Knoxville Chapter of

Tennessee Society of Certified Public Accountants

2012 Employment Law Update

November 13, 2012

Edward G. Phillips
KRAMER RAYSON LLP
800 South Gay Street
First Tennessee Plaza, Suite 2500
Knoxville, Tennessee 37929-2500
Telephone: (865)525-5134 Ext. 125
Fax: (865) 522-5723
E-mail: ephillips@kramer-rayson.com
www.kramer-rayson.com

2012 EMPLOYMENT LAW UPDATE

I. SUPREME COURT UPDATE

A. 2011 – 2012 Supreme Court Term

DISABILITY DISCRIMINATION

High Court confirms the ministerial exception and defines the scope.

***Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 696 (U.S. 2012)**

Religious-affiliated employers have enjoyed an "exception" to the federal and state employment discrimination laws where the plaintiff is found to be a "ministerial employee." This exception is premised on the First Amendment guarantee of religious freedom. The ministerial exception covers: (1) ministers and clergy whose duties are "ministerial," (2) secular employees whose *primary duties* consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship. To be considered ministerial these lay positions must be "important to the spiritual and pastoral missions of the church." If an employee qualifies as ministerial, the religious institution has a complete defense to employment claims whether statutory, contractual, or based upon common law because the government cannot interfere with the church's relationship with its ministers. While these legal principles have been developed by multiple circuit courts, the Supreme Court has never affirmed that a Constitutional ministerial exception exists and, if so, the scope of the exception – until now.

Hosanna-Tabor Evangelical Lutheran Church operates a "K through 8" school. The faculty at Hosanna-Tabor are classified as either "lay" teachers or "called" teachers. "Lay" teachers are hired by the Board of Education for one-year renewable terms of employment, while "called" teachers are hired by voting members of the Hosanna-Tabor Church congregation and cannot be summarily dismissed without cause. Once a teacher is selected by the congregation as a "called" teacher, that teacher receives the title of "commissioned minister."

The employee, Cheryl Perich, was initially hired as a "lay" teacher in 1999, and after completing the required classes, she was hired as a "called" teacher in 2000, thereby becoming a "commissioned minister." In addition to teaching secular subjects, Perich taught a religion class, led her students in daily prayer and devotions, took them to a weekly school-wide chapel, and led the chapel service twice a year.

Perich became ill in the summer of 2004, and took disability leave for the 2004-2005 school year. In late 2004, she informed the school principal that she had been diagnosed with narcolepsy, but had been assured by her doctor that she could soon return to the classroom once her medication had been regulated. The congregation did not feel that she could teach effectively

with her condition. They voted to offer Perich a "peaceful release" from her call supported by continuing to pay her health insurance. Perich refused to resign and produced a doctor's note stating that she could return to work. On February 22, 2005, Perich presented herself at the school and refused to leave until she obtained a written confirmation that she had offered to return to work. She also threatened legal action. The congregation voted to rescind Perich's call on April 10. Perich sued Hosanna-Tabor for discrimination and retaliation in violation of the ADA.

The district court granted summary judgment in favor of Hosanna-Tabor, refusing to inquire into the claims of retaliation because, as a "commissioned minister," the plaintiff fell within the "ministerial exception." The Sixth Circuit reversed. It recognized the existence of a ministerial exception rooted in the First Amendment, but concluded that Perich did not qualify as a "minister" under the exception, primarily because her religious duties only took a small fraction of the work day.

In a case of first impression for the Supreme Court, it held that the freedom of a religious organization to select its ministers gives it immunity in an employment discrimination action regarding its ministers. The High Court held that there is a ministerial exception grounded in the Religion Clauses of the First Amendment. "Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

The Court found that the exception applied to Perich because Hosanna-Tabor held her out as a minister, Perich held herself out as such, her title reflected a significant degree of religious training, and her job duties reflected a role in conveying the Church's messages and carrying out its mission. "Hosanna-Tabor expressly charged her with 'leading others toward Christian maturity' and 'teaching faithfully the Word of God …,'" said the Court.

Finally, the Court noted that the Sixth Circuit committed three errors in finding the exception did not apply to Perich. First, the Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. Second, it gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. Third, the Sixth Circuit placed too much emphasis on the amount of time Perich spent performing secular duties versus religious duties. In broad language, the majority stated, "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."

FAMILY MEDICAL LEAVE ACT

States have sovereign immunity from suits for damages under the self-care (a/k/a medical leave) provisions of the FMLA.

Coleman v. Court of Appeals, 132 S. Ct. 1327 (U.S. 2012)

In *Coleman v. Court of Appeals,* a divided Supreme Court (5-4) held that states retain sovereign immunity and cannot be subjected to suits for damages by employees alleging

violations of the "self-care," (i.e. medical leave) provisions of the Family and Medical Leave Act of 1993 ("FMLA" or "Act"). Under 29 U.S.C. §2612(a)(1)(D) an employee may take leave under the FMLA for "the employee's own serious health condition when the condition interferes with the employee's ability to perform at work." In the federal system, States, as sovereigns, are immune from suits for damages, unless they elect to waive that defense or Congress abrogates the States' immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment. In ruling with every Court of Appeals to have addressed the issue, the Court held that suits against states under the FMLA medical leave provisions were barred by the States' immunity as sovereigns in the federal system.

Daniel Coleman, the plaintiff, was employed by the Court of Appeals of the State of Maryland. When Coleman requested sick leave, he was informed he would be terminated if he did not resign. Coleman then sued the state court in the United States District Court for the District of Maryland alleging that his employer violated the FMLA by failing to provide him with self-care leave.

The district court dismissed the suit on the basis that the Maryland Court of Appeals, as an entity of a sovereign State, was immune from the suit for damages under the medical leave provision of the Act. The Fourth Circuit affirmed.

Justice Kennedy, writing for the majority, held that there are three requirements for Congress to properly abrogate state immunity. First, Congress must "make its intention to abrogate unmistakably clear in the language of the statute." This, Justice Kennedy conceded, Congress had done. Second, Congress "must tailor" legislation "to remedy or prevent" conduct transgressing the *Fourteenth Amendment's* substantive provisions. And third, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Justice Kennedy acknowledged that Congress had properly abrogated state immunity in the *family leave* provisions of the FMLA. Congress "relied upon evidence of a well-documented pattern of sex-based discrimination in family-leave policies. States had facially discriminatory leave policies that granted longer periods of leave to women than to men." States had also administered facially neutral family-leave policies in gender-biased ways based on a "pervasive sex-role stereotype that caring for family members is women's work." *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003).

The same, said the Court, could not be said for requiring the states to give all employees the opportunity to take medical leave. The Congressional concern that supported the self-care leave provision was "discrimination based on illness, not sex." There is no right under the *Fourteenth Amendment* to be free from discrimination on the basis of illness. And any benefit to women by allowing them to take leave for pregnancy-related illnesses was not "congruent and proportional to the remedy of universal medical leave." The plaintiff's contention that the provision helps "single parents retain their jobs" when they become ill and "most single parents are women," missed the mark. "The scope of the [self-care provision is] out of proportion to its supposed remedial or preventive objectives."

The dissent, written by Justice Ginsburg, and joined by Justices Breyer, Kagan, and Sotomayor, stated that the FMLA "is directed at sex discrimination. . . . [T]he FMLA was originally envisioned as a way to guarantee — without singling out women or pregnancy — that pregnant women would not lose their jobs when they gave birth. The self-care provision achieves

that aim." The dissent felt "[i]t would make scant sense to provide job-protected leave for a woman to care for a newborn, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby."

FAIR LABOR STANDARDS ACT

Courts will not defer to the Department of Labor's interpretation where it has acquiesced in conduct contrary to its current interpretation.

***Christopher v. SmithKline Beecham Corp.*, No. 11-204, 2012 U.S. LEXIS 4657 (June 18, 2012).**

Employers must comply with the minimum wage and maximum hours requirements of the Fair Labor Standards Act ("FLSA" or the "Act"), but the Act's requirements do not apply to workers employed "in the capacity of outside salesman." In *Christopher*, the United States Supreme Court considered "whether the term 'outside salesman,' as defined by Department of Labor ("DOL") regulations, encompasses pharmaceutical sales representatives whose primary duty is to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases."

