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Is Medical Marijuana a Reasonable or Required Accommodation for a Protected Disability?

Almost ten years ago, Michigan voters approved legalizing the use of marijuana for medical treatment. Today, according to published figures, over 200,000 Michigan residents — representing 2% of Michigan's population — hold medical marijuana cards, allowing them to use medical marijuana to treat a "debilitating medical condition." And in the United States, consumers spent $5.9 billion on legal cannabis this year, and sales are expected to grow to an estimated $19 billion by 2021.

The Michigan Medical Marijuana Act (MMMA) explicitly states that it does not require an employer to accommodate an employee's use of marijuana in the workplace or an employee working while under the influence of marijuana. The U.S. Court of Appeals for the Sixth Circuit determined in *Casias v. Wal-Mart Stores* that the MMMA itself does not restrict a private employer's ability to terminate an employee for medical marijuana use. However, there is a lack of guidance from Michigan courts regarding the use of medical marijuana and claims of wrongful termination based on disability discrimination under the Michigan Persons with Disabilities Civil Rights Act (PDCRA), Michigan's version of the Americans with Disabilities Act (ADA).

The question remains: Can an employer terminate an employee who holds a valid medical marijuana card for testing positive for marijuana, in violation of the employer's workplace drug policy, without violating the PDCRA or ADA?

Recently, the Supreme Judicial Court of Massachusetts in *Barbuto v. Advantage Sales and Marketing* ruled that, under Massachusetts' statute, an employee who was terminated because she tested positive for marijuana as a result of her lawful use of medical marijuana may seek a civil remedy against her employer for disability discrimination. The plaintiff, Barbuto, used medical marijuana at the direction of her physician to treat her Crohn's disease and irritable bowel syndrome. When she was hired, she advised the employer of her medicinal use of marijuana and that she would not consume it before or at work. Her supervisor informed her that her use of medical marijuana would not be an issue. Barbuto was subsequently terminated after she tested positive for marijuana on a mandatory drug test. There was no evi-

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dence to suggest that she used marijuana at work or was under the influence at work. The court equated the use of medical marijuana to the use of any other prescribed medication, finding an employee's legal use of medical marijuana could serve as a reasonable accommodation for the employee's disability. The court noted that the employer could still defeat the employee's claim if it could prove that the employee's use of medical marijuana would cause an undue hardship to the business or a risk to public safety.

The Massachusetts court's *Barbuto* decision departs from rulings in California, Colorado, Oregon, and Washington, where courts have found that employers had no duty under their state statutes to accommodate an employee's use of medical marijuana.

Other states, including Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, Nevada, New York, Pennsylvania, and Rhode Island have medical marijuana laws that contain explicit anti-discrimination or reasonable accommodation provisions.

About a month after the Massachusetts court's *Barbuto* decision, a Connecticut federal district court, in *Noffsinger v. SSC Niantic Operating Company LLC*, ruled that enforcement of the Connecticut Palliative Use of Marijuana Act (PUMA), which explicitly prohibits discrimination by employers against qualifying patients, is not preempted by federal law. The plaintiff, Noffsinger, was terminated by her new employer after she tested positive for marijuana on a pre-employment drug test, even though she informed the employer that she consumed medical marijuana only at night and at the direction of her physician to treat her post-traumatic stress disorder, provided her registration certificate, and offered to provide additional medical documentation. In permitting Noffsinger to proceed with a private cause of action under PUMA, the court rejected the employer's argument that PUMA is preempted by three different federal statutes: the Controlled Substance Act, the Americans with Disabilities Act, and the Food, Drug, and Cosmetic Act.

The Connecticut court in *Noffsinger* distinguished *Casias v. Wal-Mart Stores*, noting that although the cases were factually similar, the Sixth Circuit's ruling was based on statutory interpretation of Michigan's medical marijuana statute which does not contain any explicit anti-discrimination or reasonable accommodation provisions.

Massachusetts' medical marijuana statute likewise lacks such a provision. The Massachusetts statute has nearly identical language to the MMMA's provision that "[a] qualifying patient . . . shall not be denied any right or privilege . . . for the use of mari[j]uana in accordance with this act"; this language was used in *Barbuto* to reject the employer's argument that accommodation for continued use of medical marijuana is unreasonable because federal law prohibits its possession.

The *Barbuto* court found that the statute's limitation on medical marijuana use at work implicitly recognized that the use of medical marijuana outside of work might be a permissible accommodation. The court explained that the employee — not the employer — could be criminally liable under federal law for possession of marijuana outside the workplace. But the court was not convinced that, as a matter of public policy, it

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should declare an accommodation of medical marijuana use outside work to be *per se* unreasonable merely out of respect for federal law — when Massachusetts voters had accepted the use of marijuana for medical purposes.

In December 2015, Michigan House Bill 5161 was introduced and referred to the Michigan House Committee on Commerce and Trade, where it died. The bill, if it had passed, would have amended the MMMA to prohibit employers from terminating or taking adverse employment action against an employee for medical use of marijuana "if the use is not incompatible with and does not hinder job performance and the employee produces his or her registry identification card for the employer's inspection." In other words, this amendment, if resurrected, would force Michigan employers to re-write any zero tolerance marijuana policy and subject them to liability under the MMMA for terminating or disciplining an employee with a medical marijuana card based solely on a positive drug test.

Even without an amendment to the MMMA adding an anti-discrimination or reasonable accommodation provision, it is possible that a Michigan court could follow the lead of *Barbuto* in interpreting the PDCRA. Michigan employers should accordingly exercise caution before terminating or disciplining an employee for authorized use of medical marijuana.

