EMPLOYMENT LAW UPDATE

I. 2006-2007 SUPREME COURT DECISIONS

In 5-4 decision, Supreme Court limits the lifespan of Title VII-based pay discrimination claims. Tennessee employers, however, must be prepared to defend against claims reaching back decades under Tennessee Human Rights Act.

Ledbetter v. Goodyear Tire and Rubber Co., Inc., 127 S. Ct. 2162; 167 L. Ed. 2d 982 (May 29, 2007).

A divided U.S. Supreme Court decided that the pay discrimination claims of Lilly Ledbetter were time barred.

Ledbetter brought suit in part under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17(as amended), alleging gender discrimination in connection with her pay at Goodyear. Though she initially asserted an Equal Pay Act claim, a Magistrate recommended its dismissal and Ledbetter pursued only her Title VII pay discrimination claim. At trial, Ledbetter prevailed, and a jury awarded her $225,000 in back pay plus $3 million in punitive damages--finding that Goodyear discriminated against her in her pay throughout her entire 19-year career.

Goodyear appealed, and the Eleventh Circuit granted judgment as a matter of law in its favor, concluding that, under Title VII, pay claims like Ledbetter's are properly analyzed as "discrete acts of discrimination" rather than "continuing violations." In the Eleventh Circuit's view, Ledbetter could recover only to the extent she proved intentional discrimination with regard to pay decisions made within the appropriate limitations period (which was 180 days here, since Alabama is a non-deferral state). While the record included evidence that prior decisions had been motivated by discriminatory animus, the Eleventh Circuit found that Ledbetter failed to prove that the pay decision within the 180 day period was discriminatory.

In the Supreme Court, Ledbetter argued that the Court's decisions in *Bazemore v. Friday*, 478 U.S. 385 (1986) and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), allowed her to sue for the entire 19 year period, arguing that pay discrimination claims were like hostile work environment claims (which by their very nature, continue over time). In *Morgan* the Court held that discrete acts of discrimination are barred if not timely filed. *Bazemore* held that each and every pay check based upon an uncorrected discriminatory practice is, in fact, a new discriminatory act.

The Supreme Court held that each pay setting act (such as an annual raise) is a discrete act and the continuing violation theory does not apply.

Ledbetter asserted a disparate treatment claim, a central element of which is the intent to discriminate. However, Ledbetter alleged that the decisions made during the filing period "carried forward" the unlawful effects of earlier decisions. That argument is almost identical to the one advanced in *United Airlines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), and which was rejected.

The majority rejected Ledbetter's reading of *Bazemore* on the ground that the disparate pay scales the employer established and allowed to continue (after Title VII was applied to the states) was different from discrete decisions setting an individual's salary for the coming year.

Justice Ginsburg, in oral and written dissent, argued that the majority's reliance on *stare decisis* and its discussion of legislative intent ignored the workplace reality that pay disparities are not written across the foreheads of affected employees.

It is important to remember four things with regard to the impact of *Ledbetter* in Tennessee. First, the case was pursued under Title VII, not the Equal Pay Act, which requires no administrative charge filing, no discriminatory intent, and which incorporates a longer statute of limitations (two to three years). The Court even said the result would have been different had Ledbetter asserted an EPA claim.

Second, Tennessee employers must deal with the reality that the Tennessee Supreme Court adopted the view in *Booker v. Boeing*, 188 S.W.3d 639 (Tenn. 2006), that the one-year limitations period for claims alleging discriminatory pay under the THRA begins when the discriminatory practice ceases - which that Court took to be when the plaintiff's pay was brought in "parity" with her "peers." Translated simply, Tennessee employers have to defend against discrepancies which might have roots (legitimate or not) stretching back as long as the affected employee's tenure.

Third, by late July 2007, H.R. 2831, the "Ledbetter Fair Pay Act of 2007," was introduced but so far its passage (over a veto threat) appears unlikely.

Fourth, *Ledbetter* is not consistent with many Court of Appeals decisions that had held proof of an EPA violation also establishes a per se Title VII violation. *See, e.g., Kovacevich v. Kent State University*, 224 F.3d 806 829 ("In this Circuit, a finding of liability under the Equal Pay Act requires a similar finding of liability under Title VII where both claims present the same conduct and evidence.") The *Ledbetter* majority decision indicates that Title VII liability stands on its own merits and that the lower courts must separately analyze whether the evidence supports a violation of each statute.

