during an internal sexual harassment investigation of her department’s supervisor. The plaintiff claimed that, although she had not herself instigated the investigation, her participation in the interview — during which she offered that the supervisor had sexually harassed both her and her co-workers — constituted “opposition” to an unlawful employment practice or “participation” in an investigation, both of which would be protected under Title VII’s retaliation provision. The court disagreed, holding that the plaintiff’s mere cooperation in responding to her employer’s request for information did not rise to the level of “overt” and “active” opposition required by Title VII. Nor was her participation in an internal investigation (absent a pending EEOC charge or other formal legal proceeding) viewed by the court as adequate.

We predict, however, that the Sixth Circuit’s *Crawford* decision will be reversed. The U.S. Supreme Court has granted *certiorari* and will consider the case this term. That Court will likely view the Sixth Circuit’s construction of Title VII’s “opposition” and “participation” protections as too narrow in view of the remedial purposes of the statute.

Somewhat ironically, a three-judge panel of the Sixth Circuit has itself already laid the groundwork for a much broader interpretation of Title VII’s anti-retaliation provision. In a subsequent case, *Thompson v. North American Stainless LP*, the plaintiff alleged that he had been discharged in retaliation for an EEOC gender discrimination charge filed by his fiancée who worked for the

same company. Although there was no evidence that the plaintiff had himself assisted his fiancée in preparing her charge, and it was undisputed that he had not participated in the EEOC investigation, a two-judge majority of the Sixth Circuit held that because the plaintiff was so “closely related to or associated with” someone engaged in protected activity, it was consistent with the purpose of Title VII to allow the plaintiff to proceed with his own retaliation claim. The majority further opined that, because a plaintiff asserting such a “third-party retaliation” claim would still need to prove a causal connection between the actual protected activity and the alleged retaliation, employers remained protected from frivolous “association” claims.

One Sixth Circuit Judge, Richard Griffin, argued in dissent that it is not the job of the courts to expand plain and unambiguous statutory language based upon individual judges’ perceptions of the intent of the legislature, and that the majority had both ignored precedent and made the Sixth Circuit the first federal appellate

court to hold that Title VII allows an action for “third-party retaliation” on behalf of friends and family members who have not themselves engaged in any protected activity. Doubtlessly influenced by Judge Griffin’s dissent, the Sixth Circuit then vacated the panel opinion and agreed to rehear the case *en banc*.

Two other federal appellate circuits have recently broadened Title VII’s anti-retaliation provision by allowing “third-party association” claims to proceed to trial. This past February, in *DeWitt v. Proctor Hospital*, the Seventh Circuit allowed a plaintiff to proceed with an “association” claim in a case brought under the Americans with Disabilities Act. The plaintiff’s husband suffered from prostate cancer for which he received expensive treatments covered by the hospital’s self-insured medical plan. The plaintiff’s supervisor occa-



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sionally pulled her aside to inquire about her husband’s condition and asked whether they had considered less expensive treatment options. In a staff meeting, the hospital informed employees that it would have to be “creative” in cutting costs. When the plaintiff was fired three months later and inexplicably designated “not eligible for rehire,” she sued claiming that she was discriminatorily fired because of the expense associated with her husband’s disability. Without much legal analysis, the Seventh Circuit reversed the trial court’s grant of summary judgment in favor of the hospital, finding that the plaintiff’s “fairly persuasive circumstantial evidence” was sufficient to allow her claim to proceed to trial.

More recently, in *Holcomb v. Iona College*, the Second Circuit held as “a matter of first impression” that a white college basketball coach who claimed to have been fired because he was married to an African-American woman could proceed with a Title VII race discrimination claim. The court found too restrictive the holdings of other courts that “association” claims are not cognizable under the language of Title VII that prohibits discrimination against an individual “because of *such individual’s* race.” The court reasoned that, “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s *own* race.”

Logic and common sense have taught us that adverse job action taken against an employee who has overtly raised an issue of discrimination requires special attention to make sure that no retaliatory motive can be inferred. This will no longer be enough, in light of the fact that adverse action against related third parties, or possibly even retaliation by someone other than a management representative (shunning by co-workers, for instance), may be found sufficient to impose liability under the anti-retaliation provision of the civil rights laws. This requires an additional level of concern — one that intuition does not necessarily alert us to.

Elizabeth Hardy

“Genetic Information” Discrimination Law Certain To Confuse

Beginning next year, the EEOC will take on responsibility for a newly created category of employment discrimination: Discrimination or retaliation based on “genetic information.”

President Bush signed the legislation, entitled the Genetic Information Nondiscrimination Act (GINA), on May 21, 2008. Its employment provisions become effective November 21, 2009. The EEOC is to issue regulations by May 21, 2009.

The employment provisions parallel much of Title VII, prohibiting employees from failing or refusing to hire, or from discharging, or from otherwise discriminating against any employee in the areas of compensation or other terms, conditions, or privileges of employment because of genetic information, or from limiting, segregating, or classifying employees so as to deprive or tend to deprive them of employment opportunities because of genetic information.