Under the federal ADA, employers are more insulated, as possession and use of marijuana remain illegal under federal law. At this writing, the Trump administration may be about to change the federal government's approach to the enforcement of federal laws making the possession or use of marijuana a federal crime. Under the Obama administration, the Justice Department was prohibited by a budget provision from spending federal dollars to block or interfere with state laws permitting medical marijuana, and it instead directed its attention to drug cartels and transportation of marijuana across state lines. Attorney General Jeff Sessions is endeavoring to reverse that approach.

Sarah L. Nirenberg

What's New at Trump's Department of Labor?

There have been a number of significant developments at the U.S. Department of Labor (DOL) in the months since Donald Trump took office. It seems that "everything old is new again," as the Trump administration attempts to undo policies the Obama administration had put in place.

Since our last issue, President Trump's initial choice for Secretary of Labor, Andrew Puzder, withdrew a day before his confirmation hearing in February 2017 after criticism of his company's employment practices and his hiring of a household employee not authorized to work in the United States. In April, Alexander Acosta, Dean of the Florida International University College of Law, was confirmed as Labor Secretary.

Independent Contractors and Joint Employment. In June, the DOL withdrew two highly publicized 2015 and 2016 Administrator Interpretations regarding misclassification of employees as independent contractors and joint employment. This topic is discussed in the article that follows.

Persuader Rule. The DOL is also taking steps to rescind the revised "persuader" rule under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), another Obama administration proposal that would have expansively required employers to make a public report to the DOL when they sought professional advice designed to persuade employees about union organizing or collective bargaining, whether the persuasion was through direct contact with employees or indirectly. Under the prior interpretation of the LMRDA's advice exception, employers could hire consultants (including attorneys) to create materials and strategies for organizing campaigns and to script managers' communications with employees, without disclosing this to the DOL, as long as the consultant (or attorney) had no direct contact with employees. In

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November 2016, a Texas federal court issued a nationwide permanent injunction on enforcement of the newly proposed interpretation, and in June 2017 the DOL issued a notice of proposed rulemaking regarding its intended withdrawal of the new rule. The comment period closed August 11, 2017, and it is expected that the proposed expanded rule will be rescinded in the near future, returning employers and professionals to the LMRDA reporting regime that has existed for the last 50 years.

White Collar Exemptions. As we reported in our last issue, the long-awaited new rules on the white collar exemptions turned out to be a non-event, with a Texas federal court, in November 2016, enjoining the new rules regarding the salary threshold necessary for meeting the exemptions. The Obama DOL appealed the injunction on December 8, 2016, but most predicted that the appeal would not be pursued under the Trump administration. This prediction turned out to be inaccurate, as the DOL under Secretary Acosta has continued to argue that the lower court's decision should be reversed. However, the DOL is not seeking to have the specific salary threshold of $913 per week ruled valid, but is asking the U.S. Court of Appeals for the Fifth Circuit to confirm the DOL's authority to establish a salary level test for the exemptions. The Texas federal court, in issuing the injunction, essentially had ruled that the DOL did not have the authority to use salary level as a test for determining whether an employee fit within an exemption. The DOL asked the appeals court not to address the validity of the specific salary level set with the new regulations, and stated that it intended to address that through new rulemaking. See sidebar entitled "DOL Seeks Comments on Overtime Rule Changes."

OSHA Changes. The Occupational Safety and Health Administration has not been immune from reversals with the new administration. According to an April 25, 2017 memo, OSHA has reversed its policy announced in the 2013 "Fairfax Memorandum" of allowing employees at non-union workplaces to choose a union-affiliated representative for "walk around" inspections. OSHA has also withdrawn its Obama-era "Volks Rule" which effectively extended the six-month statute of limitations for OSHA recordkeeping violations by five years.

Sonja L. Lengnick

DOL Seeks Comments on Overtime Rule Changes

On July 26, 2017, the DOL sought public comments on a number of issues affecting the overtime rules, including:

- *Whether the salary threshold should be updated based on inflation, and if so, how inflation should be measured;*
- *Whether the salary threshold should vary based on factors such as the size of employer, census region, or some other method;*
- *Whether the executive, administrative, and professional exemptions should be subject to different salary thresholds;*
- *Whether the DOL should keep the provision contained in the 2016 rules that a portion of the salary necessary to reach the threshold could be satisfied through a bonus payment;*
- *Whether a test for the exemptions that relies on duties and does not contain a salary threshold would be preferable, and, if so, what duties should be included; and*
- *At what level does the salary threshold become so high that it supplants the duties test?*

Employers who are interested in submitting comments should contact Eric Pelton or Sonja Lengnick.

DOL Withdraws Guidance on Independent Contractors and Joint Employment

The Obama administration modified joint employer concepts to expand circumstances under which a company can be deemed a joint employer, and thus liable under employment laws such as the Fair Labor Standards Act and Family and Medical Leave Act. The Obama administration was similarly aggressive in examining independent contractor relationships it believed employers were using to avoid employment laws such as Title VII, FLSA, FMLA, and tax laws. And the Obama National Labor Relations Board's 2015 decision in *Browning-Ferris Industries of California* created much consternation among employers that the requirements for showing joint employer status under the National Labor Relations Act between an employer and a staffing firm's employees, or between a franchisor and its franchisee's employees, were being substantially lightened.