Pharmaceutical companies use a process called "detailing" to promote prescription drugs. During that process, "detailers" or "pharmaceutical sales representatives" attempt to persuade physicians to prescribe certain products. In 2003, SmithKline Beecham hired Michael Christopher and Frank Buchanan as pharmaceutical sales representatives. For the next four years, Christopher and Buchanan spent forty hours per week calling on physicians and ten hours per week attending events, reviewing product information, returning phone calls, responding to e-mails, and performing other miscellaneous tasks. Christopher and Buchanan were not required to report their hours, were subject to minimal supervision, and earned over $70,000.00 annually. When they worked more than forty hours in a given week, Christopher and Buchanan did not receive time-and-a-half wages. They sued SmithKline Beecham, alleging they were misclassified as outside salesmen in violation of the FLSA.

Judge Alito, writing for the 5-4 conservative majority, analyzed the Act and DOL's relevant regulations. The court noted, Congress did not define "outside salesman," leaving that task to the DOL. The "general regulation" provides that "an outside salesman is any employee whose primary duty is making any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Further, the "promotion-work regulation" states that "[p]romotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work." The Court also relied on reports issued in connection with the DOL's promulgation of regulations, noting that "the DOL has made it clear that '[e]xempt status should not depend' on technicalities."

Instead of going through the regulatory process to alert employers that the DOL believed the pharmaceutical representatives were not "outside salesmen," the DOL announced its position in *amicus* briefs, the first one of which was filed in the Second Circuit in 2009, followed by a number of other such briefs including in *Christopher*. This end run around the regulatory process was ultimately slapped down by the Supreme Court.

First, the Court addressed the deference owed to the DOL's interpretation. The DOL's *amicus* brief argued that a detailer is not an "outside salesman," asserting that "[a]n employee does not make a 'sale' . . . unless he *actually transfers title* to the property at issue." (Emphasis added.) The Court noted that "the statute and regulations certainly do not provide clear notice of this", and explained, that "the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully." Stated differently, "[*o*]*ther than acquiescence*, no explanation for the DOL's inaction is plausible." (Emphasis added.) The Court thus concluded that deferring to the agency's interpretation would "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" In other words, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." The DOL's interpretation received "a measure of deference proportional to the 'thoroughness evident in its consideration . . . .'"

Second, the Court found the DOL's interpretation unpersuasive, reasoning that it "plainly lacks the hallmarks of thorough consideration." Again, the agency argued that "[a]n employee does not make a 'sale' . . . unless he actually transfers title to the property at issue." The Court disagreed, concluding that "[t]his . . . interpretation is flatly inconsistent with the FLSA" because the FLSA "defines 'sale' to mean, *inter alia*, a 'consignment for sale,'" which "does not involve the transfer of title." The Court also rejected the DOL's contention that a "consignment for sale" may *eventually* result in the transfer of title because "[m]uch the same may be said about a physician's nonbinding commitment to prescribe . . . ." Further, the Court noted that "the DOL's conclusion that pharmaceutical detailers perform only nonexempt promotion work is only as strong as the reasoning underlying its conclusion that those employees do not make sales." In short, the Court ignored the Department of Labor's interpretation.

Finally, the Court turned to "traditional tools of interpretation" to determine whether Christopher and Buchanan qualified as outside salesmen. The FLSA exempts persons employed "*in the capacity* of outside salesman." The Court noted that "the statute's emphasis on the 'capacity' of the employee counsels in favor of a functional, rather than a formal, inquiry . . . ." Further, the Court pointed to several words in the statutory definition of "sale"—"includes," "any," and "other disposition"—that show "Congress' intent to define 'sale' in a broad manner." The Court thus concluded that "the catchall phrase 'other disposition' is most reasonably interpreted as including those arrangements that are tantamount, in a particular industry, to a paradigmatic sale of a commodity" and held that "it follows that petitioners made sales for purposes of the FLSA and therefore are exempt outside salesmen within the meaning of the DOL's regulations."

B. 2012-2013 Supreme Court Term

Does University of Texas' use of race as a positive factor in admissions decisions violate the Equal Protection Clause of Fourteenth Amendment?

***Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), *cert. granted by Fisher v. Univ. of Tex.*, 132 S. Ct. 1536 (U.S. 2012).**

Fisher v. University of Texas is a case currently before the United States Supreme Court concerning the affirmative action admissions policy of the University of Texas at Austin. The case, brought by undergraduate Abigail Fisher in 2008, asks that the court either declare the admissions policy of the University inconsistent with, or entirely overrule *Grutter v. Bollinger*, a 2003 case in which the Supreme Court ruled that race could play a limited role without a complex formula in the admissions policies of universities.

The United States District Court heard *Fisher v. University of Texas* in 2009 and upheld the legality of the University's admission policy. The case was appealed to a three-judge panel from the Fifth Circuit which also ruled in the University's favor. The Supreme Court agreed on February 21, 2012, to hear the case. Justice Elena Kagan has recused herself from the case.

This past week, the United States Supreme Court heard *Fisher v. University of Texas*. On the surface, the case is about the college admissions process as it pertains to one girl at one university, but when the court rules, it will undoubtedly have a much wider impact on the role of race in college admissions across the country.

Abigail Fisher sued the University of Texas after being denied admission as an undergraduate to the state's flagship public university on the grounds that consideration of race in college admissions violates the *Equal Protection Clause* of the *Fourteenth Amendment*. Fisher asserted that her rejection from the college was because she is white, and that less qualified students of color were admitted in her place. Her case cites her extracurricular activities – soccer and cello – and that her parents had attended the school as factors that should have set her above other applicants.

In response, the University of Texas asserted that Fisher was not eligible for admission under academic guidelines that had nothing to do with race. Texan universities use a program called The Top Ten Percent Plan to determine admission to their public universities. The top ten percent – in academics and test scores – of each graduating high school class in the state are automatically admitted to the public universities, should they apply. The University contends that because many school districts in the state remain *de facto* segregated, this policy allows for greater diversity in university classrooms. The remaining open spots in freshmen classes are then determined based on other non-academic merits, including racial diversity. Since Fisher was not automatically eligible for admission based on her grades and test scores under the Top Ten Percent Plan, other admissions factors were taken into consideration for her application.

The United States District Court ruled in favor of the University in this case in 2009, as did the Fifth Circuit Court of Appeals in 2011. As a result, Fisher has brought the case to the United States Supreme Court. Both courts held that there was no meaningful distinction between *Fisher* and *Grutter.*

The Supreme Court's decision will clarify the role that race is allowed to play in college admissions. The last time the court heard a case on affirmative action was in 2003, in *Grutter*. The court ruled then that the University of Michigan's law school could take "soft variables" like

race into account in admissions, but that using quotas for determining the racial makeup of an entering class was unconstitutional. The Court upheld "the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body" as not violating the *Equal Protection Clause*.

When the case was presented before the Court on Oct. 10, Chief Justices John Roberts, Samuel Alito and Antonin Scalia questioned the methodology of the University's consideration of race, specifically as its policies relate to creating a "critical mass" of minority students on campus, using the framework from the *Grutter* ruling. Justices Ruth Ginsberg and Sonia Sotomayor questioned whether Fisher even had a case, given that she had already graduated from college – Louisiana State University – and that she did not meet the threshold of academic eligibility when she had originally applied to UT Austin. Fisher's case also only claims the application fee of $100 as monetary damages from not being admitted to the University. Justice Elena Kagan recused herself from the case, having worked on it in lower courts when she was Solicitor General.

If the Supreme Court rules in favor of Fisher and overturns *Grutter*, it is likely that affirmative action in public universities will be ended. The court is expected to rule on the case next June. The Court's rationale would also impact affirmative action plans required by the federal government for government contractors and recipients of federal grants.

Does the "supervisor" liability rule established by *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* (i) apply to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or (ii) apply only to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim?

***Vance v. Ball State Univ.*, 646 F.3d 461 (7th Cir. Ind. 2011), *cert. granted by Vance v. Ball State Univ.*, 2012 U.S. LEXIS 4685 (June 25, 2012).**

Plaintiff, Maetta Vance, was the only African-American employee at Ball State University working in the university's food service department. In 2005, Vance began filing complaints with the University of coworkers' offensive conduct, including the use of alleged racial epithets. In May 2006, Vance filed a complaint against her supervisor with the Equal Employment Opportunity Commission (EEOC) alleging that her supervisor made her work through breaks. In October 2006, Vance filed another EEOC complaint alleging that Ball State retaliated against her for filing a claim by diminishing her work duties, forcing her to work through breaks, denying her overtime hours and disciplining her unequally. After getting her right-to-sue letter, Vance filed various federal and state discrimination claims with the United States District Court for the Southern District of Indiana, including violations of Title VII. The district court dismissed all of Vance's claims on summary judgment and found that there was no basis for Ball State's liability on a hostile environment claim based on race, as it promptly investigated each complaint Ms. Vance filed, calibrating its response to the results of the investigation and the severity of the alleged conduct.