Like Title VII, GINA prohibits retaliation based on protected activity. It also prohibits the acquisition of genetic information except under limited circumstances and for limited purposes. As with Title VII, similar prohibitions apply to labor unions and employment agencies.

Unfortunately, GINA’s definitional provisions are rife with ambiguity. For instance, GINA broadly defines “genetic information” as including not only information about an individual’s genetic tests, but those of his or her family members as well. Family members, for purposes of the statute, include dependents and other relatives up to “fourth degree” familial relationships. Even more certain to generate confusion is the statute’s categorization of any “manifestation” of a genetically related disease or genetic disorder in a family member as protected “genetic information.”

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An example of how the vague contours of the statute may create liability can be found in one of the exceptions to the prohibition on acquiring genetic information. This exception applies when an employer “inadvertently requests or requires” family medical history of the employee or his or her family member. But what is an “inadvertent request”? Consider this common casual exchange: An employee mentions to her boss she is stopping off at the hospital on her way home to visit her aunt, and the boss offers the cordially routine follow-up, “Oh, what’s wrong?” If the answer is breast cancer or some other genetically linked disease, is this an acquisition of “genetic information,” and if so, is it a prohibited acquisition or is it “inadvertent”?

Other exceptions in the statute are equally prone to confusion. Employers may legitimately acquire genetic information if needed to comply with Family and Medical Leave Act certification provisions, but there is no similar exemption for participation in the interactive process under the Americans with Disabilities Act. Similarly, employers are authorized to acquire genetic information to administer wellness programs and to monitor biological effects of toxic substances in the workplace, but only if numerous technical criteria are satisfied.

GINA creates an enforcement scheme virtually identical to Title VII’s. An individual claiming to have been wronged must first file a timely charge with the EEOC before suing in federal court. Like Title VII, GINA imposes a cap of \$300,000 (or less, depending on employer size) on compensatory and punitive damages. But, unlike Title VII, GINA does not allow for disparate impact claims, though it does provide that this question will be studied by a commission Congress will appoint in 2014.

The statute also amends the Employee Retirement Income Security Act and the Public Service Health Act to impose similar prohibitions on group health plans and health insurance issuers. However, as emphasized in a recent report by the Congressional Research Service, these prohibitions pertain only to health insurance and, at least at present, do not impact long-term care insurance, life insurance, or short-term or long-term disability insurance.

Because there has been virtually no reported litigation arising out of existing state laws prohibiting genetic discrimination, business groups opposed GINA’s enactment as “a solution in search of a problem.” Impetus for the law lies primarily with a widely publicized EEOC settlement with Burlington Northern Railroad for allegedly requiring certain employees to submit to genetic testing. In addition, advocacy groups cited anecdotal evidence of individuals refusing potentially life-saving genetic screening, purportedly out of concern that insurers and employers might someday use the test results against them. Regardless of the rationale for this new statute, we can be sure that its contours will become clear only through future regulatory action and litigation.

Julia Turner Baumhart

Court Reinforces Job Guarantees For Returning Military Personnel

A recent decision of the U.S. Court of Appeals for the Sixth Circuit (which includes Michigan), *Petty v. Metropolitan Government of Nashville-Davidson County*, is a good reminder that returning military personnel are essentially guaranteed reemployment by their former employers upon their return from service. In that case, the court ruled that despite Petty’s admitted misrepresentations in the reemployment process, his former employer (Metro) violated his reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) when it (1) failed to “promptly rehire him” due to its return-to-work-process, and (2) failed to place him into the position to which he was entitled.

Petty had been employed as a police officer with Metro since 1991, and was promoted to the rank of

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sergeant in 2000. Throughout his employment he was in the Army Reserves. In 2003 he was called to service and eventually deployed to Iraq. While in Iraq, it was discovered that Petty was manufacturing wine in his quarters and he admitted giving alcohol to an enlisted soldier — violations of General Order 1A. In lieu of going forward with court martial proceedings, Petty requested to resign “for the good of the service.” The Army accepted his request and formally dismissed the charges against him in January 2005. His discharge was characterized as “under honorable conditions” and Petty returned to the States on February 1, 2005.

On February 28, 2005, Petty visited Metro to request reinstatement. He was required to go through a return-to-work process that applied to all police officers who had been away for an extended period of time. This included completing a personal history questionnaire, a medical examination, a computer voice stress analysis, a drug screen, and a debriefing with a police department psychologist. The stated purpose was to ensure that police officers were physically, emotionally, and temperamentally qualified.

Metro returned Petty to work three weeks later on March 21, 2005. But the position to which he was returned was not the same position he had left — it was an office job in which he answered phone calls and took police reports. Metro had learned during its investigation that Petty had redacted part of the Department of Defense form that described his separation as being “in lieu of trial by court martial” — a clearly deceptive act on his part. Metro had traditionally placed officers facing discipline (or otherwise “disempowered”) in office jobs.

Petty filed a lawsuit alleging violations of USERRA. The trial court granted Metro’s motion for summary disposition and dismissed Petty’s claims that Metro violated his rights by delaying his rehire and by not placing him in his former position.