The pendulum is now swinging back under the Trump administration. In June, the DOL withdrew guidance previously issued as "Administrator Interpretations" relating to both independent contractor and joint employment definitions. The Obama administration's DOL had taken an expansive view of independent contractor relationships. Indicative of its attack on the perceived misuse of independent contractors was an Administrator Interpretation issued by the Wage and Hour Division of the DOL in July 2015. It focused on a six factor "economic realities" test that would make it difficult for employers to convince the government its contractor relationships were truly independent.

Similarly, the Wage and Hour Division, through an Administrator Interpretation, expanded the circumstances under which a company can be deemed a joint employer under the FLSA for workers the company believes were employed by separate entities with which it contracts. The Wage and Hour Division suggested that courts abandon control-based joint employer tests in favor of a single uniform list of "economic reality" factors with a focus on companies that contract for the provision of services. The Administrator Interpretation unabashedly announced that its intent was to expand statutory coverage of the FLSA so the DOL can collect wages from larger deep-pocket businesses.

The withdrawal of both Administrator Interpretations by the DOL should provide some comfort to employers. But caution should prevail. Although the Obama administration's guidance was expansive, it was not inconsistent with some court rulings on these issues. Employers should continue to be careful about classifying workers as "independent contractors" or entering into borderline "joint employer" situations. It is not yet clear whether the withdrawn guidance will be replaced by new guidance that is more employer-friendly. Dramatic changes to existing law are unlikely, even though enforcement priorities appear to be changing.

The DOL has also announced it will reinstitute its use of opinion letters, perhaps setting the table for more meaningful guidance in the future. Opinion letters, which were utilized for decades but were stopped in 2010 in favor of Administrator Interpretations, typically provided guidance on specific inquiries made by employers and other groups seeking guidance. In contrast, Administrator Interpretations were general and broad-based and provided less meaningful guidance. But they were used by the previous Wage and Hour administrator to signal enforcement priorities.

The reinstitution of opinion letters should provide specific guidance to employers seeking to understand how these complex Wage and Hour regulations, and others, may apply to particular factual situations. While not binding precedent, courts often look to such guidance as persuasive. In making the announcement, DOL Secretary Alex Acosta said, "Opinion letters will benefit employees and employers, as they provide a means by which both can develop a clearer understanding of the [FLSA] and other statutes." DOL opinion letters are available on its website. Employers may also submit

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requests for new opinion letters on specific issues. We suggest seeking counsel in preparing such requests.

Meanwhile, Congress has taken a direct shot at the NLRB's controversial *Browning-Ferris* decision. In July, a House Appropriations Subcommittee approved a spending bill for fiscal year 2018 that would prohibit the NLRB from applying the legal standard set out in *Browning-Ferris*, and a second bill was introduced that would amend the NLRA and FLSA to require "direct" and "immediate" control to establish joint employment. Whether or not these bills are ever enacted, employers may not need to wait long for relief. The Board is about to have a Republican pro-business majority, which can be expected to reverse the *Browning-Ferris* decision at its first opportunity.

Eric J. Pelton

Duty to Accommodate Religious Beliefs — How Far Does It Stretch?

Evidently quite far. In holding that it is not for an employer or the courts to "question the correctness or even the plausibility of an employee's religious understanding," the U.S. Court of Appeals for the Fourth Circuit recently upheld a $587,000 jury verdict in a religious accommodation case involving an apparently devout evangelical Christian who refused to use his employer's biometric hand scanner, which was for monitoring employee attendance and work hours. The employee testified that he believed the use of the scanner would associate him with the "Mark of the Beast," render him a follower of the Antichrist, and condemn him to everlasting punishment.

The lawsuit, *EEOC v. Consol Energy, Inc.*, was brought by the EEOC on behalf of Beverly Butcher, a coal miner who worked for Consol in West Virginia. Butcher refused to use a new hand scanner system that he believed was a threat to his core religious beliefs grounded in the "authenticity . . . [and] authority of the scriptures." Butcher feared that using the scanner would result in being "marked," even though the scan would not leave a physical mark or visible sign, and that undergoing a scan by either his left or right hand could lead to his identification with the Antichrist. Butcher obtained a letter from his pastor vouching for his "deep dedication to the Lord Jesus Christ." He also submitted his own letter that cited verses from Revelation and explained why he believed the scanner would associate him with the Mark of the Beast. Butcher chose to resign his employment at the Robinson Run Mine after 37 years rather than waiting to see if his employer would discharge him for refusing to use the scan.

While Consol conceded that Butcher had "bona fide" religious beliefs, it challenged Butcher's rationale for refusing to use the scanning system as unreasonable and mistaken. Offering its own interpretation of the scriptures, Consol asserted that the Mark of the Beast is associated only with the right hand or the forehead, and that using his left hand would obviate any reasonable religious concerns. Consol also argued that since the system would not imprint a physical mark, it would not compromise Butcher's beliefs regarding the Mark of the Beast. Last, Consol argued that Butcher should have stayed on the job, taken the disciplinary charges, and then filed a union grievance rather than resign.

The EEOC maintained that the only relevant issue for Butcher's religious accommodation request was "whether Butcher objects to the scanner, not why he objects" and that "Butcher's religious beliefs did not need to be consistent with the beliefs of others in his religion, as long as the belief is sincerely held." It further argued that Consol deliberately denied Butcher an accommodation of typing in his personnel number in lieu of using the scanner (an accommodation that had been provided to two employees with hand injuries), and that a union grievance would have been futile.