Unanimous Court preserves regulatory exclusion of "companionship workers" employed by third parties from overtime requirements.

Long Island Care at Home, Ltd., et al., v. Evelyn Coke, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (June 11, 2007).

This term, Justice Breyer, speaking for a unanimous court, authored an opinion holding that "companionship services" workers employed by third-party agencies (as opposed to being paid by the patient's family) are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act. At stake was whether the U.S. Department of Labor (DOL) properly promulgated a regulation related to an exclusion of coverage for "companionship services"[1] workers pursuant to a 1974 amendment[2] which had extended protection to vast numbers of workers previously left out in the proverbial cold.

The Department of Labor subsequently issued two relevant regulations. The first, part of a set of "General Regulations," defined the term "domestic employment" as

> services of a household nature performed by an employee in or about a private home …*of the person by whom he or she is employed* … such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, lawndressers, caretakers, handymen, gardeners, footmen, grooms and chauffeurs of automobiles for family use [as well as] babysitters employed on other than a casual basis.

29 C.F.R. § 552.3

The second, set out in the "Interpretations" subsection, explains that exempt companionship workers *include* those

> who are employed by an employer or agency other than the family or household using their services … [whether or not] such an employee [is assigned] to more than one household or family in the same workweek.

29 C.F.R. § 552.109(a).

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[1] Companionship services workers are defined thus: "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of labor]." 29 U.S.C. § 213(a)(15).

[2] 29 U.S.C. § 206(f).

As the ranks of companionship workers caring for severely impaired disabled and elderly clients have swelled, the DOL repeatedly debated whether to narrow the exemption to require overtime for workers paid by third parties. Many companionship workers do not receive employment benefits and routinely work in excess of sixty hours a week. Industry representatives and some elder care advocates argued against changing the regulation, concerned that worry about overtime liability would compromise their ability to provide needed around-the-clock care at affordable prices.

Plaintiff Evelyn Coke challenged her employer's failure to pay overtime. The district court rejected her contention that the so called "third-party" regulation was neither controlling nor valid, and dismissed her lawsuit. *Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp.2d 332, 341 (E.D. N.Y 2003). On appeal, the Second Circuit reversed, finding the regulation unenforceable. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 133, 135 (2d Cir. 2004). Even after the decision was vacated by the Supreme Court and the Second Circuit was instructed to consider a recent DOL Advisory Memorandum explaining and defending the regulation, the Second Circuit was unpersuaded. *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 50-52 (2d Cir. 2006) (per curiam). To resolve the issue, the Supreme Court accepted certiorari.

Coke asserted that 29 U.S.C. § 213(a)(15), which defines domestic services workers, does not apply to those who provide companionship services at the behest of agencies. First, she pointed to the context of the 1974 amendments themselves, which were intended to expand coverage, and noted that workers employed by certain large entities were already covered prior to their adoption. Second, she relied on statements made by some members of Congress during debates. Third, she pointed to the definition of "domestic service employment" contained in the Social Security statute, which covers domestic work performed "in a private home *of the employer*." 26 U.S.C. § 3510(c)(1).

The Supreme Court was not persuaded. The 1974 FLSA companionship worker amendment refers broadly to "domestic service employment" and expressly delegates authority to the DOL Secretary to flesh out the details. The Social Security Act, by contrast, specifically defines the term.

Coke also argued that the "General Regulation" defining domestic service employment, 29 C.F.R. § 552.3, should control. This regulation includes the same emphasis that the Social Security Act contains on the connection between the client and the employment relationship. The opinion does acknowledge that the two regulations are facially inconsistent, but rejects Coke's assertion that the General Regulation must control.

Judge Bryer pointed out, however, that the sole purpose of 29 C.F.R. § 552.109(a) is to explain the exemption's impact on individuals hired by third parties, whereas the General Regulation's focuses is on describing the kind of work in question. And, while the DOL vacillated over the years about the proper interpretation of the regulations, that

fact alone does not provide separate grounds for disregarding the present interpretation. On a similar note, even though the "Advisory Memorandum" in question was issued in response to the litigation, the Court found no evidence to suggest that it did not actually represent the agency's current fair and considered judgment.

Employers obtained another victory in what has come to be known as the "Roberts Court." This may not, however, be the end of the story. A new pro-employee administration could amend the regulation to extend coverage to employees of third-party agencies, or Congress could act to change the statute's language – a not uncommon result for unpopular Supreme Court employment decisions.