The appeals court reversed and ordered that summary judgment be entered in Petty’s favor. The court noted that Petty had met the statutory prerequisites to qualify for USERRA’s reemployment guarantee (*i.e.*, advance

notice, less than five years of military service, a timely request for reemployment, proper documentation, and an “honorable” discharge), and held that Metro was not permitted to delay or require him to comply with its own return-to-work process. Importantly, the court found inconsequential Metro’s asserted obligation to ensure that returning police officers met certain qualifications for the position, noting Congress’ clearly expressed view that a returning veteran’s reemployment rights take precedence over such concerns. Since Petty had met USERRA’s prerequisites, Metro had no legal basis for questioning his honesty or qualifications or for placing him in the desk position.

Jennifer A. Zinn

Courts Clarify Sarbanes-Oxley Act Protections

The Sarbanes-Oxley Act was passed in 2002 to combat fraudulent accounting practices and other corporate misconduct in the post-Enron era. The Act (often colloquially called “SOX”) provides whistleblower protection to employees of publicly traded companies who engage in certain kinds of protected activity. Because whistleblower claimants must exhaust an elaborate administrative process before suing in court, caselaw guidance on the meaning and application of the Act’s whistleblower provision has been emerging very slowly. Recent federal court decisions have now begun to clarify several key aspects.

Whom Does The Act Cover? SOX applies to publicly traded companies and the officers, employees, contractors, subcontractors, and agents of publicly traded companies. A U.S. District Court in Michigan held in *Rao v. DaimlerChrysler* that SOX does not cover a non-publicly traded subsidiary of a publicly traded parent. The court explained, however, that the Act may cover a

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non-publicly traded subsidiary of a publicly traded parent if there are overlapping executives between the two entities and if the parent is itself involved in the subsidiary's employment decisions.

In *O'Mahoney v. Accentune*, a U.S. District Court in New York recently extended whistleblower protection to a foreign plaintiff. An earlier precedent, *Carnero v. Boston Scientific Corp.*, had declined to extend whistleblower protection to a foreign plaintiff. The *O'Mahoney* court emphasized that the foreign plaintiff was employed and compensated by a U.S. subsidiary of a foreign parent, that the alleged misconduct involved U.S. employees and occurred in the U.S., and that the plaintiff named both the U.S. subsidiary and the foreign parent as defendants. In contrast, in *Carnero*, the plaintiff was employed and compensated by a foreign subsidiary that had a U.S. parent, the reported misconduct had occurred in Latin America, and the plaintiff only named the foreign subsidiary as a defendant. Consequently, SOX whistleblower protection may extend to a foreign plaintiff when a U.S. company employs the plaintiff and the alleged misconduct occurs within the U.S.

What Activity Does The Act Protect? SOX protects employees of publicly traded companies who file, testify, participate in, provide information, or assist in an investigation of employer conduct that the employee reasonably believes constitutes a violation of one of the Act's "enumerated laws." The "enumerated laws" are: mail fraud, wire fraud, bank fraud, securities fraud, a violation of an SEC rule or regulation, or a violation of any provision of federal law relating to fraud against shareholders.

Some courts have held that the "enumerated laws" apply only to fraud against shareholders. The New York

federal court in *O'Mahoney*, however, concluded that the "relating to fraud against shareholders" phrase only pertains to the final enumerated category. As a result, the "fraud" categories may be considered more broadly.

The U.S. Court of Appeals for the Fourth Circuit reasoned in *Livingston v. Wyeth Inc.* that a violation of federal law is "relating to fraud against shareholders" only if it is sufficiently material that it could impact shareholders. That court also held that an employee's belief that his employer's complained-of conduct violates securities laws must be "reasonable." The court concluded that Food and Drug Act (FDA) violations (the alleged misconduct in that case) are not "relating to fraud against shareholders." The court opined that it was not clear that the employer had an obligation to inform shareholders of the alleged FDA violations, and it emphasized that FDA violations generally lack the requisite materiality.

In sum, a complaint of a violation of federal law that is too attenuated to involve fraud against shareholders should not support a SOX whistleblower claim. The Fourth Circuit extended the "reasonable belief" test recently in *Welch v. Chao* by holding that a

bank executive who complained of accounting irregularities could not have reasonably believed the irregularities violated federal securities laws.

In *Allen v. Administrative Review Board*, the U.S. Court of Appeals for the Fifth Circuit also utilized both subjective and objective standards to scrutinize the reasonableness of the plaintiff employee's belief that a violation had occurred. To be *subjectively reasonable*, the court held, the employee must have actually believed that a violation occurred, even if the employee's belief was mistaken. To be *objectively reasonable*, the employee's belief must be reasonable in light of the employee's access to

Because whistleblower claimants must exhaust an elaborate administrative process before suing in court, caselaw guidance on the meaning and application of the Act's whistleblower provision has been emerging very slowly.

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information, experience, and background. “The objective reasonableness of a belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experiences as the aggrieved employee.”