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The Fourth Circuit agreed with the EEOC that the question of correctness or even the plausibility of Butcher's religious understanding is "beside the point," as long as Butcher had an honestly held belief. The court further noted that Butcher's religious beliefs were protected whether or not his pastor or other members of his religious sect agreed with them. The Fourth Circuit also held that a jury could properly conclude — as it apparently did — that Butcher was constructively terminated when he was forced to choose between his continued employment and his religious beliefs.

By not judging Butcher's religious beliefs to any degree — *i.e.*, whether they are even accepted by other members of his faith — the ruling opens the door to potentially bizarre and idiosyncratic religious discrimination claims that cannot, at least in the Fourth Circuit (Virginia, West Virginia, Maryland, and North and South Carolina), be challenged on the basis of reasonableness. The only remaining ground for an employer to challenge such a claim, according to the Fourth Circuit, will be on the accommodation issue: Whether an accommodation is unreasonable or unduly burdensome given the employer's legitimate business needs.

Elizabeth Hardy

Courts Issue Conflicting Opinions on LGBT Protection under Title VII

Some of the most remarkable developments in employment discrimination law over the past year have been the expanded protections for individuals who identify as LGBT. Overall, there have been decisions by three U.S. Circuit Courts of Appeals — the Second, Seventh, and Eleventh Circuits — and we are currently awaiting a decision by the Fourth Circuit and a sequel decision by the Second Circuit.

The U.S. Courts of Appeals have decided these cases in one of three ways: (1) finding that LGBT status is not a protected characteristic; or (2) finding that it is protected; or (3) a middle ground, finding that LGBT status is only protected as gender discrimination insofar as it constitutes treating individuals differently because they are not conforming to traditional gender roles.

Those supporting LGBT rights may not approve of the approach in the last category, because it does not state that they are protected because of their status. Those who oppose LGBT rights oppose the second and third categories because they view them as illegitimate judge-made expansions of Title VII.

The U.S. Supreme Court may have to settle the Circuit split and provide a consistent approach. Here are the recent developments.

Eleventh Circuit. In March 2017, in *Evans v. Georgia Regional Hospital*, the Eleventh Circuit issued the first decision on this issue. This case examined the claim of a lesbian former employee who brought suit claiming sexual orientation and gender non-conformity discrimination in violation of Title VII. The court ruled that her gender non-conformity claim, which was based on the argument that she was discriminated against because she did not conform to stereotypes of her gender, may be a viable claim of gender discrimination, and sent the case back for a trial. But the court upheld its prior precedent that LGBT individuals are not protected against discrimination under Title VII.

Second Circuit. Later in March 2017, in *Christiansen v. OmnicomGroup, Inc.*, the Second Circuit followed the Eleventh Circuit's holding in *Evans v. Georgia Regional Hospital*. The plaintiff, Christiansen, was an HIV-positive openly gay man who alleged that, during his employment at an advertising agency, he was subjected to a pattern of harassment by his supervisor in the form of suggestive images and inappropriate remarks that referred to his effeminacy, sexual orientation, and HIV status. The trial court dismissed the case, holding

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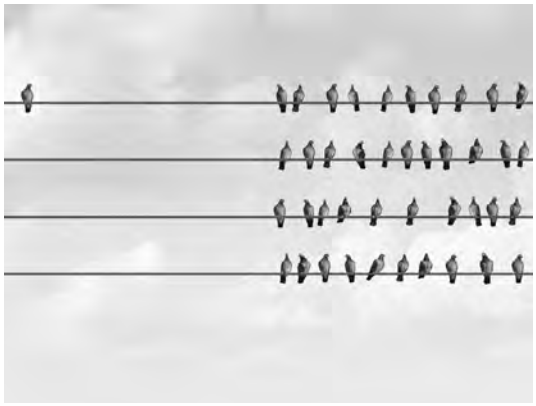
that the claims alleged sexual orientation discrimination which under Second Circuit precedent is not cognizable sex discrimination under Title VII.

On appeal, the Second Circuit stopped short of finding that sexual orientation discrimination is prohibited by Title VII. But, like the Eleventh Circuit, the court held that Christiansen adequately alleged discrimination on the basis of gender stereotyping, warranting a trial. In a concurring opinion, Chief Judge Katzmann argued that the Second Circuit should revisit its prior decisions that sexual orientation claims are not cognizable as sex discrimination under Title VII.

In May 2017, another panel of the Second Circuit took Judge Katzmann's suggestion. In *Zarda v. Altitude Express Inc.*, the plaintiff argued that he was fired because he was gay. The trial court dismissed the case, which was affirmed, but then the Second Circuit agreed to hear the case *en banc* and revisit its prior rulings.



Seventh Circuit. In April 2017, the Seventh Circuit, in a rare *en banc* decision, in *Hively v. Ivy Tech Community College*, was the first, and so far the only, federal appellate court to rule that discrimination on the basis of sexual orientation is sex discrimination prohibited by Title VII. This decision expands LGBT rights to full protected status, making LGBT status equal to race, gender, religion, and national origin.

The plaintiff, Hively, was a part-time adjunct professor who was openly lesbian. She applied for and was denied several full-time positions, and her contract was not renewed. She sued claiming she was discriminated against based on her sexual orientation. The trial court dismissed her claim on the ground that sexual orientation is not a protected category under Title VII. In August 2016, a three-judge panel of the Seventh Circuit affirmed, stating it was bound by precedent.