II. THE UPCOMING SUPREME COURT TERM

Three employment law cases are presently on the Supreme Court's docket for the 2007-2008 term. All three cases involve the resolution of significant conflicts among the Circuit Courts of Appeal.

May individual plan participants recover against ERISA fiduciaries for account losses attributable to defined contribution plans, and does Section 502(a)(3) permit participants to bring actions for money relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharges")?

La Rue v. Dewolff, Boberg & Associates, Inc., 450 F.3d 570 on rehearing, 458 F.3d 359 (4th Cir. 2006), *cert granted by* 127 S.Ct. 2971, 168 L.Ed.2d 157 (June 18, 2007).

David La Rue brought suit under ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §1132(a)(2) and 1132(a)(3) claiming that DeWolff breached its fiduciary duty by failing to invest his money in a 401(k) plan as he instructed, resulting in losses to his 401(k) account. In one of its early ERISA decisions, the Supreme Court held that in a § 502(a)(2) claim, the relief "inures to the benefit of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). The Court reversed the lower court decision allowing a plaintiff to bring an individual § 502(a)(2) claim seeking compensatory and/or punitive damage when the insurance company waited six months before it approved the plaintiff's disability benefit claim. LaRue poses the same question addressed in *Russell* but the context of a losses sustained by his individual 401(k) account. The question is whether a participant in a 401(k) plan may recover under ERISA § 502(a)(2) when the relief requested is limited to the harm allegedly caused to the individual's account balance rather than to the entire 401(k) plan. The Fourth Circuit upheld the dismissal of LaRue's § 502(a)(2) claim on the ground that he was seeking non-class individual relief and that was not available because § 502(a)(2) limits the relief available to redressing injuries to the entire plan, not to individual accounts. The Third,

Fifth, Sixth[3] and Seventh Circuits have permitted recovery by either individual plaintiffs or classes of individuals under 502(a)(2). The Solicitor General has weighed in on the matter in favor of allowing plaintiffs to recover under § 502(a)(2).

The second question the Supreme Court will tackle is whether, under section 502(a)(3), which permits participants to obtain "appropriate equitable relief" for ERISA fiduciary violations, a participant may obtain "make whole" relief. For years, the Supreme Court has limited the kind of relief available under this section of ERISA to that which was traditionally available in equity prior to the merger of law and equity courts. For example, a party may recover equitable restitution when there is a "specifically identifiable" fund of money being held (wrongly) by another. *Sereboff v. Mid Atl. Med. Servs.*, 126 S. Ct. 1869, 1874 (2006) (allowing "recovery through a constructive trust or equitable lien on a specifically identified fund"). Legal restitution, however, is not permitted. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). In LaRue, the plaintiff wants to recover for losses he allegedly sustained when his 401(k) funds were not invested as he instructed. Thus, the second question in the LaRue case again asks whether, when Congress authorized the recovery of "appropriate equitable relief", it meant to allow pension plans to be sued by participants seeking to recover what the Court has heretofore (even as late as the 2006 term) characterized as legal, not equitable relief.

The Solicitor General also supports the petitioner on the 502(a)(3) claim arguing that the equitable remedy of "surcharge" (which the solicitor, citing Black's Law Dictionary 1482 (8th ed. 2004), defines as "[t]he amount that a court may charge a fiduciary that has breached its duty"), was permitted in courts of equity prior to the merger. The Sixth Circuit[4], along with the Eighth and Ninth Circuits, have joined the Fourth Circuit in holding that monetary recovery is not permitted under 502(a)(3).

Just what is a "charge" of discrimination for purposes of determining whether a complaint is timely made?

Holowecki v. FedEx., 440 F.3d 558 (2nd Cir. 2006), *cert granted by* 127 S.Ct. 2914, 168 L. Ed. 2d 242 (June 4, 2007).

In order to file suit under the Age Discrimination in Employment Act (ADEA), plaintiffs first need to file a "charge" with the EEOC. That charge must be filed at least 60 days before a suit is filed and, in deferral states such as Tennessee with their own state

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[3] *Kuper v. Lovenko*, 66 F.3d 1447 (6th Cir. 1995)(participant allowed to recover losses to defined contribution plan caused by fiduciary breaches though his recovery was allocated to his individual account and not to all accounts in the plan).