Non-publicly traded employers confronted with a SOX whistleblower complaint should aggressively challenge whether it is a covered entity. Any employer should carefully assess whether the alleged misconduct constitutes a violation of one of the Act’s enumerated laws and whether the employee, given his or her background, knowledge, and experience, could have reasonably believed that a violation of one of the enumerated laws occurred. Although the SOX whistleblower provision has its place in legislation designed to protect investors, intended limitations on its reach are being recognized as these cases now begin to reach the courts.

Eric J. Pelton

Safeguarding Your Electronically Stored Medical Information

Employers should take note of a recent HIPAA settlement that underscores the importance of safeguarding electronically stored “protected health information.” On July 16, 2008, the U.S. Department of Health and Human Services (HHS) entered into a settlement with Seattle-based Providence Health & Services (a not-for-profit health care system), following an investigation by HHS into the theft of optical disks and backup tapes that were left overnight in the personal vehicle of a Providence employee. HHS also investigated four separate thefts of laptop computers left unattended by Providence employees. The medical data on the tapes, disks, and laptops — which included infor-

mation on more than 386,000 patients — had not been encrypted.

Under the settlement agreement, Providence agreed to pay \$100,000 to HHS and to implement a stringent corrective action plan that required Providence to: (1) revise and update its policies regarding the physical and technical safeguarding of electronically stored medical information; (2) provide mandatory workforce training on the new safeguards; (3) monitor compliance through unannounced visits to its facilities and workforce interviews; and (4) submit detailed compliance reports to HHS for three years. By settling with HHS, Providence avoided the potential of costly civil penalties under HIPAA’s Privacy and Security Rules.

Organizations that create, receive, maintain, or transmit electronically stored health information should have adequate security measures in place — including data encryption and password protection — to minimize the risk that information will be intercepted and disclosed in violation of HIPAA.

On a related point, if your organization is served with a subpoena requesting documents that contain protected health information under HIPAA, there are specific rules you must follow when responding to the subpoena. The rules vary depending upon whether your organization is a party to the underlying litigation and whether the subpoena was issued with or without a court order. If your organization is not a party, and the subpoena was issued without a court order, the subpoena must include a written statement providing “satisfactory assurances” that the requesting party is complying with HIPAA. Those assurances include notifying the person whose medical information is at issue, giving him or her an opportunity to object, or obtaining a qualified protective order if that person was not notified. HIPAA does not permit disclosure of documents with private health information *unless* the subpoena includes this written “satisfactory assurances” statement.

William B. Forrest III

ADA Amendments Broaden Disability Act's Coverage

Several weeks ago, President Bush signed into law the ADA Amendments Act of 2008 (ADAAA). The ADAAA, which takes effect January 1, 2009, significantly broadens coverage and rejects the reasoning and standards of several landmark U.S. Supreme Court decisions. The purpose of the amendments is to move litigation away from the question whether a person is disabled and instead focus on whether discrimination occurred. This will make it more difficult for employer-defendants to gain summary judgment on ADA claims.

The ADAAA expands the statutory definition of "disability," which it proclaims was improperly narrowed by the Supreme Court's holdings in *Sutton v. United Airlines, Inc.* (1999) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* (2002). As originally enacted, the ADA defined "disability" as (1) a physical or mental impairment that substantially limits one or more major life activities or (2) having a record of or being regarded as having such an impairment. It did not define the phrases "substantially limits" or "major life activity." The *Sutton* and *Toyota* cases interpreted these phrases narrowly, requiring that the ameliorative effects of mitigating measures be considered and mandating that the terms "substantially" and "major" be interpreted strictly.

The ADAAA changes this approach. It specifies that the definition of disability "shall be construed broadly." While the ADAAA does not define "substantially limits" (early versions of the bill, which defined it as "materially restricts," were cut), that phrase is to be defined "consistently with the findings and purposes" of the Act, *i.e.*, in favor of broad coverage. The EEOC's

definition of "significantly restricted" is explicitly rejected in the ADAAA as too narrow.

The ADAAA also defines for the first time the key phrase "major life activity," providing a non-exclusive list of physical and mental activities and major bodily functions. It further states that conditions that may be controlled through medications or adaptive devices are to be analyzed without the effects of such ameliorative measures (except in the case of eye glasses or contact lenses).



A new definition of "regarded as disabled" represents another dramatic change. Under the ADAAA, a person will now meet the requirement of being regarded as disabled "if the individual establishes that he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment *whether or*

not the impairment limits or is perceived to limit a major life activity." This is a relaxed standard and a significant departure from current caselaw, which requires a plaintiff to show that he was regarded as having an *actual* disability, *i.e.*, as having an impairment that substantially limits one or more major life activities. Now, a person who can link an adverse job action to the *perception* of a far less severe and less limiting impairment (as long as, according the amendments, the perceived condition lasts longer than six months and is not "minor") will be able to make out a disparate treatment claim under the "regarded as" prong. However, the ADAAA states that an employer need not provide a reasonable accommodation to a person who merely fits the "regarded as" definition, thereby clarifying an area that has led to a split among federal appellate circuits.