Hively's petition for an *en banc* hearing was granted, and the entire Seventh Circuit bench overturned the panel decision. The full court concluded that adverse employment actions on the basis of sexual orientation were a subset of actions taken because of sex, and therefore constituted sex discrimination. The court reasoned that it is no different for an employer to discriminate against a female employee for having a female partner than for dressing or speaking differently from other female employees, which is cognizable sex discrimination under Title VII. The court also reviewed U.S. Supreme Court opinions relating to sexual orientation over the last 20 years and noted a gradual extension of protections under the U.S. Constitution. The court concluded that, in light of recent U.S. Supreme Court decisions and "common-sense reality," it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.

Fourth Circuit. In other developments having implications for LGBT employees, in particular transgendered employees, last year the U.S. Supreme Court remanded a case involving a transgendered student's right to use the restroom of his gender identity, in *GG v. Gloucester County School Board*. The U.S. Supreme Court was expected to hear the case this past Term, but the Trump administration reversed an Obama administration policy that was central to the Fourth Circuit's prior ruling, so the Supreme Court remanded the case to the Fourth Circuit for a new opinion. Although the case involves Title IX of the Civil Rights Act, a ruling could impact the meaning of "sex discrimination" under Title VII.

The Trump administration has also been weighing in on this issue in other ways. Trump's appointment of Associate Supreme Court Justice Neil Gorsuch will likely impact this issue when it comes before the Court. The Trump administration has taken steps to oppose the

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expansion of LGBT rights. Trump tweeted that he opposes transgender individuals serving in the military. His Justice Department also filed a brief in the pending Second Circuit case arguing that Title VII does not protect sexual orientation discrimination, and that any efforts to amend the law should be directed to Congress.

In light of the unsettled state of the law in this area, employers should review their anti-discrimination and anti-harassment policies for compliance with federal, state, and local laws in the jurisdictions where they have employees. Employers should also keep in mind that the EEOC considers discrimination based on sexual orientation and gender identity to be forms of sex discrimination. Many employers choose to include sexual orientation and gender identity as categories protected under company policy, even if not protected by law.

Sonja L. Lengnick and Ryan D. Bohannon

Michigan Employer Has the Right to Enforce Non-Competition Agreements Nationwide

Michigan permits employers to enter into reasonable non-competition agreements with their employees, and as a matter of public policy, Michigan has a strong interest in applying its law to its residents' contractual agreements. But some states — most prominently California — severely limit the availability of non-competition agreements. And even with a choice-of-law provision, out-of-state courts will often refuse to enforce non-competition agreements on public policy grounds. This subjects Michigan-based employers with nationwide operations to considerable risk when former employees choose to engage in competitive activity in these states.

The U.S. Court of Appeals for the Sixth Circuit, however, has recently mitigated that risk. In *Stone Surgical, LLC v. Stryker Corp.*, the court held that while an employer-unfriendly state (Louisiana) had a strong interest in enforcing its rule against non-competition agreements, that interest was not materially greater than Michigan's contrary interest in protecting Michigan companies from unfair competition. It thus upheld the Michigan choice-of-law agreement, and affirmed a judgment against the Louisiana employee for violating his non-competition agreement.

The *Stone Surgical* decision provides a roadmap for Michigan-based multi-state employers in drafting similar choice-of-law provisions. Stryker — a Michigan medical device manufacturer — entered into a non-competition agreement with a sales representative in its Louisiana sales territories. The agreement contained a clause stating that any dispute had to be brought in a Michigan state or federal court, and a provision that Michigan law would govern. Notwithstanding the agreement, the sales representative left to join a competitor and argued that Louisiana law should apply, notwithstanding the choice-of-law provision, thereby invalidating the non-competition agreement. After a jury verdict in Stryker's favor, the losing parties appealed.

On appeal, the primary issue was whether Louisiana law (which would invalidate the non-competition agreement) or Michigan law (which would enforce it) should control the analysis. The Sixth Circuit chose Michigan law. Michigan applies the *Restatement (Second) of Conflict of Laws* § 187(2)(b) to choice-of-law issues when the parties have a choice-of-law provision in their contract. That, in turn, states the choice-of-law provision controls unless —

> application of the law of the chosen state [Michigan] would be contrary to a fundamental policy of a state [Louisiana] which has a materially greater interest than the chosen state in the determination of the particular issue and which,

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under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Turning to this provision, the Sixth Circuit sought to determine whether Louisiana or Michigan law would apply in the absence of a choice-of-law agreement — that is, which state had the "most significant relationship to the transaction and the parties" with respect to the issue in question? The court found that, on balance, Louisiana had the greater interest because:

- It was unclear whether the contracting took place in Michigan or Louisiana;
- There was little evidence of where the non-competition agreement was negotiated;
- The "place of performance" was Louisiana, since the non-competition agreement required the sales representative to refrain from performing in that state;
- The location of the subject matter of the contract was Louisiana, as it described what the employee could and could not do in Louisiana if he left Stryker; and
- The domiciles of the parties did not favor either party.

The court noted, however, that Louisiana's greater interest was not the end of the analysis. To disregard the choice-of-law provision, Louisiana's interest in the subject matter had to be "materially greater" than Michigan's — and the court held it was not. Michigan had its own interests: Stryker was a Michigan corporation, with its headquarters and management located in Michigan. Michigan has a strong interest in protecting its businesses from unfair competition. And Stryker suffered economic loss from the breach of the non-competition agreement, "something Michigan surely has an interest in protecting" a Michigan company from. The court thus upheld the Michigan choice-of-law and the enforceability of Stryker's non-competition agreement.