Vance appealed the district court's findings that she did not establish a basis for employer liability in the hostile work environment claim or put forth sufficient facts to support he retaliation claim against Ball State in violation of Title VII. On appeal, she argued that there were disputed facts regarding whether one of the alleged harassers, Mr. Davis, was in fact her "supervisor," thus making summary judgment inappropriate. The standard for employer liability is vastly different for supervisor harassment as opposed to co-worker harassment. Employers are "strictly liable" for harassment inflicted by supervisors, but can assert an affirmative defense when the harassment does not result in a tangible employment action (*citing Ellerth*, 524 U.S. 742, 756 (1998) and *Faragher*, 52 U.S. 775, 807-908 (1998)). If only coworkers were culpable for making a work environment hostile, the plaintiff must show that the employer has "been negligent either in discovering or remedying the harassment." *Id.*

The Seventh Circuit had previously held that a supervisor under Title VII is an individual whose "authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee."(*citing Hall v. Bodine Elec. Co.*, 276 F. 3d 345 (7th Cir. 2002). This conflicts with other circuits which have held that the "authority to direct an employee's daily activities establishes supervisory status under Title VII." The Seventh Circuit applied its standard for determining who is a supervisor under Title VII. The court rejected Vance's argument that Davis was a supervisor because he "had the authority to tell her what to do." The Seventh Circuit held that since Davis did not have direct authority to hire, fire, demote, transfer or discipline Vance, he was not her supervisor. Ball State was not liable for Davis' co-worker harassment because it investigated plaintiff's complaint against Davis (and others) and took proper and effect remedial action. The Supreme Court granted *certiorari* to decide this split in the circuits on the important question of who is a supervisor under Title VII.

Did the Third Circuit correctly hold -- in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits -- that Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA) authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement?

US Airways, Inc. v. McCutchen*, 663 F.3d 671 (3d Cir. Pa. 2011) *cert. granted with oral argument to be heard by the U.S. Supreme Court.

The Defendant, James McCutchen was seriously injured in an automobile accident. A benefit plan administered by a plan administrator for the Plaintiffs, US Airways, paid the Defendant $66,866 for his medical expenses. The Defendant then recovered $110,000 from third parties. US Airways, which had not sought to enforce its subrogation rights, then demanded reimbursement of the entire $66,866 it had paid under the benefit plan without allowance for Mr. McCutchen's legal costs (which reduced his net recovery to less than the amount US Airways demanded). US Airways sued Mr. McCutchen as the plan beneficiary for appropriate equitable relief pursuant to Employment Retirement Income Security Act (ERISA) § 502(a)(3), 29 U.S.C.S. § 1132(a)(3)(B). The United States District Court for the Western District of Pennsylvania ordered McCutchen to pay US Airways the $66,866 because under the plan description, a beneficiary was required to reimburse the plan for any amounts it paid out of any monies recovered from a third party.

McCutchen appealed this decision to the Third Circuit claiming that US Airways, as the plan administrator, would be unjustly enriched if it were now permitted to recover from him without any allowance for his attorneys' fees and expenses. The plain language in the benefit plan stated that the "beneficiary is required to reimburse the Plan for any amounts it has paid of any monies the beneficiary recovers from a third party." US Airways argued that "applying federal common law to override the benefit plan's controlling language" would be essentially "pioneering federal common law to apply limitations on an equitable claim." However, the Third Circuit vacated the district court's final judgment and concluded that, "in the absence of any indication in the language or structure of ERISA § 502(a)(3), 29 U.S.C.S. § 1132(a)(3), Congress intended to limit the equitable relief available under § 502(a)(3) through the application of equitable defenses and principles that were typically available in equity." This was contrary to opposite holdings and interpretations by the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits. The 3rd Circuit Court of Appeals relied on its interpretation of the Supreme Court's decision in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011) and stated that "the Supreme Court recently demonstrated in *CIGNA* the importance of the written benefit plan is not inviolable, but is subject – based upon equitable doctrines and principles – to modification and, indeed, even equitable reformation under ERISA § 502(a)(3)." This analysis by the Third Circuit allows a defendant to assert equitable defenses, such as unjust enrichment, on a plan administrator's equitable reimbursement claim despite contractual plain language to the contrary. The Supreme Court granted *certiorari* to settle this dispute between the Circuits.

II. SIXTH CIRCUIT UPDATE

DISABILITY DISCRIMINATION

Sixth Circuit, *en banc*, reverse outdated *Monette* "sole cause" burden of proof in ADA cases, substituting the "because of" – a "but for" standard.

***Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012)**

Susan Lewis was dismissed from her position as a registered nurse at one of Defendant's retirement homes. Lewis filed a discrimination claim under the Americans with Disabilities Act ("ADA"), claiming that Defendant fired her because she had a medical condition which made it difficult for her to walk and occasionally required her to use a wheelchair. Defendant claimed it terminated Lewis based on an outburst at work, during which she yelled, used profanity and criticized her supervisors. At trial, Lewis asked the court to instruct the jury that she could prevail if her disability was a "motivating factor" in the company's employment action; a phrase which appears in Title VII as it was amended in 1991, but not the ADA. The district court, following *Monette v. Electronic Systems Corporation*, 90 F.3d 1173 (6th Cir. 1996) charged the jury that the plaintiff had to prove she was terminated "solely" because of her disability. *Monette* had borrowed the "solely" standard from the Rehabilitation Act. The jury returned a verdict for the defendant. A panel of the Sixth Circuit reluctantly affirmed, pointing to established Sixth Circuit authority that one panel cannot overrule a previous panel's reported decision.

The entire Sixth Circuit took the matter up *en banc* and, in a well reasoned decision written by Judge Sutton, reversed *Monette.* The court relied on *Gross v. FBL Financial Services,*

557 U.S. 167, 129 S. Ct. 2343 (2009), which held that it was error to inject the "motivating factor" burden of proof and the *Price Waterhouse* burden shifting approach in a "mixed motive" case into the ADEA. *Gross* held that direct evidence of age discrimination does not shift the burden of proof in an ADEA case to the employer to prove that it would have taken the same action regardless of age. To the contrary, ADEA plaintiffs must prove that the adverse action was taken "because of" age, a burden which never shifts to the employer. Put another way, an ADEA plaintiff must prove by a preponderance that "but for" his age he would not have been terminated.

In applying *Gross* to *Lewis* and the ADA, the Sixth Circuit held that it was error for *Monette* to import the "solely" standard from the Rehabilitation Act. Rather, ADA plaintiffs must prove that the adverse action was taken "*because of*" their disability which is a "but-for" standard. Thus, the "motivating factor" standard of Title VII and the mixed motive paradigm of *Price Waterhouse* do not apply in an ADA action. The burden of proof remains on the plaintiff at all times. The Sixth Circuit has now joined the mainstream of the Courts of Appeals by adopting the "because of" standard.

In order to sue under the ADA for failure to provide a reasonable accommodation, the employee must request an accommodation; no duty to engage in interactive process until accommodation is requested.

***Melange v. City of Center Line*, 2012 U.S. App. LEXIS 11175 (6th Cir. 2012)**

In 1992, Karl Melange began his employment with the City as a custodian. In August, 2005, Melange suffered a closed head injury and was diagnosed with hydrocephalus, an excessive accumulation of cerebrospinal fluid in the brain. He was cleared to return to work in 2006, but subsequently injured his shoulder in a bicycle accident in July 2007, and he was placed on short-term disability leave. Finally, in January 2008, after twenty-six consecutive weeks of short-term disability, he was automatically placed on long-term disability pursuant to the collective bargaining agreement (CBA).

Under the applicable CBA, if Melange was unable to return to work at the end of six months of short term disability and six months of long term disability, he would be terminated. On July 7, 2008, the City sent Melange a letter directing him to go to two follow-up appointments to determine if he could return to work. The City received a letter on July 30 from the first doctor indicating that Melange could not return to work. As a result, the City mailed him a termination letter on July 31. In mid-August, the City received a letter from the second doctor asking that Melange be given an opportunity "to return to work under supervision," and be laid off if he could not perform. Wisely, the City stood upon its termination.

Melange filed suit alleging that the City had failed to accommodate him, mistakenly regarded him as disabled, and terminated him in violation of the ADA. The district court granted summary judgment in favor of the City on the grounds that Melange was not a "qualified individual" within the meaning of the ADA, and that he failed to request an accommodation prior to his termination.