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On a related point, a recently decided federal case addressed the scope of medical records an employer may lawfully request under the ADA. In *Varley v. Highlands School District*, a U.S. District Court in Pennsylvania granted summary judgment dismissing the plaintiff-employee's claim that her employer regarded her as having a mental disability and discriminated when it prohibited her from returning to work. But the court allowed her to go to trial on her claim that she was improperly required to undergo medical exams and provide a *complete* medical history.

Varley was a transition coordinator for the school district, working with special education students and assessing their vocational skills. She had a history of mental health issues, which she had earlier disclosed to coworkers. She had also told coworkers of a prior suicide attempt, and showed them cuts she had made on her stomach. In 2004, she had an episode during which she became tearful, could not compose herself, and had to leave work. Before returning her to work, the school district required that she be evaluated by its psychiatrist and also requested her *complete* psychiatric records.

Varley claimed that the inquiries regarding her past medical history were not job-related or consistent with business necessity as required under the ADA. The school district insisted they were necessary because it had reason to believe she could pose a danger to herself or students. The court noted the EEOC's enforcement guidance which states that, while an employer may require an employee to provide documentation sufficient to substantiate that she has an ADA disability, it cannot ask for *unrelated* documentation — meaning that in most circumstances an employer cannot ask for *complete* medical records. Based on lay and expert testimony that Varley was not viewed as a present danger to herself or others, the court concluded that there were viable issues as to whether the school district's demand for *complete* records violated the ADA.

Jay C. Boger

Employment Arbitration Rules Continue To Evolve

U.S. Supreme Court Developments. During its current term, the U.S. Supreme Court will likely resolve the longstanding question whether employees covered by a collective bargaining agreement (CBA) that forbids discrimination on the basis of race, sex, and other protected characteristics can be required to arbitrate claims of employment discrimination *exclusively* through the CBA's grievance and arbitration procedures, with no access to the courts. After the Court's 1973 *Alexander v. Gardner-Denver* decision, it had been generally believed that CBA provisions could never detract from an employee's right to sue in court under federal and state anti-discrimination statutes.

Ten years ago, the Supreme Court seemed to hint in *Wright v. Universal Maritime Service* that a CBA *could* waive covered employees' "rights to a judicial forum for federal claims of employment discrimination" *if* the CBA contained a "clear and unmistakable waiver" of those rights. But the Court did not actually hold that such a waiver *would* be enforceable; in fact, it declined to reach that question. Since then, only the U.S. Court of Appeals for the Fourth Circuit has endorsed the idea that a CBA's explicit waiver of union members' rights to a judicial forum would be valid.

Now, a case from the Second Circuit, *14 Penn Plaza LLC v. Pyett*, squarely presents the question. Long-service night watchmen in a New York City office building were reassigned to less desirable positions as night porters and light duty cleaners. The CBA contained a mandatory arbitration clause for claims under all anti-discrimination statutes and declared all such claims "subject to the grievance and arbitration procedure as the sole and exclusive remedy for violations." The appellate court, like the trial court, held that this clause did not require dismissal or stay of the age discrimination lawsuit the former watchmen filed in court after their union refused to take their age discrimination claims to arbitration.

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The facts of *14 Penn Plaza* illustrate why collectively bargained arbitration provisions may warrant a different rule from that governing individual employment contracts. Unions retain complete control over whether, and how vigorously, to pursue members' complaints — including claims of discrimination — at both the grievance and arbitration stages. Unions must also deal with competing interests of employee groups within a bargaining unit. Because the union in *14 Penn Plaza* had consented to the arrangement that brought in the employees who displaced the plaintiffs, it did not wish to pursue their age discrimination claims in arbitration. Thus, in its view of its own interests and the interests of its membership as a whole prevented the displaced watchmen from vindicating their rights through arbitration — the only forum that the CBA allowed them.

The *14 Penn Plaza* case is set for argument on December 1, 2008. Among the many *amicus* briefs filed, the EEOC and the Solicitor General of the United States have weighed in to support the Second Circuit's conclusion that the displaced watchmen could proceed with their lawsuit.

The Supreme Court was also active on the arbitration front in its 2007-2008 term. In *Preston v. Ferrer*, the Court again emphasized the force of the federal policy favoring arbitration. In that case, the California Court of Appeals had stopped Preston from arbitrating his claim that Ferrer owed him management fees under a contract containing a broad arbitration clause, until the California Labor Commissioner (before whom Ferrer was challenging the contract's enforceability under state law)