The *Stryker* decision should serve as a powerful weapon in a Michigan employer's arsenal, as any Michigan-based employer should be able to cite the same factors in favor of upholding a Michigan choice-of-law provision. But there are caveats that a Michigan employer should heed. First, an employer can undertake steps to make sure that the *Restatement* factors favor Michigan — including being clear that an agreement does not become effective until signed in Michigan by the company's representative, or physically engaging in negotiations in Michigan. Second, a Michigan employer who has wind that an employee is about to violate his or her non-competition agreement should try to be the first to file a lawsuit, since *Stryker* is not binding on other federal circuits or on state courts, which will likely weigh their own states' interests as greater than Michigan's. Third, and perhaps most importantly, employers should insert a strong, mandatory forum selection clause that forces an employee to bring suit only in a Michigan court.

Thomas J. Davis

NLRB Interregnum

At this writing, the National Labor Relations Board is in a hiatus between the Obama Board and the Trump Board, and the U.S. Senate, and many bureaucrats at the NLRB too, are wrapping up their summer recess.

When President Trump came into office last January, the five-member Board had two member vacancies, both for Republicans; it had two sitting Democratic members, Mark Gaston Pierce and Lauren McFerran; and it had one Republican member, Philip Miscimarra. Trump quickly installed Miscimarra as Chairman, but took a surprisingly long time to identify and nominate two new Republican members.

In the meantime, the Board retained its Democratic majority and kept issuing pro-union decisions, typically by a 2-1 vote with Miscimarra dissenting.

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Just before the summer recess, the U.S. Senate confirmed one of the two Republican nominees, Marvin Kaplan (creating a 2-2 balance), and the Senate is expected to confirm the second Republican nominee, William Emanuel, shortly after the recess ends. The Board will then have a 3-2 Republican majority for the first time since early in the Obama administration.

That particular group of five members will not last long, as Miscimarra recently announced that, for personal reasons, he will not accept another appointment when his term expires in December 2017.

In addition, the term of the Board's Democratic General Counsel, Richard Griffin, will be expiring in November 2017. There is no doubt that President Trump will appoint a management-side attorney to fill this often under-estimated position, which serves as the gateway to the Board's consideration of cases presenting issues that the General Counsel would like to have addressed and potentially changed. Griffin has been aggressively pro-union and extremely active in raising the NLRB's profile — as just one example, he has turned the NLRB into a national sanitizer of workplace rules that have been customary in American industry for generations.

The pattern established by the Obama Board over the past eight years of regularly reversing longstanding NLRB precedents and taking new and radical approaches to long settled issues of NLRB law, virtually always favoring unions and disfavoring business interests, has been extensively catalogued. The intense fly-specking of work rules and social media policies has been a genuine annoyance for the business community. But the pieces are now in place, politically, for course correction. It will nevertheless take time for appropriate cases to reach the Board for decision-making. We hope the Trump Board will address and reverse such issues as:

- Quickie/ambush elections, micro-units, and restrictions on pre-election hearings.
- Employee conduct, social media, and civility rules.
- The new legal standard for joint employer liability.
- The new duty of employers to continue withholding dues after a collective bargaining agreement expires.
- The new duty to continue health insurance for striking employees.
- The new limitations on an employer's ability to use permanent strike replacements.
- The new duty to bargain with a union over employee discipline before a collective bargaining agreement is settled.
- Increased union representation rights for faculty (and students?) at educational institutions.

Some of the radical decisions by the Obama Board of the last few years are now working their way through the U.S. Courts of Appeals — the federal courts responsible for reviewing actions by the NLRB. The outcomes of such appeals have generally been far more reasonable, realistic, and considerate of the business perspective. Here are some recent examples.

Joint Employer Liability. In *NLRB v. CNN America, Inc.*, the U.S. Court of Appeals for the District of Columbia Circuit refused to enforce the Board's finding that CNN was a joint employer with a contractor, because the Board had "applied a standard for determining whether companies are joint employers that appears to be inconsistent with its precedents, without addressing those precedents or explaining why they do not govern." The D.C. Circuit also has on its docket, for later decision, the Board's 2015 decision in *Browning-Ferris Industries of California*, in which the Board overruled, with much fanfare, its decades-old test for joint employer status.

Workplace Civility Policies. In *T-Mobile USA and Metro PCS Communications*, the Fifth Circuit rejected the Board's ruling that a workplace conduct policy — which required employees to "maintain a positive work environment" and "demonstrate appropriate team work," and prohibited "failing to treat others with respect" — infringed employees' rights under the

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NLRA, concluding that a reasonable employee "would understand the rule to express a universally accepted guide for conduct in a responsible workplace."

Unprotected Concerted Activity. The Eighth Circuit rejected the Board's ruling that Jimmy John's acted illegally by firing employees who publicly posted bulletins stating that customers' sandwiches may have been prepared by sick employees, adding: "We hope your immune system is ready because you're about to take the sandwich test." The court found this publicity-generating "concerted" activity was disloyal and legally "unprotected" because it targeted the quality of Jimmy John's product and not its labor relations.

Property Rights v. Disruption Rights. In *Fred Meyer Stores v. NLRB*, the D.C. Circuit, reversing the Board, gave proper weight to a big-box retailer's property rights — and the union's contractual limitations — when the store had police remove union representatives who were intentionally disrupting business to enhance the union's bargaining position. The Board had found this antagonistic activity protected and the removal of the union representatives violative of the NLRA.

Theodore R. Opperwall

Recent Disability Accommodation Decisions

The past months have seen a number of accommodation decisions from the U.S. Courts of Appeals under the Americans with Disabilities Act (ADA).