Applying very employer-friendly reasoning, in an opinion authored by Judge Smith Gibbons, the Sixth Circuit affirmed. The court held that Melange was not otherwise qualified

because he could not meet the reasonable attendance requirements of the job, thus he failed a *prima facie* case. More importantly, the Court rejected Melange's claim that the City did not reasonably accommodate him because at no time prior to his termination did he request an accommodation. The Court held, "The employee bears the burden of requesting a reasonable accommodation …." Once the employee requests an accommodation, the employer has a duty to engage in an 'interactive process' to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations . . ." But if the employee never requests an accommodation, the employer's duty to engage in the interactive process is never triggered." The court held that the second letter could not be considered a request for a reasonable accommodation because it was not received until two weeks after Melange had been terminated.

Employer establishes "direct threat" defense to ADA action through an IME, despite conflicting medical opinions from plaintiff's treating physicians.

***Wurzel v. Whirlpool Corp.*, 2012 U.S. App. LEXIS 8640 (6th Cir. 2012)**

Brian Wurzel worked as a forklift operator for Whirlpool for 20 years before he was diagnosed with Prinzmetal Angina in 2003, a disease that causes heart spasms and renders him temporarily incapacitated due to tightness in the chest, shortness of breath, numbness in the left arm, pain in the neck, dizziness, and fatigue. There is no way to predict when a spasm will occur, how severe it will be, or how long it will last. Wurzel visited several doctors, and took nitroglycerin pills to relieve his symptoms when they arose.

Although cleared to work by his treating physician, Wurzel experienced severe chest pains and spasms on many occasions. He repeatedly required treatment in the plant's medical emergency room. Whirlpool became concerned about problems should these attacks occur while Wurzel was operating heavy machinery, such as a forklift. He was transferred to a different position where he would not be using the forklift. As Wurzel continued to experience spasms, Whirlpool hired an independent medical examiner to evaluate the situation. Wurzel understated the severity of his condition to the examining physician, and Whirlpool's plant physician had to provide the true facts regarding the severity and frequency of spasms. The examining physician ultimately found that Wurzel should not be permitted to work alone or near moving machinery because he was a "direct threat" to injure himself or others. Subsequently, Wurzel went on an extended sick leave. He eventually returned to work without restrictions on March 2010.

Wurzel filed a complaint alleging that he was "regarded as" disabled and that Whirlpool disregarded the opinion of two treating cardiologists that he could work without restrictions. The district court held that Wurzel failed to make out a *prima facie* case of discrimination because Wurzel did not establish that he was regarded as disabled under the pre- and post-amendment versions of the ADA. On appeal, the Sixth Circuit noted that because the relevant events took place from May 2003 to August 2009, both the ADA and the ADAAA—which modified the ADA in 2008—apply to the case. Even under the more liberal ADAAA standard, Wurzel could not establish the fundamental requirement that he was "otherwise qualified" because Whirlpool had established that he was a "direct threat" to the health or safety of himself or others.

Applying the four-part standard of *Estate of Mauro v. Borgess Medical Center*, 137 F.3d 398 (6th Cir. 2000) and 29 C.F.R. § 1620.2(r) - (i) the duration of the risk, (ii) the nature and severity of the potential harm, (iii) the likelihood that the potential harm will occur, and (iv) the imminence of the potential harm - the court concluded that Whirlpool was entitled to summary judgment because the evidence established as a matter of law "that Whirlpool's determination that Wurzel posed a direct threat was based on a reasonable medical judgment, which relied on the most current medical knowledge and best available objective evidence and reflected an individualized assessment of Wurzel's abilities." First, Wurzel's condition was life-long. Second, if he were to suffer a spasm while driving a tow motor or working alone in proximity to moving machinery, the consequences for his own well-being and others can hardly be disputed. With regard to the third and fourth factors, Wurzel testified there was no way to know when a spasm was about to happen, and the work environment certainly falls within the potentially dangerous category. Finally, the court held that the plant physician was reasonable in discounting the opinions of Wurzel's two treating cardiologists because they did not have knowledge of Wurzel's true condition.

FMLA LEAVE DISCRIMINATION

***McDonnell Douglas* standard applies in FMLA interference and retaliation actions, isolated "private conversation" is insufficient to prove employee is "regarded as" disabled.**

***Donald v. Sybra*, Inc., 667 F.3d 757 (6th Cir. 2012)**

Gwendolyn Donald worked at Arby's restaurant for over two years as an assistant manager. Shortly after being hired, she began experiencing a number of serious health problems that required her to take leave. In 2006, she missed a week for gallbladder surgery, and in 2007 she missed eight weeks in order to receive treatment for ovarian cysts and renal stones and was granted FMLA leave. Donald claims that in an isolated statement some months prior to her termination the district manager, with knowledge of her ailments, remarked that Donald "should be disabled" like the district manager's husband. On February 14, 2008, Donald's supervisor discovered that Donald had been charging customers for the full price of food, ringing it up as discounted, and pocketing the difference. On February 26, Donald notified her supervisor that she would be unable to come to work until February 29 because of the pain from her renal stone treatment, but provided neither formal written notice nor a request for FMLA leave. When she returned, she was confronted by her supervisor and the district manager about the theft, but vehemently denied the allegations. Her employment was terminated.

Donald sued in June 2009 for FMLA interference and retaliation. She also brought an ADA "regarded as" claim. The district court granted summary judgment on the FMLA claim because Donald did not establish that the articulated reason for her termination – theft – was pretextual. The district court dismissed the ADA claim finding "insufficient evidence" of a causal connection between her illness and her termination. Donald appealed.

In addressing her FMLA interference and retaliation claims, the Sixth Circuit observed that although there is a factual dispute as to whether the leave was protected under the FMLA, as well as whether there was a causal connection between the leave and termination, the court need not address these. The court stated the standard announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)—that the burden shifts to the employer to show a legitimate

nondiscriminatory reason for termination—undoubtedly applies to FMLA retaliation actions, but was unclear whether it applied in FMLA interference actions (which do not require a showing of intent). After concluding that *Grace v. USCAR*, 521 F.3d 655, 670 (6th Cir. 2008) set precedent that *McDonnell Douglas* does apply to interference claims, the court applied the standard to both claims. Ultimately, it found that the employer had articulated a legitimate nondiscriminatory reason for her termination, that she was stealing. It did not matter if she denied the allegations because the Sixth Circuit has adopted the "honest belief" rule, and it is not the court's place to wade into an employer's decision-making process as long as the employer honestly believes that she had engaged in misconduct.

As for her ADA Claim, the Sybra court found that the prior version of the ADA applied to the case, and that in order to be regarded as having a disability, she must "be regarded as having an impairment that limits a major life activity." The court found that Donald put forth no evidence demonstrating that the district manager or any other employee thought her unable to engage in a major life activity. Furthermore, the district manager's statement was said in a personal conversation and was isolated. Without further evidence, the court stated, her ADA claim cannot survive summary judgment. Summary judgment on FMLA retaliation claim affirmed despite temporal proximity; the plaintiff failed to establish pretext.

Happy Oktoberfest – you're fired. Plaintiff cannot show that employer's "honest belief" of FMLA fraud is pretextual.

***Seeger v. Cincinnati Bell Tel. Co.,* 681 F.3d 274 (6th Cir. 2012)**

There are two discrete theories of recovery under the FMLA: (1) the "interference" or theory arising from § 2615(a)(1), and (2) the "retaliation" or "discrimination" theory arising from § 2615(a)(2). The interference theory has its roots in the FMLA's creation of substantive rights, such that "[i]f an employer interferes with the FMLA-created right to medical leave or to reinstatement following the leave, a violation has occurred," regardless of the intent of the employer. On the other hand, the central issue raised by the retaliation theory is "whether the employer took the adverse action because of a prohibited reason or for a legitimate nondiscriminatory reason."

Additionally, under the FMLA, an employee can establish the causal connection element of the *prima facie* case by showing a close temporal proximity between the FMLA leave and the termination. However, if the employer articulates a legitimate, nondiscriminatory reason for discharging the employee, the burden shifts back to the plaintiff to prove the reason was pretextual. A plaintiff may establish pretext by showing that the employer's proffered reasons: (1) have no basis in fact; (2) did not actually motivate the action; or (3) were insufficient to warrant the action. Where the employer can demonstrate an *honest belief* in its proffered reason, however, the inference of pretext is not warranted. Thus, under the "honest belief" rule, an employer's proffered reason is considered honestly held where the employer can establish it reasonably relied on particularized facts that were before it at the time the decision was made. Thereafter, the burden is on the plaintiff to demonstrate that the employer's belief was not honestly held.