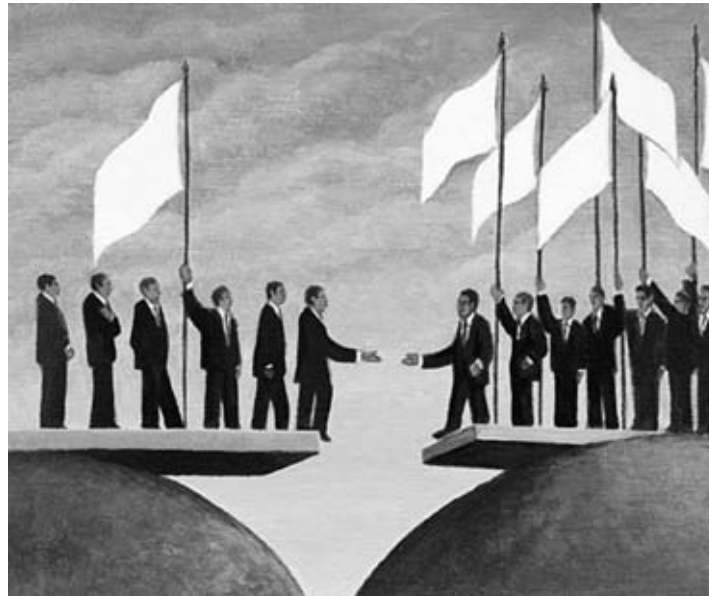
addressed the dispute. The Supreme Court reversed, rejecting the notion that arbitration was not appropriate if a specialized administrative agency would otherwise have jurisdiction.

A second major arbitration decision from the 2007-2008 term was *Hall Street Associates, LLC v. Mattel, Inc.* The Court held that a court asked to vacate or modify an arbitration award pursuant to the Federal Arbitration Act (FAA) may only do so on the limited grounds stated in that Act. While this may sound obvious, many courts had not seen the FAA as establishing such a clear bound-

ary. This ruling has several important practical consequences for parties entering into arbitration agreements.

First, *Hall Street* invalidates "customized" standards of review. Many employers and businesses, desiring an escape route from an arbitration result that seems to ignore the law have incorporated some form of judicial review for "clear legal error" into their arbitration

agreements (both pre-dispute and post-dispute). At the same time, a number of federal appellate circuits have tacked a "manifest disregard of the law" ground onto the FAA. *Hall Street* says, in essence, that neither courts nor parties have any business expanding the limited grounds for judicial review (*i.e.*, corruption, partiality, misconduct, lack of jurisdiction) that Congress included in a law intended to promote quick dispute resolution outside of the courts. This likely means there is no room left for the "manifest disregard" standard in FAA jurisprudence. At a minimum, employers who provided for expanded judicial review in pre-dispute arbitration agreements can no longer rely on those agreements.



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Second, the *Hall Street* ruling may prompt increased use of state laws that permit closer judicial scrutiny of arbitration awards. For example, it has long been established that the Michigan Arbitration Act allows courts to vacate an arbitration award if it contains an error of law “so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise.”

Federal Appellate Decisions. Two recent federal decisions confirm that only a very rare statute exempts claims from arbitration. In *Landis v. Pinnacle Eye Care, LLC*, decided August 11, the Sixth Circuit held that claims brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA) fell within a broad arbitration clause in an optometrist’s employment agreement because neither USERRA’s text nor its legislative history showed that Congress intended to preclude employees from waiving the right to bring USERRA claims in court. USERRA may present a closer case on this point than most statutes because it explicitly pre-empts contracts or practices arising under state law (*e.g.*, an arbitration agreement?) that establish “additional prerequisites to the exercise or receipt of rights and benefits under the statute.” The Sixth Circuit ultimately decided that this provision did not immunize USERRA claims from mandatory arbitration, but one judge noted in a concurrence that Congress should clarify what it intended.

In *Guyden v. Aetna, Inc.*, decided October 2, the Second Circuit reached the same result — *i.e.*, arbitration was required — with respect to a whistleblower’s claims under the Sarbanes-Oxley Act. The court noted that not only did the statute fail to prohibit arbitration of such claims, but that Congress had actually chosen to delete a provision that would have done so.

In June, the Sixth Circuit applied familiar arbitration contract principles in an unusual setting. A female equity partner had signed a law firm partnership agreement that required the firm and its partners to arbitrate disputes involving any “controversy or claim arising under or related to [the] Agreement or its interpretation.” After

differences between the partner and the firm developed, primarily over compensation, she filed a federal lawsuit alleging discrimination based on sex, pregnancy, and disability, as well as retaliation. The appeals court affirmed the trial court’s holding that the partner’s claims must be arbitrated because they could not be resolved without reference to the partnership agreement. Determining whether she was paid less than comparable male partners, for example, would require determining how much she should have been paid, a question that inevitably implicated the partnership agreement. Also, analysis of firm governance terms would be central to determining whether the partner qualified as an “employee” entitled to sue under anti-discrimination statutes. KOHP represented the prevailing law firm in this case.

Noel D. Massie

FMLA Issues Keep On Percolating

Here are some Family and Medical Leave Act (FMLA) highlights from recent months.