[4] *Helfrich v. PNC Bank, Kentucky, Inc.,* 267 F.3d 677 (6th Cir. 2001).

laws and agencies, be filed within the earlier of 300 days after the occurrence or 30 days after the complainant receives notice of the end of the state law proceedings. *See* 29 U.S.C. §626(d). And, unlike the Title VII scheme, ADEA claimants only need to wait 60 days after filing the charge to file suit, rather than waiting until they receive a right to sue letter. *Compare* 29 U.S.C. §626(e) with 42 U.S.C. §2000e-5(e)-(f).

Fourteen former FedEx couriers alleged a pattern and practice of age discrimination by their former employer. The Second Circuit permitted eleven of those plaintiffs (the ones who had not previously filed a charge) to "piggyback" on the EEOC "charge" of Patricia Kennedy. The "piggybacking" issue was not the topic of dispute; rather, the question was whether Kennedy's contact with the EEOC should count as a "charge" of discrimination.

Kennedy filled out an EEOC intake questionnaire and a four-page verified affidavit detailing her complaints regarding what she perceived as FedEx's attempts to target older couriers for productivity and disciplinary action. The EEOC, however, never assigned the complaint a case number, never investigated or attempted to resolve the matter, and never notified the employer of the complaint.

The Second Circuit noted that the ADEA does not define the term, "charge," but that its regulations require merely that it be in writing (or reduced to writing by the EEOC) from the person making the charge, that it names the employer and that it generally describe the allegedly discriminatory acts. *See* 29 C.F.R. §§1626.3, 1626.6, 1626.8. It agreed with the approach of the Third Circuit that submissions need to indicate a "manifest intent" for the agency to begin its processes in order to qualify,[5] but concluded that individuals should not be foreclosed from suit because the EEOC fails to follow through on its end of the bargain.

Court will consider whether "Me Too" evidence was improperly excluded in ADEA disparate treatment case.

Mendelsohn v. Sprint/United Management Co., 466 F.3d 1223 (10th Cir. 2006), *cert granted by* 127 S.Ct. 2937, 168 L. Ed. 2d 261 (June 11, 2007).

Ellen Mendelsohn was selected for layoff, along with other Sprint employees. She brought suit under the ADEA. At trial, she sought to introduce the evidence of other older employees who were terminated at the same time who believed that they were selected because of their age. Her goal was to demonstrate a pervasive atmosphere of age discrimination. Sprint in turn sought to exclude all evidence of age discrimination not linked to Mendelsohn's supervisor. The district court agreed, excluding the testimony of

[5] *See Bihler v. Singer Co*, 710 F.2d 96, 99 (3d Cir. 1983) (the so-called "manifest intent" rule is an extra-regulatory requirement).

all Mendelsohn's proposed witnesses on that subject. The jury returned a verdict in favor of Sprint, and Mendelsohn sought a retrial. The Tenth Circuit agreed with Mendelsohn, finding the district court had abused its discretion by applying the "same supervisor" rule to an ADEA RIF case. The dissent argued that the Tenth Circuit erred in concluding that testimony from non-similarly situated employees is admissible where the plaintiff makes no independent showing of a company-wide policy of discrimination.

III. SIXTH CIRCUIT DECISIONS

A. Benefits

Pollett v. Rinker Materials Corp., 477 F.3d 376 (6th Cir. 2007), *rehearing, en banc, den.* 2007 U.S. App. LEXIS 16392 (6th Cir., June 26, 2007).

In February, the Sixth Circuit considered whether an employee who was suspended without pay was "actively at work for the purposes of qualifying for short-term disability benefits." The answer, based on the administrative record, was "no."

William Pollett was suspended without pay for three days during a company investigation of a broken conveyer belt and his response to it. Two days later, his physician declared him incapable of any work due to numerous ailments. He stayed out on leave for about one month. When he returned, he was terminated for plant safety violations, including the most recent incident and one involving the negligent operation of a fork lift a year previous. Pollett applied for short term disability benefits but was denied.

Employees must be "actively at work" when they notify the employer of their disability under the plan. "Actively at work" means they are at work the day immediately preceding an excused leave of absence. Pollett argued that a suspension without pay is an excused leave of absence. The Sixth Circuit disagreed, refusing to equate a unilaterally imposed penalty with an employer's decision to grant requested leave. Pollett's absence from work was not excused. It was imposed upon him, barring him from employment and its attendant privileges.