Tom Seeger was employed as a network technician by Cincinnati Bell Telephone Co. ("CBT") from 1979 to 2007. He was also a member of a union and his employment was

governed by a collective bargaining agreement ("CBA"). In late August 2007, Seeger began to experience medical problems that stemmed from a herniated lumbar disc. On September 5, he commenced a leave of absence, which was approved as both FMLA leave, and paid disability leave under the CBA. After three weeks of leave, CBT offered Seeger a temporary restricted job as a telephone operator, a job that may involve as few as two hours a day. Seeger underwent an examination by a doctor, who wrote "no work" for Seeger. Four days later, however, two of Seeger's co-workers saw him at Oktoberfest. The co-workers reported that Seeger had to walk 10 blocks to and from the site, and that he was seen walking without difficulty and drinking beer. Seeger returned from his FMLA leave. Meanwhile, CBT's HR director began an extensive investigation. Ultimately, after gathering all the needed documentation, the statements of the witnesses, and giving Seeger every opportunity to tell his side of the story, the HR director terminated him for FMLA fraud upon his return from FMLA leave.

Seeger filed suit for interference and retaliation under the FMLA. The district court granted summary judgment on the grounds that Seeger offered no evidence showing that CBT's legitimate nondiscriminatory reason for firing him was pretextual. Specifically, the district court held that Seeger failed to refute CBT's evidence that it had an "honest belief" in its nondiscriminatory basis for Seeger's termination.

On appeal, the Sixth Circuit affirmed. Given that Seeger had received all of the FMLA leave to which he was entitled, the court found that the essence of his claim was retaliation, not interference with his substantive FMLA rights. The employer did not shortchange his leave time, deny reinstatement, or otherwise interfere with his substantive FMLA rights. The court further determined that Seeger had established the causation element of the *prima facie* case from the close temporal proximity between the FMLA leave and his termination. However, CBT articulated a legitimate, nondiscriminatory reason for discharging him. And because the "determinative question is not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did," Seeger's evidence of pretext was not enough to overcome the employer's honest belief that Seeger had committed FMLA fraud. In a quote that warms an employer's heart, the court said, "Nothing in the FMLA prevents employers from ensuring that employees who are on leave from work do not abuse that leave." What's the take away from this case? Summary judgment was affirmed where employer terminated employee the day he returned from FMLA leave because timing alone was insufficient to establish pretext.

Textbook case on how to mishandle FMLA leave administration, and pay with liquidated damages.

***Thom v. American Standard, Inc.*, 666 F.3d 968 (6th Cir. 2012)**

The FMLA stipulates that, "an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12–month period . . . because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(D). Employers, for their part, are "permitted to choose any one of . . . [four] methods for determining the '12–month period' in which the 12 weeks of leave entitlement . . . occurs." 29 C.F.R. § 825.200(b). Two of these four methods are the "rolling" year method and the "calendar" year method. The rolling year method calculates an employee's leave year "backward from the date an employee uses any FMLA leave." *Id*. By contrast, the calendar year method renders an employee eligible for 12 weeks of FMLA leave each calendar year.

In this case, Thom worked for American Standard as a molder for 36 years until he was discharged on June 17, 2005. On April 27, 2005, Thom requested FMLA leave for two months in order to have shoulder surgery. He was granted the leave through June 27, and underwent surgery. He recovered quicker than anticipated, and his doctor approved him for light duty work on May 31, and unrestricted work on June 13. Thom attempted to return to work on May 31, but was sent home by human resources because "the company did not permit employees with non-work related injuries to perform light duty work temporarily after FMLA leave."

When Thom did not return on June 13, HR contacted him and he requested additional time to recover due to increased pain. Thom said he would return on June 27. Thom promised to promptly get a doctor's note to extend his recovery time, but was unable to secure a timely appointment with his surgeon. He scheduled an appointment with his primary care physician for the morning of June 17. After the appointment, Thom went directly to work with a doctor's note requesting an extension of his leave until July 18. By the time he reached work, however, American Standard had already terminated his employment. The company had counted every day from June 13 to 17 as an unexcused absence, and, as a result, Thom had exceeded the absences allowed by the company

The district court granted summary judgment in favor of Thom on his FMLA interference claim, but denied him liquidated damages because it found the defendant had acted in "good faith." American Standard appealed the summary judgment in favor of Thom, and Thom appealed the denial of liquidated damages.

On appeal, the Sixth Circuit affirmed the summary judgment for the plaintiff, but reversed the denial of the liquidated damages. The court found that Thom could only prevail under the calendar method. Further, the court found that "[a]t no time throughout the FMLA process did the Company mention to Thom that his leave time would be governed by a 'rolling' 12–month period" until after the commencement of the suit. American Standard argued that it had always used the "rolling" method, and Thom should have had imputed knowledge from two key officers in Thom's union. The court disagreed and stated that imputed notice to the union was not appropriate here given that the initial approved date was ten days beyond the permitted leave under the rolling year method. The court took the employer to task for relying on the rolling year method, which it had failed to raise as a defense until after suit was filed, where it never advised Thom of the method, and it had failed to apply it in the letter granting his leave to June 27. Finally, the court held that Thom was entitled to liquidated damages because the after-the-fact reliance on the rolling method as their primary justification was pretextual and negates any good faith. This is a good example of an employer mishandling FMLA administration, costing it over $300,000, **plus** what it paid to its own counsel to defend the case.

RACE AND SEX DISCRIMINATION

Plaintiff's same sex hostile work environment claim failed because he offered no evidence that the alleged harasser was in fact, homosexual; his retaliation claim failed because he could not demonstrate a causal connection between his complaints and the adverse employment action.

***Wasek v. Arrow Energy Servs., Inc.* 2012 U.S. App. LEXIS 12515 (6th Cir. 2012)**

AES assigned Wasek to a four-man crew to work the tower on an oil rig in Pennsylvania. The job was located out of town and Wasek and another employee initially shared a hotel room. The employee began telling Wasek sexually explicit stories, and the two then stopped sharing a room. The employee then began touching Wasek in a sexual manner while on the job site. Additionally, the employee repeatedly made sexually explicit jokes and told inappropriate stories. Wasek believed the employee behaved this way because he "may have been bisexual." Wasek complained to his supervisors, but they told him to "whip his [co-worker's] ass." Following several other incidents, and several other failed attempts to receive help from his supervisors, Wasek walked off the job site without notice. When Arrow's human resource representative inquired, Wasek told his tale of what he believed was sexual harassment and said he "had had it." Arrow managers met with Wasek, telling him that he was "not going back to Pennsylvania" because the staff was upset that he had left them "high and dry" Arrow tried to find Wasek other work and eventually identified a position in Michigan. Meanwhile, Wasek found another job. He did not tell Arrow that he found new employment until he failed to report to Michigan as instructed. Wasek filed suit and alleged violations of Title VII, including a hostile work environment and retaliation claims.

Wasek appealed the district court's grant of summary judgment. The Sixth Circuit acknowledged that the conduct was harassing, but the issue was whether it was "because of sex." There are three ways to prove same-sex harassment. The plaintiff must produce "(1) 'credible evidence that the harasser was homosexual,' (2) evidence that 'make[s] it clear that the harasser is motivated by general hostility to the presence of [the same sex] in the workplace,' or (3) 'comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'" The second and third elements were not relevant in this all male workforce. The Court held that Wasek's speculation that the harasser was "a little strange, possibly bisexual" fell far short of the "credible evidence standard" set forth in *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998).

Regarding the Wasek's retaliation claim, the court found that he had engaged in protected activity when he complained about the coworker to his superiors since the facts demonstrated that the employee could have *reasonably believed* he was sexually harassed. Further, the court noted that its analysis was not affected by the fact that Wasek was able to continue doing his job. Additionally, the court noted that Arrow took adverse employment action against Wasek when it banned him from working in Pennsylvania. However, the retaliation claim failed because Wasek did not demonstrate a causal connection between his complaints and the Pennsylvania ban, as all of the available evidence indicated that the ban resulted from Wasek leaving his work site. Ultimately, the Sixth Circuit affirmed the district court's grant of summary judgment to the employer.

"Noose" leads to race discrimination complaint; thereafter the insubordinate complainant terminated by decisionmaker who was untainted by others' retaliatory motives.