Leave of Absence Not a Reasonable Accommodation for Temporary Employee. In *Punt v. Kelly Services and GE Controls Solutions*, the U.S. Court of Appeals for the Tenth Circuit held that a temporary employee diagnosed with breast cancer was not entitled to a leave of absence as a reasonable accommodation under the ADA. Kelly Services (a temporary staffing agency) assigned Punt to work at GE Controls Solutions as a receptionist, and her presence in its reception area was deemed to be an "essential function" of her position. After her diagnosis, Punt began missing work for medical appointments and other reasons. Punt then said that she would need a week off and additional undefined time off in the future for surgery and treatment. GE Controls Solutions asked Kelly Services to replace Punt because it needed someone who could fulfill the requirements of the receptionist position. Kelly replaced Punt and offered her other assignments, which she declined. Punt sued, claiming that Kelly Services and GE Controls Solutions had violated the ADA by failing to accommodate her by giving her the week off as well as the undefined future time off for medical treatment. Noting that physical attendance was an essential function of most jobs, the Tenth Circuit affirmed summary judgment for both Kelly Services and GE Controls Solutions, and held that Punt's request to miss a week of work and unknown days in the future was "not plausibly reasonable on its face." The court found that a reasonable accommodation is one that "presently or in the near future" will enable the employee to perform the essential functions of the job.

Working from Home Indefinitely Not a Reasonable Accommodation. In *Credeur v. State of Louisiana*, the U.S. Court of Appeals for the Fifth Circuit rejected Credeur's request for unlimited telecommuting as a reasonable accommodation. Credeur, a litigation attorney, sued her employer for allegedly failing to accommodate her after she experienced complications associated with a kidney transplant. After her kidney transplant, her employer allowed her to work from home for several months with the goal of reintegrating her into the office. After many months of telecommuting, the employer denied Credeur's continuing request to work from home and required her to work three to four hours per day in the office. The Fifth Circuit held that Credeur was not a "qualified" individual within the meaning of the ADA because she could not perform the essential functions of a litigation attorney with or

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without reasonable accommodation. The court noted that there is general consensus among the courts that regular work-site attendance is an essential function of most jobs, and it deferred to the employer's written evidence that attendance at the office and in court were essential functions of Credeur's job.

Leniency for Disability-Related Misconduct Not a Reasonable Accommodation. In *DeWitt v. Southwestern Bell Telephone Co.*, the U.S. Court of Appeals for the Tenth Circuit rejected DeWitt's requested accommodation of retroactive leniency for misconduct and held it was not reasonable within the meaning of the ADA. DeWitt was an insulin-dependent diabetic who worked as a customer service representative. Southwestern Bell allowed her to take breaks as needed to eat or drink to maintain proper blood sugar levels and also granted her intermittent leave for diabetes-related health. DeWitt was terminated for hanging up on two customers, a violation of her employer's code of business conduct and her "last chance" agreement for other performance issues. DeWitt attributed her conduct to having suffered a severe drop in her blood sugar, which caused her to experience disorientation, confusion, and lethargy, and claimed that Southwestern Bell failed to accommodate her by not excusing the dropped calls that were caused by her disability. The Tenth Circuit disagreed and held that the ADA does not require employers to accommodate a disability by excusing past misconduct, even when that misconduct is caused by a disability. The court cited the EEOC's ADA Enforcement Guidance which states that reasonable accommodations are "always prospective."

Failure to Properly Engage in Interactive Process Results in Dismissal of Case. In *Brown v. Milwaukee Board of School Directors*, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of the school district where the employee failed to engage in the interactive process to determine a possible accommodation. Brown was an assistant school principal who seriously injured her knee while restraining a student. When she returned to work following surgery, she submitted medical documentation stating she could not be in the vicinity of potentially unruly students. Since all students have the potential to be unruly, the school district understood that restriction to bar all contact with students, which was an essential function of her job. The school district repeatedly communicated its understanding to Brown over a lengthy period as it sought to accommodate her by finding a new position. When Brown's leave of absence expired before a suitable available position was found, the school district terminated her. Brown sued, claiming her disability never prevented her interaction with all students and that the school district failed to accommodate her and then unlawfully terminated her. The Seventh Circuit found that, to the extent Brown claimed her restrictions were less severe than what the school believed, she failed to uphold her end of the interactive process, and accordingly the school district could not be held liable for failing to put her in a position that it believed would exceed those restrictions. The court also concluded that an available position that did not require proximity to students was not a reasonable accommodation because it would have required a promotion for Brown. Since Brown was not the most qualified candidate, the school district was not obligated to give her that position.

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No Protected Disability under ADA Requiring Accommodation Despite Cancer Diagnosis. In *Alston v. Park Pleasant, Inc.*, the U.S. Court of Appeals for the Third Circuit affirmed summary judgment in favor of the employer. Alston was terminated for performance reasons shortly after she was diagnosed with cancer. The parties did not dispute that Alston had been diagnosed with DCIS, a form of breast cancer, but the court found that Alston did not produce sufficient evidence as to whether her DCIS qualified as a disability under the ADA. The court noted that cancer can be, and generally will be, a qualifying disability under the ADA, but emphasized that the determination of whether an impairment substantially limits a major life activity requires an individualized assessment. Here, Alston never claimed that her DCIS limited any substantial life activity, such as immune system function or normal cell growth. At her deposition, Alston testified that she was not substantially limited in any major life activity. Instead, she simply stated that she was an individual who had been diagnosed with cancer in remission and, on that basis, claimed that she qualified as an individual with a disability. But because she offered no evidence as to any limits on a major life activity, the court found that she failed to establish an essential element of her *prima facie* case.