DOL Regulation Requiring Individualized Notice Upheld. Although the FMLA does not have any specific requirements regarding notice, U.S. Department of Labor (DOL) regulations require prompt notification when paid leave time will be counted against FMLA leave, and also require that such notification be provided no less often than the first time in each six-month period that the employee gives notice of the need for leave. The U.S. Court of Appeals for the Fifth Circuit held in *Downey v. Strain* that the DOL’s individualized notice regulations were valid. The employee in that case had been prejudiced by the employer’s noncompliance — *i.e.*, if the employee had received individualized notice, she would have been able to postpone surgery, thus allowing her to fully exercise her right to take 12 weeks

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of protected FMLA leave each year, and protecting her right to return to her previous job or its equivalent.

FMLA Protection For Alcoholism Starts When Treatment Begins. In *Darst v. Interstate Brands Corp.*, the employee claimed his FMLA rights were violated when he was terminated for absenteeism after returning from a leave for alcoholism treatment. Prior to arranging for treatment or being admitted, however, he had missed three days of work, which the employer treated as unexcused. He nonetheless submitted a medical certification form stating that he had a serious health condition that covered the unexcused absences. The U.S. Court of Appeals for the Seventh Circuit noted that “treatment” is a defined FMLA term that does not include actions such as calling to make an appointment. Because the employee produced no evidence that he actually received any treatment as defined by the FMLA on the three days in question, he was not entitled to FMLA leave for those days, and his employer was free to terminate him.

Disclosing FMLA Diagnosis Can Create ADA Liability. After receiving an HIV diagnosis, an employee enrolled in a medical study and asked his manager for a work schedule that would accommodate his weekly blood draws. The manager told the employee that he would need a specific diagnosis so the manager could evaluate the request, and the employee reluctantly informed the manager of his HIV diagnosis. The manager disclosed the employee’s HIV diagnosis to the employee’s supervisor, who, in turn, informed two of the employee’s coworkers. To determine whether an employee qualifies for FMLA leave, an employer may ask questions related to the need for leave — but such infor-

mation is entitled to confidentiality under the ADA, which strictly limits the inquiries an employer may make regarding medical conditions and the manner in which information can be used. In *EEOC v. Ford Motor Credit Co.*, a U.S. District Court in Tennessee rejected the employer’s defense that the employee had voluntarily disclosed the information (voluntarily disclosed information is not protected by the ADA), and declined to dismiss the employee’s ADA lawsuit.

Honest Belief About Leave Abuse Precluded

FMLA Claim. In *Vail v. Raybestos Products Co.*, the employer undertook surveillance because it suspected that an employee, while on intermittent FMLA leave for migraine headaches, was actually working for her family’s lawn care business. The surveillance revealed that, shortly after the employee had visited her doctor and received instructions not to return to work for 24 hours, she called off work but then proceeded to mow a lawn. The Seventh Circuit affirmed the dismissal of the employee’s FMLA lawsuit, holding that the employee must show she took leave “for

the intended purpose” and that the employer can defeat an FMLA interference claim by showing that she did not. The court concluded that the employer did not violate the FMLA due to its “honest suspicion” that she was abusing her leave.

Handbook Language Created Additional Rights. Watch what you say in your employee handbook regarding FMLA leave. In *Peters v. Gilead Sciences, Inc.*, the Seventh Circuit held that an employee could proceed with state law breach of contract and promissory estoppel claims based on handbook language that granted



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employees leave commensurate with that provided by the FMLA — despite the fact that the employer had less than 50 employees within 75 miles of the employee's worksite and was therefore not subject to the FMLA. The court held that these representations in the handbook (which were repeated in letters to the employee) could create enforceable state law rights apart from the FMLA.

Staffing Firm And Client-Employer Are “Joint Employers.” In *Grace v. USCAR and Bartech Technical Services*, the U.S. Court of Appeals for the Sixth Circuit held that a staffing firm and its client were “joint employers” for purposes of the FMLA, thereby triggering potential FMLA liability for both. While a Bartech employee assigned to USCAR was on an approved FMLA leave, her position was eliminated and her job was not restored upon her return. She sued both entities alleging they had interfered with her FMLA rights. Relying on a DOL regulation, the Sixth Circuit rejected USCAR's argument that it was not her “employer” — *i.e.*, that it was merely Bartech's client and Bartech was the “employer.” The court found that USCAR directed the day-to-day work of the employee and controlled her salary and hours.

Consequently, they were joint employers and equally liable for alleged FMLA violations relating to her non-reinstatement. Although only the primary employer (the staffing firm) is responsible for giving required notices and providing FMLA leave under the DOL regulations, when an eligible employee takes leave both the primary and secondary employers must honor the decision and not engage in retributory action. The secondary employer argued here that it had legitimate reasons for eliminating the employee's position, but the court held that

she had produced sufficient motivational evidence to warrant a trial on whether the restructuring would have occurred regardless of her FMLA leave.