***Davis v. Omni-Care, Inc.*, 2012 U.S. App. LEXIS 11168 (6th Cir. 2012)**

Jose Davis, an African American male, worked for Omni-Care as a driver technician. One day Davis noticed a six-inch long string tied in a slip knot with a loop hanging on the end hanging on a co-worker's bulletin board. Davis perceived this to be a noose, which he found racially offensive and verbally complained to someone sitting nearby. Davis thereafter wrote a

letter formally complaining about the noose. The plant general manager immediately removed the noose, informed Davis that he had taken care of the situation, and reported it to Area Director, Gloria Calhoun. After talking with Davis, Calhoun decided that diversity training was the appropriate response to this incident, although Davis felt more serious measures were warranted. Davis, apparently angry that the coworker who had made the noose was not fired, stopped taking calls and responding to his two managers to whom he attributed a retaliatory motive. When Calhoun learned that Davis was not communicating with his supervision, she called and asked to speak to Davis herself. Davis refused. He was told to talk with Calhoun or go home. He went home. Calhoun fired Davis the next day for insubordination.

Davis then filed a complaint alleging a hostile work environment based on race and retaliation under Title VII and Ohio law. The hostile work environment claim was withdrawn and the district court granted Omni-Care's motion for summary judgment on the retaliation claim.

The Sixth Circuit affirmed, holding that Davis failed to show that retaliation was the more likely reason for his discharge. The court noted that Davis' cited incidents of retaliation by his two managers did not demonstrate retaliatory intent because the decision maker, Calhoun, was not involved in any of those incidents. Calhoun terminated Davis for his admitted refusal to talk to her which she correctly viewed as insubordination. Additionally, the court noted that a "cat's paw" theory of liability, where a seemingly unbiased decision maker makes an adverse employment decision that was in part motivated by a biased subordinate, lacked merit because the area director's decision was not tainted by either of the two managers and Davis did not demonstrate that either manager's alleged retaliatory motive or actions was a proximate cause of the area director's decision to terminate him.

Cat's paw declawed. Independent investigation insulates employer from allegedly race-biased report by supervisor.

***Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826 (6th Cir. 2012)**

Romans, a Caucasian male, was a Fire and Safety Officer for Michigan Department of Human Services ("DHS") at a juvenile delinquent housing facility. He developed a running feud with a black co-worker, Perteet. Romans was disciplined multiple times over a three-year period (two one-day, a three-day and a five-day suspension). In September 2007, Perteet filed an internal racial harassment claim against Romans. It was investigated by Hall-Thiam who found that Romans had harassed Perteet, and she speculated that it "may have been racially motivated." In November 2007, Romans filed a racial harassment charge with the EEOC, claiming that he was being harassed by Perteet. Meanwhile the DHS's Office of Labor Relations representative Dean decided to take no action on the Hall-Thiam report, and instead ordered a new investigation. The second investigation report concluded that Romans had "failed to work cooperatively and treat others with courtesy and respect;" "threatened workplace violence;" and engaged in "discriminatory harassment of coworkers." Any one of these was grounds for termination. Dean made the decision to terminate. Romans sued under Title VII claiming that he was terminated because of his race. The Hall-Thiam report was the lynch pin of his evidence.

The district court granted summary judgment and Romans appealed. Romans argued that that Hall-Thiam's report was direct evidence of a racial motive to terminate him and claimed that

Dean was the conduit of Hall-Thiam's prejudice. The Sixth Circuit disagreed, holding that even if you assumed Hall-Thiam's report directly evidences racial discrimination, Romans failed to show that there was a '"causal nexus' between the ultimate decisionmaker's decision to terminate the plaintiff and the supervisor's discriminatory animus … Plaintiff must show that '[b]y relying on this discriminatory information flow, the ultimate decisionmakers acted as the conduit of [the supervisor's] prejudice -- his cat's paw."' Dean had broken the chain by expressly declining to rely on Hall-Thiam's report, ordering a new investigation, and relying on that investigation to terminate Romans. Thus, the "cat's paw" theory established in *Staub v. Proctor Hosp*. did not apply.

The court ultimately held that Romans had failed to show that black employees were treated differently from him in similar circumstances. Romans' claim that Perteet had sexually harassed others was not similar to Perteet's claim that Romans had harassed and threatened him. The claim against Perteet was not substantiated, while witnesses substantiated Perteet's claim against Romans.

Female "adult business" proprietor's sexual harassment claim fails; employer properly terminated her for threatening co-workers.

***Theus v. GlaxoSmithKline*, 452 Fed. Appx. 596 (6th Cir., Nov. 30 2011).**

Rhonda Theus began working for a predecessor of defendant in August 1998, and became a GlaxoSmithKline ("GSK") employee around July 2001. In early 2007, Theus started an online adult business that involved publishing nude photos and engaging in live video broadcasts. Her female coworkers eventually found out about her other business ventures, and by July of 2007, Theus started to experience problems at work. Specifically, Theus claimed that her coworkers teased her and joked about putting a nail under her tire. Additionally, she claimed two female coworkers called her derogatory names ("bitch, whore, slut"), and threatened to fight her. Defendant's human resource manager investigated the claims. However, none of Theus's coworkers corroborated her claims and alleged that Theus was in fact the one threatening and harassing people. Thus, no action was taken against either Theus or her coworkers.

After taking a multi-month medical leave, Theus returned in March 2008. By April 2008, the HR Manager received multiple complaints from Theus about her co-workers, and from the co-workers about Theus' allegedly threatening conduct. The HR Manager initiated another investigation, and Theus was placed on administrative leave pending its completion. After interviewing eleven employees, including Theus, the HR Manager concluded that Theus had said that, "[i]f any of these whores f_ _ _ with me, I am going to go to my car and get my pistol and blow their ass away." Others also reported that Theus frequently mentioned keeping a gun in her truck, routinely yelled and cursed at coworkers, and intentionally bumped into them. The HR Manager, without consulting with her supervisor, terminated her for violating the workplace violence policy.

The Sixth Circuit held that Theus had established the first four elements of a sexual harassment claim: that she's a member of a protected class, she was subject to unwelcome sexual harassment, the harassment occurred because of her gender, and the harassment affected a term, condition or privilege of employment. However, the Court held that she failed to establish a basis for imposing employer liability. In regards to Theus's co-worker hostile work environment

claim, the Court held that the nature of her complaints were not sufficient to put GSK on notice that Theus was being discriminated against based on her gender. In fact, the only behavior that Theus reported that implicates the gender discrimination was the use of gender based epithets, and GSK's response (initiating an investigation and interviewing numerous coworkers in an effort to ascertain the full nature of the problem) was reasonable.

With regard to Theus' claim that her supervisor had sexually harassed her, raised for the first time after her termination, the court applied affirmative defense of *Faragher* and *Ellerth.* GSK had shown that it had taken reasonable care to prevent sexual harassment by having a written, properly disseminated policy and had shown, in the case of the co-worker harassment that was reported, that it took prompt and effective remedial action. GSK also showed that Theus had failed to take advantage of the available preventive and corrective measures. She admittedly never claimed to GSK that her supervisor was sexually harassing her until after she was fired.

Theus' retaliation claim was also dismissed. Russell terminated her following his investigation. Theus' denial that she made the underlying threat was irrelevant; Russell had reasonable good faith belief that she had made them. Her claim that no other co-workers were terminated for violating the workplace violence policy, even though they had allegedly threatened her, failed because they were not similarly-situated. "The reports that GSK received regarding Theus involved the potential for the ultimate form of workplace violence -- retrieving a gun and killing a coworker." Theus has not presented any evidence of others who were not terminated for similar conduct.

RETALIATION

Plaintiff established a causal connection through temporal proximity of his Title VII complaints and his termination; yet, his claim failed as he could not prove that the employer's reasons for terminating him were pretextual.

***Algie v. N. Ky. Univ.*, 456 Fed. Appx. 514 (6th Cir. 2012)**

A few years after Plaintiff, Algie, began working for NKU, he filed an EEOC charge under Title VII. In 2006, he filed his first lawsuit against NKU. He alleged that following that lawsuit, NKU began a series of retaliatory actions. In June 2007, Algie filed a second EEOC charge. In June 2007, Algie's first lawsuit was dismissed in favor of NKU. Algie was discharged in October 2007. NKU had abundant, legitimate, non-discriminatory reasons to terminate Algie. He was found to be guilty of "resume fraud, insubordination, constant monitoring of co-workers, and certain safety concerns." The district court granted summary judgment on the grounds that Algie had both failed to establish a causal connection and pretext. The Sixth Circuit affirmed.