Shannon V. Loverich

Sixth Circuit Panel Misfires Twice on FLSA Collective Action Claims

In its 2016 decision in *Monroe v. FTS USA, LLC*, the U.S. Court of Appeals for the Sixth Circuit had affirmed a troubling U.S. District Court award against a Tennessee employer of cable technicians that allegedly violated overtime obligations under the Fair Labor Standards Act (FLSA). However, on the employer's petition for *certiorari*, the U.S. Supreme Court issued a "grant/vacated/remand" order (GVR) in light of its intervening 2016 decision in *Tyson Foods, Inc. v. Bouaphakeo*, which addressed similar FLSA collective action principles. The Supreme Court sent the *Monroe* case back to the Sixth Circuit to conform its decision with *Tyson Foods*.

In June 2017, the Sixth Circuit reaffirmed its 2016 holding, paying scant attention to *Tyson Foods*. Unless the case is voided *en banc* by the entire Sixth Circuit bench, or reversed by the Supreme Court (as it should be), it will present a dangerous precedent for employers in Michigan, Ohio, Kentucky, and Tennessee who try to resist across-the-board collective actions and damages claims brought under the FLSA.

In the *Monroe* case, the plaintiff cable technicians alleged a corporate-wide "time-shaving" policy, and there was some evidence supporting this claim. They were paid on a "piece-rate" basis. They asserted that management had falsified time sheets; that management had instructed employees to under-report hours; and that "incentives" — such as rewarding "productivity" — were designed to motivate employees to under-report their time worked. Productivity involved completing the work quickly. But offering such an incentive would not be unlawful absent connecting evidence that the plaintiffs had apparently not presented in the *Monroe* case.

The case was tried as if only one overall theory was being advanced: According to the trial court, the employer's policy to shave time to avoid overtime — regardless of the method used — was said to impact all employees similarly, thus making certification of one class appropriate. A supposedly representative sample of plaintiffs' witnesses testified — 17 out of approximately 300 class members. The trial court found the employer liable, and damages were assessed by the court, based on the testimony of these supposedly representative 17 witnesses. The court computed an average for each

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plaintiff who testified, and then applied that average to the rest of the class. This average of an average was used despite the fact that weekly unpaid overtime situations for the 17 witnesses varied from 8 to 24 hours. The jury was given no role in this calculation.

On remand following the Supreme Court's GVR, the Sixth Circuit panel again affirmed (by a 2-1 vote), finding *Tyson Foods* inapplicable, despite the Supreme Court's rather pointed suggestion that it should be applicable. The Sixth Circuit panel essentially reprinted its original decision, barely mentioning *Tyson Foods*. If the case had involved a properly defined class, or subclasses, affirmance of certification would not have been surprising, and likely would not have generated a blistering dissent from Judge Jeffrey Sutton.

As the dissenting judge forcefully pointed out, the case should at least have involved certification of subclasses so that during trial on liability, the jury could determine whether testimony was representative of what had been alleged. The trial court's approach, on the other hand, conflated dissimilar fact settings into one supposedly representative and uniform scenario, allowing proofs pertaining to one group of employees to apply to a dissimilar group. For instance, there was no way to check whether jurors had found any one of the alleged time-shaving approaches to have impacted any group, let alone the entire class, in a similar way. The trial court's approach to damages likely violated the Seventh Amendment's requirement that a jury, not the trial judge, assess damages.

Judge Sutton's dissent did not challenge the notion that representative proofs could — if properly aligned with a viable theory of a case — support class certification, as well as damages calculations by a jury. Instead, he focused on the disconnect between who was representing whom on account of what violative conduct, and the fact that the jury had virtually no input into the damages award.

The U.S. Supreme Court's decision in *Tyson Foods* did in fact warrant consideration, not the dismissive label of "dictum" given it by the Sixth Circuit panel's majority. The Supreme Court in *Tyson Foods* had approved a method for calculating damages based on statistical showings, as opposed to requiring individual testimony from each claimant. The time required for "donning and doffing" at issue in *Tyson Foods* could be calculated with a measure of reliability as an average applicable to all employees required to wear work-related gear, who had not been paid for the time to put the gear on and to later take it off. The underlying liability issue and resulting calculation of damages could then be deemed representative for all class members. In approving this approach, the Supreme Court stressed the reliability of the data in this uniform factual setting — vastly different from the facts in *Monroe* where each employee's experience was different. Even as to donning and doffing, the Supreme Court cautioned that representative testimony, to establish class-wide liability, must involve evidence that each class member could have relied on to establish liability in his or her own claim.

The Sixth Circuit's panel decision in *Monroe* warrants further review, and a petition for rehearing *en banc* was filed on July 3, 2017. If *en banc* review fails, a petition for *certiorari* would likely be granted in light of the split between the Sixth Circuit's decision in *Monroe* and the Seventh Circuit's 2013 decision in *Espenscheid v. DirectSat USA, LLC*. In considering the petition, the Supreme Court may well take note of the cavalier treatment the Sixth Circuit panel's majority gave the Supreme Court's GVR.

Thomas G. Kienbaum

Celebrating Our Twentieth Anniversary

We have two reasons to celebrate this summer, the 20th anniversary of the founding of our firm, and that Chambers USA has again this year, as in prior years, rated our firm as the top labor and employment law practice based in Michigan.

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