Calculation Of Hours For FMLA. In *Staunch v. Continental Airlines*, the Sixth Circuit addressed a recurring question regarding whether an employee (a flight attendant) had the requisite 1,250 hours for FMLA eligibility. The airline ran a calculation based on its records and found that she fell short; the employee calculated her time based on her own recollection and concluded she had worked well over 1,250 hours. The DOL regulations

direct courts to follow the rules for calculating hours under the Fair Labor Standards Act, and note that if the “employer does not maintain an accurate record of hours worked by an employee..., the employer has the burden of showing that the employee has not worked the requisite hours.” The Sixth Circuit found that the airline did not maintain a record of the *actual* hours spent performing some of the flight attendant's duties, and it therefore had the burden of proving that she did not work the requisite 1,250 hours. However, the court went on to conclude that the airline met this burden by compiling



pay registers detailing each flight she worked and adding time required by the applicable collective bargaining agreement for work performed outside of flight time. It rejected the employee's attempts to refute these calculations with an undated generalized list she compiled strictly from her own recollection.

Still Awaiting New DOL Regulations. On February 11, 2008, the DOL released proposed revisions to its FMLA regulations, which contain a number of significant modifications. The public comment period closed

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on April 11, 2008. The DOL is expected to issue the final version before the end of President Bush's term. Notable changes proposed by the DOL include:

- **Five-Year Break in Service.** Prior service with the employer must be counted toward the 12-month eligibility rule unless a break in service of over five years occurred. Exceptions include breaks in service caused by military duty or certain collectively bargained leaves of absence.

- **Coverage of PEOs as "Joint Employers."** Professional Employer Organizations (PEOs) are not joint employers of their clients' employees if the PEO assumes administrative functions such as payroll and benefit administration but does not participate in or control employment decisions such as hiring, firing, or direction of work.

- **Chronic Serious Health Conditions Requiring Periodic Leave.** Eligible employees with chronic serious health conditions prompting episodes of leave remain protected by the FMLA, but must visit their health care provider at least twice per year.

- **Missed Overtime.** Overtime that an employee would have been required to work but did not due to FMLA leave must be counted against available FMLA leave.

- **Bonus Goals and FMLA Absences.** Under certain circumstances, bonus awards based on employee achievement of specific goals may be denied to employees who fail to achieve those goals due to FMLA absences.

- **Specific Written Notice of FMLA Eligibility and Designation within Five Business Days.** The time period to notify employees of FMLA eligibility and designation is extended from two business days to five business days.

- **Revised FMLA Forms.** The DOL's prior FMLA medical certification form has been expanded to require more specific information about the frequency and duration of absences. The DOL also separated its prior form concerning notice to employees into two forms entitled "Designation Notice" and "Eligibility Notice."

EEOC Advises On Religious Discrimination

On July 22, 2008, the EEOC released a new section of its Compliance Manual regarding religious discrimination under Title VII. According to EEOC statistics, religious discrimination charges have doubled in the past 15 years to a record level of 2,880 in 2007. The new section was, at least in part, a response to this rise. It does not purport to change the law, and the EEOC's existing regulations on religious discrimination remain in effect.

The EEOC states in the new section that "religion" includes certain "non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.'" Employers are required to reasonably accommodate employees' sincerely held religious beliefs when they conflict with a work requirement, as long as the accommodation does not constitute an undue hardship. Although the "reasonable accommodation" and "undue hardship" language is familiar to most employers under the ADA, the reasonable accommodation of religion required under Title VII involves a more limited standard than under the ADA. The examples and "Employer Best Practices" set out in the accommodation section of the Compliance Manual contain many common scenarios and may serve as a useful resource.

The EEOC Compliance Manual also contains a religious harassment section, including guidance on balancing anti-harassment obligations with accommodation obligations. This tension often arises where an employee's religious beliefs require him or her to "proselytize," and co-workers complain that this is harassment.

Employers should be mindful that the EEOC only addresses federal law, and that state anti-discrimination laws may vary. The Compliance Manual can be found on the EEOC's website at www.eeoc.gov/policy/docs/religion.html.

Shannon V. Loverich

Sonja Lengnick

Jennifer A. Zinn Joins The Firm

Jennifer A. Zinn has practiced in the labor and employment relations field for over two decades. She comes to Kienbaum Opperwall Hardy & Pelton, P.L.C. from Ford Motor Company's Office of the General Counsel, where she had primary responsibility for day-to-day employment counseling at the Company. She provided advice and oversight and also handled litigation across a broad spectrum of labor and employment matters.

Before joining Ford Motor Company, Ms. Zinn was a partner at a large Detroit-based law firm where she practiced labor and employment law on behalf of management clients.

Ms. Zinn has extensive counseling experience regarding the Family and Medical Leave Act, the Americans with Disabilities Act, the Uniformed Services Employment and Reemployment Rights Act, the Fair Labor Standards Act, and other federal and state employment statutes.

Ms. Zinn is a graduate of Williams College and the University of Michigan Law School.



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**KIENBAUM OPPERWALL
HARDY & PELTON, P.L.C.**
ATTORNEYS AND COUNSELORS

280 North Old Woodward Avenue, Suite 400, Birmingham, Michigan 48009 • Phone (248) 645-0000 • Fax (248) 645-1385

211 West Fort Street · Suite 500 · Detroit, Michigan 48226 • Phone (313) 961-3926 • Fax (313) 961-3945

www.kohp.com

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