The Sixth Circuit held that Algie had sufficiently established a causal connection for a *prima facie* case of retaliation through temporal proximity of the complaints and the termination and additional circumstantial evidence. Specifically, the fact that NKU terminated Algie during the pendency of his second EEOC complaint and approximately six weeks after his first lawsuit was dismissed establishes a causal connection for a *prima facie* case. However, Algie failed to rebut the employer's legitimate, nondiscriminatory reasons for the termination. Algie had lied on

his application. When asked if he had been convicted of a felony, Algie wrote, "Yes, cultivation of marijuana, a tray of discarded seedlings were confiscated on my property after I made the decision to give up smoking about one year ago." NKU later determined that Plaintiff actually pled guilty to felony trafficking of marijuana, and "his conduct involved five or more plants as to cultivation and eight ounces or more of marijuana." As for insubordination, Algie repeatedly commented on the "character and qualifications of his supervisors." He was also excessively monitoring his co-workers. The court held, "A critical attitude toward co-workers and disruptive behavior in the workplace may constitute a legitimate reason for discharge." And lastly, Algie's prior criminal charges for harassment, domestic violence and fourth degree assault justified the safety concerns. Algie had not demonstrated *any* of these reasons were pretextual.

Summary judgment proper in FMLA retaliation claim despite temporal proximity.

***Krumheuer v. GAB Robins N. Am., Inc*., 2012 U.S. App. LEXIS 9999 (6th Cir. 2012)**

From Fall of 2002 to February 2007, Krumheuer was employed as a claims adjuster at an insurance appraisal provider, GAB. Beginning in 2006, Krumheuer's work performance declined and his supervisors recorded several issues, including his failure to respond to telephone and email messages, chronically poor attendance, and failure to follow the call-in procedure. In October 2006, he was issued a written warning that failure to rectify the performance issues may result in termination. That same month, Krumheuer began to experience symptoms of a heart attack, and requested medical leave until December. The request was granted and Krumheuer was later diagnosed with coronary heart disease.

After Krumheuer returned to work in December, he continued to miss a substantial amount of work without providing notice or medical documentation. He requested leave for surgery, which was granted, but the surgery was rescheduled. He was terminated soon thereafter in a substantial reduction in force.

Krumheuer sued for interference and retaliation under the FMLA. The district court granted summary judgment for the defendant. The Sixth Circuit affirmed. First, the court noted that although Krumheuer's complaint mentioned an interference claim, he failed to develop an argument to support that claim, so it only addressed the retaliation claim. Second, the court recognized that the close temporal proximity between the leave request and his termination was sufficient, in itself, to establish the causal connection element of the *prima facie* case. However, the Sixth Circuit has adopted the rule that temporal proximity is ***insufficient by itself*** to establish that an employer's nondiscriminatory reason for discharge was pretextual. According to the court, GAB had a legitimate nondiscriminatory reason despite the close temporal proximity of the events – 84 employees had been laid off nationwide at the same time plaintiff was, including one of plaintiff's co-workers. Moreover, plaintiff's documented performance problems provided a second legitimate nondiscriminatory reason for selecting him for the layoff. Krumheuer was unable to rebut the record of repeated warnings and had no explanation for his poor attendance. Thus, he failed to establish evidence of pretext.

Plaintiff failed to show causal connection between her harassment complaint and her termination two and one-half months later.

***Kean v IT-Works, Inc.*, 2012 U.S. App. LEXIS 4918 (6th Cir. 2012)**

Plaintiff was a female employed as a therapist at IT-Works. A male therapist was subsequently hired and began telling sexual jokes around customers and other therapists and to other female prompting Kean to complain to their supervisor in November 2007. Indeed, Kean and several other female employees met with their supervisor, as well as one of the owners of IT-Works, to discuss the employee's behavior. The owner spoke with the employee and told him to stop his inappropriate conduct, which he apparently did. Approximately two and one-half months later, Kean's supervisor told her about IT-Works' owners' financial problems; specifically that they were having trouble making payroll and paying bonuses. Kean was fired for gossiping after she told another employee about the financial situation.

Kean sued IT-Works alleging that the co-worker's offensive comments had created a hostile work environment in violation of Title VII, and that IT-Works fired her in retaliation for complaining about his conduct. The district court granted summary judgment for the employer holding that Kean's inability to recall "specific comments" she claimed were harassing failed to establish a hostile work environment claim and that Kean had failed to introduce sufficient evidence to create an inference that her complaints motivated IT-Work's decision to fire her.

The Sixth Circuit affirmed, holding that Kean did not present sufficient evidence to hold an employer liable for sexual harassment caused by a coworker. This claim failed specifically because Kean could not remember the specific about the employee's comments (she could only recall they "related to women's breasts and genitalia"), thus the jury could not determine whether the words reached the threshold required for a hostile work environment. Further, Plaintiff could not prove that IT-Works acted indifferently or unreasonably in light of what they knew.

Kean's retaliation claim was dismissed despite the fact that the termination was ***two and one-half months*** after the harassment complaint. The court held that the proximity in time alone was ***not*** sufficient to establish the ***causal connection prong*** of the *prima facie* case. This was all the more true because of the intervening positive performance appraisal was evidence of non-retaliation. The court held, "Intervening favorable actions of an employer may not be a complete bar to recovery [citation omitted], but they assuredly weigh against a claim of retaliation." It is hard to square this case with the holding of *Algie* and *Krumhauer* that a close temporal proximity alone is sufficient to establish the causal connection element of the same *prima facie* case. Perhaps the answer is that a two and one-half month time delay, standing alone, is not "proximate enough" to raise the inference of a causal connection.

AGE DISCRIMINATION

Curmudgeon plaintiff could not establish pretext by arguing that his employer's proffered reason – lack of flexibility – was "entirely subjective."

***Segel v. Kimberly-Clark Corp.*, No. 10-2223, 2012 U.S. App. LEXIS 6500 (6th Cir. Mar. 28, 2012).**

Kimberly-Clark hired Segel as a sales representative in 1985. Segel excelled as a salesman, and "his annual performance reviews consistently indicated that he 'meets performance expectations' or 'exceeds performance expectations' for his position." However, starting in 2000, Segel's performance reviews showed that he lacked flexibility and interpersonal skills. In 2006, Segel alienated the buyer for a key customer, who found him "difficult to work with" and informed Kimberly-Clark management that she would rather work with someone else. In response, Kimberly-Clark placed Segel on a 90-day "Performance Improvement Plan," which he failed to pass because he continued to demonstrate inflexibility. The parties then entered a 30-day "Last Chance Agreement," which Kimberly-Clark found Segal had violated by not demonstrating the required flexibility. Kimberly-Clark terminated Segal, who filed suit, alleging that it had violated the ADEA.

The parties agreed that Segal established a *prima facie* case of age discrimination. "Kimberly-Clark articulated a legitimate, nondiscriminatory reason for the examination by explaining that it terminated the plaintiff because 'an important part of his position as a CBM was to develop and maintain strong relationships with Kimberly-Clark's customers' and his 'confrontational style adversely impacted his relationship with his customer.'" The district court granted summary judgment. Segel appealed, arguing that the stated reasons were pretextual.

The Sixth Circuit affirmed. The court first observed that Kimberly-Clark's reasons were "richly supported by the record" because the plaintiff's performance reviews "persistently expressed concern regarding his inflexibility toward his colleagues and his clients as early as 2000." Further, "when his 2006 performance review indicated a heightened level of dissatisfaction with his inflexibility, Kimberly-Clark provided him with both a 90-day PIP and a 30-day Last Chance Agreement," which "highlighted the plaintiff's inflexibility as the reason for his probationary status with Kimberly-Clark and made clear that his failure to improve would result in termination."

The plaintiff argued that: (1) "'flexibility' is an entirely subjective criterion;" and (2) "subjective assessments are easily susceptible to manipulation in order to mask the employer's true motivations." (citing *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008)). *White* held that "since the very issue in dispute is whether the reasons given by the interviewers for their decision should be believed, it would be highly inappropriate for us to assume . . . that their own subjective perceptions of [plaintiff] were accurate," to support that proposition.

The Sixth Circuit correctly distinguished *White*. "The record in this case presents a longstanding concern with Segel's flexibility; whereas the adverse employment decision in *White* occurred in a vacuum of otherwise glowing reviews, Kimberly-Clark's decision to terminate Segel took place after years of documented concerns regarding his flexibility." Moreover, "the plaintiff in *White* was interviewed by only four people on one occasion, whereas the plaintiff was evaluated by a greater number of individuals on multiple occasions over the course of many years." In sum, "even though a subjective term like 'aggressive' was not a sufficiently clear motivating factor in *White*, we find that a similarly subjective term—'inflexible'—is adequate where it was repeatedly utilized by varying people on numerous occasions." In other words, "when Kimberly-Clark subsequently terminated the plaintiff, its

decision was based on documented 'particularized facts' that the plaintiff consistently failed to be appropriately flexible with his customers and his colleagues."