Administrators must interpret plans in accordance with plain meaning as understood by an ordinary person.[6] Two of the three judges concluded an "excused leave of absence" did not include a suspension without pay. The opinion notes that a more difficult question would be presented where an employee is suspended with pay, but declines to answer that question.

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[6] *Morgan v. SKF USA, Inc.*, 385 F.3d 989, 992 (6th Cir. 2004).

B. Family and Medical Leave Act

Repeated angry comments by supervisor, temporal proximity and factual questions about whether employee's work restrictions were reason for firing result in denial of summary judgment.

Bryson v. Regis Corp., 2007 U.S. App. LEXIS 19481 (August 16, 2007).

Supercuts store manager Karen Bryson was told by her doctor on December 3rd that she needed knee surgery, which was scheduled for December 16. She informed her supervisor on December 6th that she would be absent, and the supervisor told her she would not be permitted leave. Bryson tried to reschedule the surgery, but her physician instructed her that it could not wait.

The supervisor's response was to threaten Bryson with termination and engage in other retaliatory behavior. She alternately described her to other Regis employees as a cripple, a faker, and selfish bitch. Nonetheless, Bryson completed the paperwork, requesting leave between December 16 and January 1. This request was granted by Regis' corporate offices. Curiously, the company explained that it would not count her use of paid leave against her FMLA entitlement.

Bryson developed complications, and timely filed a request for an extension of leave, to which Regis responded with a letter explaining that she needed to return to work by March 10 - - the day her 12 week entitlement expired.

Two days prior to her scheduled return to work, Bryson and her physician completed different parts of her return to work form. Her physician's RTW certificate indicated that Bryson "could not return at this time." Bryson mailed the form on March 8, but it was not received by Regis until March 15, five days after she was terminated.

Bryson called her supervisor on March 8th, leaving a message updating her on her ability to return to work with some restrictions. On March 9th, she called a senior manager who worked closely with Bryson's supervisor and left a similar message. The manager allegedly told Bryson she didn't think "corporate or [the supervisor] would go for that [performing work while seated]. Bryson received the termination letter on March 11.

Without question, Bryson engaged in protected activity by taking leave, and suffered adverse action in the form of termination. The district court, however, concluded she could not show a **causal connection** between the two because she could not come back to work at the expiration of her leave.

The Sixth Circuit disagreed, noting that Bryson's termination, occurring on the precise date she was scheduled to return to work and without the employer's receipt of the doctor's statement was sufficient to constitute evidence of a causal connection.

Moreover, the information that she could not return could have come from the supervisor with the expressed animus toward her leave.

An inability to return to work is a legitimate, non-discriminatory reason to terminate an employee whose FMLA entitlement runs out, and there is no "interference" under those circumstances – – even if the knowledge of inability is gained after termination. For retaliation purposes, however, employers cannot rely on "after acquired evidence" to insulate themselves for decisions made prior to knowledge of an employee's inability to return to work. Put another way, an employer cannot wash away the sin of deciding to fire someone because they took leave by later claiming it does not matter because the employee could not come back to work anyway.

Bryson's termination letter was sent five days prior to the company's receipt of the problematic physician certification statement. Thus, the company had to be acting on some other basis, and there were genuine factual questions about whether the direct supervisor's animus played a role in the decision to terminate.

Lessons here? Never let frustration about difficulties with workload be expressed as personal attacks, and be sensitive to the warning signs of a supervisor who is placing you at risk. If the information about an individual's proposed return to work is not clear, exercise a little extra patience. Had Regis waited to drop the hammer until it was clear that she could not return to work, it would have been in a much stronger position.

Employer not estopped from denying second FMLA request by ineligible employee where it had wrongly approved a previous request.

Mutchler v. Dunlap Mem'l. Hosp., 485 F.3d 854 (6th Cir. 2007).

Carol Mutchler, a registered nurse, requested and was approved for medical leave in order to obtain treatment for bilateral carpal tunnel syndrome - - one surgery at a time. The employer apparently relied upon the verifications of employees as to the number of hours they had worked rather than independently verifying eligibility.

Mutchler's leave request covered the period necessary to recover from surgery on the left hand. While she was out, the human resources manager discovered that Mutchler had actually worked only 1,242.8 hours. The human resources manager told Mutchler while she was recovering from the initial surgery her initial leave would be allowed, but that her second request would not qualify for FMLA protection. Mutchler completed the second surgery, and she was bumped into an alternate position in which she made less money.