FICA TAXATION OF SEVERANCE BENEFITS

Sixth Circuit Decision Offers FICA Tax Refund Opportunities for Severance Pay for Tennessee Employers.

***United States v. Quality Stores, Inc.*, No. 10-1563 (September 7, 2012).**

Any employer that implemented reductions in force or layoffs after 2008 may consider filing refund claims for the Federal Insurance Contributions Act (FICA) taxes paid on severance benefits based on a recent Sixth Circuit Court of Appeals decision. In *United States v. Quality Stores, Inc*., No. 10-1563 (September 7, 2012), the Sixth Circuit held that severance payments paid to employees pursuant to an involuntary reduction in force were not "wages" for FICA tax purposes.

Quality Stores, a debtor in bankruptcy, closed a number of stores and distribution centers and through its severance plans paid periodic and lump sum severance to employees on account of the involuntary separation resulting directly from a reduction in force or the discontinuance of a plant or operation. The payments were not conditioned on the receipt of state unemployment compensation and did not relate to the rendering of any particular employment service. Quality Stores reported the severance payments as wages on W-2 forms and withheld federal income tax and FICA taxes from them and paid its share of FICA tax. Quality Stores did not, however, agree with the Internal Revenue Service (IRS) that the severance payments were "wages" subject to FICA withholding.

IRS rulings at that time exempted only certain involuntary severance payments from FICA taxes, provided that those payments satisfied the IRS's *administrative* definition of **supplemental unemployment benefits** compensation ("SUB Pay"). The IRS required, among other things, conditioning receipt of severance on an employee's receipt of unemployment compensation benefits and payment of the benefits in installments rather than a lump sum. According to the IRS, FICA applied to all other severance payments.

Quality Stores challenged the IRS's position that traditional severance payments are subject to FICA and subsequently filed refund claims to recover more than $1,000,000 in FICA taxes. Quality Stores argued that FICA does not apply to any severance that satisfies the *statutory* definition of SUB Pay provided in section 3402(o) of the Internal Revenue Code. A SUB payment is defined by statute as a payment that is: (1) an amount paid to an employee; (2) pursuant to an employer's plan; (3) because of an employee's involuntary separation from employment; (4) resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions; and (5) included in the employee's gross income. I.R.C. § 3402 (o)(2)(A). Quality Stores severance payments met the statutory definition of SUB payments.

The Sixth Circuit agreed with Quality Stores, concluding that severance that satisfies the statutory definition of SUB Pay is exempt from wages for FICA tax purposes. The payments are still considered "wages" for federal income tax withholding – but not FICA taxes. Significantly, those requirements do not require that SUB payments be tied to the employee's receipt of unemployment compensation benefits and do not distinguish between periodic or lump sum payments. This decision represents a substantial expansion of the types of severance that are exempt from FICA.

FICA Refund Opportunity

For some employers this *could* represent a FICA-tax refund opportunity. The amount at stake is considerably higher than the actual taxes because interest is paid on successful refund claims.

III. NLRB ISSUES SERIES OF DECISIONS AFFECTING WORKPLACE POLICIES

In the past several months, the National Labor Relations Board ("NLRB" or "Board") has issued a series of decisions that could affect everyday policies that union and non-union employers maintain in the workplace. The decisions are summarized below.

First, in *Flex Frac Logistics*, 358 NLRB No. 127 (9/11/12), the NLRB ruled that a statement in an employer's at-will policy requiring employees to keep "personnel information and documents" confidential was "overly broad" and illegal. The NLRB held that such language had a reasonable tendency to chill employees' exercise of their right to engage in "protected and concerted activities" guaranteed to them by the National Labor Relations Act (NLRA). The NLRB specifically found that the rule would lead employees to reasonably believe that they were prohibited from discussing wages or other terms and conditions of employment with nonemployees such as union representatives.

Similarly, in *Knaus BMW*, 358 NLRB No. 164 (9/28/12), the Board found that an auto dealership's rule that "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership" was unlawful because it could reasonably tend to limit employees' ability to object to their working conditions and seek the support of others in improving them. In both cases, the NLRB relied on the fact that employees could be disciplined or terminated for violating the policies as the basis for concluding that the policies interfered with their rights under the NLRA.

In another ruling that may have broad implications for the ability of employers to conduct workplace harassment investigations, the Board in *Banner Estrella Medical Center*, 358 NLRB No. 93 (7/30/12) invalidated a rule prohibiting employees from discussing with each other ongoing investigations of employee misconduct. The NLRB stated that absent some evidence that such a confidentiality rule is necessary to protect the integrity of an investigation, it had the effect of coercing and restraining employees in their right to engage in "mutual aid or protection" for the purpose of improving their working conditions. Under this decision, routine directives to persons interviewed in harassment and misconduct investigations that they must not speak with others about the investigation could run afoul of the NLRA and result in the filing of an unfair

labor practice charge, unless the employer can establish that witnesses need protection, evidence could be destroyed, or other detrimental effects could result from not keeping the investigation confidential.

In the past year, the National Labor Relations Board ("Board") has issued a series of decisions in an effort to make the agency more relevant to non-union employers and employees. One of the Board's most controversial positions has related to its view that fairly generic "employment at-will" disclaimer language, which has been a staple of employee handbooks for over thirty years, was overly broad and chilled Section 7 rights (i.e. the right to engage in protected concerted activity related to terms and conditions of employment) of non-union employees.

In *American Red Cross,* (28-CA-23443) (February 1, 2012), one of the Board's administrative law judges found that a requirement that employees sign an acknowledgement that states, in part, "I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way" was "overly broad and discriminatory". The rationale was that an employee could view it as a requirement that the employee waive his/her Section 7 rights. The case was settled before an appeal to the Board.

In *Hyatt Hotels Corporation* (28-CA-061114), the Acting General Counsel authorized a complaint to be filed against Hyatt Hotels alleging that it was engaging in an unfair labor practice by promulgating a handbook which stated, "I acknowledge that no oral or written statement or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either the Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President." The complaint charged that the provision was "overly broad and discriminatory." Hyatt settled with the Board and agreed to rescind and reverse the at-will provision of its handbook.

Employers were outraged and rightfully so. The purpose of requiring a written agreement signed by high level management to avoid employment at-will is to prevent state law wrongful discharge claims based on oral or written statements purportedly creating employment for a definite term. The purpose is not to chill employees' Section 7 rights or create a waiver of the right to organize - - which would clearly be unlawful.

As a Halloween treat, on October 31, 2012, the Acting General Counsel issued an advice memoranda on two cases that clarified what employers can include in their employment at-will disclaimers.

In *Rocha Transportation,* Advice Memoranda, (Case 32-CA-086799) (October 31, 2012) the Division of Advice of the General Counsel's Office opined that the following language in the employer's handbook was **lawful**: "No manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make such agreement and then only in writing." The Division of Advice found the disclaimer lawful because it did not purport to provide that employment at-will could never be changed. Instead it allowed the employer's president to enter into

agreements modifying the at-will relationship, which could include changes through collective bargaining.

In *Swift Corporation d/b/a Mimi's Café*, Advice Memorandum, Case 28-CA-084365 (October 31, 2012), the Division of Advice found the following at will disclaimer to be **lawful**, "No representative of the Company has authority to enter into any agreement contrary to the foregoing (employment) at-will relationship." This was lawful, according to the Advice Memoranda, because it did not foreclose the possibility of modifying the at-will employment relationship. "Instead", according to the General Counsel's Office, "the provision simply highlights the Employer's policy that its own representatives are not authorized to modify an employee's at-will status."

Speaking at the Annual Conference of the ABA's Labor and Employment Section on November 1, 2012, the Acting General Counsel indicated that a policy stating that the "employment relationship is at-will" does not, in and of itself, violate the Act. Where the Board finds that the language taken as a whole could be understood as waiving or restricting employees' Section 7 rights (as in *American Red Cross)*, it will be declared unlawful. However, where the employer requires any deviation from the at-will status to be in writing and signed by the president or other high level officer of the company, it should be found lawful. While the Board has not expressly said so, *Rocha Transportation* and *Mimi's Café* essentially reverse the Board's position in *Hyatt Hotels.* Our advice is to use the *Rocha Transportation* language and not the *Mimi's Café* language if you are going to limit the manner in which an employee can avoid your at-will employment policy.