Plaintiff argued that though she did not actually work 1,250 hours, her "hours of service" for FMLA purposes included the additional ten hours per week for which she was routinely compensated for under the "Weekender Program." The extra pay Mutchler

received was an incentive designed to entice nurses to be available to work weekend shifts if necessary (i.e., non-compensable waiting time).

The district court rejected Mutchler's argument, concluding that she was not an "eligible employee." The court disregarded the extra pay because it was not "hours worked."

The FMLA regulations, at 29 C.F.R. § 825.110(c), reinforce the district court's conclusion.

> [W]hether an employee has worked the minimum 1,250 hours of service is determined according to principles established under the [FLSA] for determining compensable hours of work (see 29 C.F.R. part 785). The determining factor is the *number of hours an employee has worked* for the employer within the meaning of the FLSA … any accurate accounting of *actual hours* worked under FLSA principles may be used. (Emphasis added.)

Next, Mutchler argued the hospital should be *equitably estopped* from denying her leave pursuant to 29 C.F.R. § 825.110(d) which provides, "If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility." Noting that some other Circuits have found 29 C.F.R. § 825.110(d) invalid, the Sixth Circuit stated that in any event estoppel did not apply to the circumstances of this case. Here, there were two separate requests for leave for finite periods of time, and the employer advised her that the second request would not be covered. Plaintiff's argument that her second request was an extension, rather than a new request, proved unavailing.

Finally, Mutchler asserted a common law estoppel claim. To prevail, she needed to show 1) a representation of a material fact; 2) awareness of the true facts by her employer; 3) either actual or implied intent by her employer that she act upon the represented fact; 4) her own ignorance of the true facts; and 5) detrimental and justifiable reliance. *See Tregoning v. Am. Cmty. Mut. Ins. Co.*, 12 F.3d 79, 83 (6th Cir. 1993) (quoting *Armistead v. Vernitron Corp.* 944 F.2d 1287, 1298 (6th Cir. 1991). Unfortunately for Mutchler, her claim fell apart. As to the first surgery, she could not demonstrate detrimental reliance. As to the second, she chose to move forward with the surgery in spite of being forewarned that the employer had determined she was ineligible.

The Sixth Circuit affirmed the grant of summary judgment to the employer. Ironically, had Mutchler simply submitted and been granted leave based upon a single request for the entire period, the result would likely be different. And, though this employer emerged "victorious," its sloppy leave processing procedures created an expensive legal nightmare, which could have ended very differently. Lesson here? Don't rely on an employee's assertions that he or she qualifies for leave. Take time to

thoroughly review the employee's eligibility at the time of the request and be specific in your written response. If an error is discovered, communicate clearly and quickly and allow the leave request to play itself out before moving the problem forward.

C. Sex Discrimination

Employer could <u>not</u> "reasonably rely" on predetermined and fishy psychiatrist's findings regarding two female police officers.

Denhof v. City of Grand Rapids, 2007 U.S. App. LEXIS 18170 (6th Cir. 2007).

Patricia Denhof and Renee LeClear were part of a 2001 lawsuit filed by nine female police officers, alleging discrimination, harassment and retaliation. A state court judge held an eight day hearing to determine whether to grant injunctive relief to Denhof, who alleged, among other things, that fellow police officers tapped her home phone, attempted to break in to her house and failed to provide requested backup. The judge declined to grant the request, casting doubt upon Denhof's veracity.

Ten days later, the Police Chief sent a letter to the police psychologist, inquiring whether Denhof should undergo a fitness for duty examination. Most problematic were comments made by Denhof to her supervisor to "spread the word that I will kill anyone who comes into my house."

The psychologist, Dr. Peterson, recommended a fitness for duty examination. Before even examining Denhof, Peterson observed in his letter

> Clearly, the tension between Ofc. Denhof and the department has escalated to such a degree that it is difficult to imagine how she could continue to work in this environment . . . We can argue for years about whose fault it is, but at some point we are best off simply separating, for the good of all persons involved.

Denhof was ordered to submit to the examination, was stripped of her badge and weapon, and placed on paid administrative leave. The psychologist administered a battery of tests and found Denhof unfit for duty.

The City held a meeting with Denhof, who submitted reports from a treating psychiatrist and psychologist, but denied her request for a second opinion and never provided the contradictory reports to Peterson. She was later placed on unpaid leave and threatened with termination for failure to follow treatment recommendations. When she pointed out that she'd never received any treatment recommendations, a follow-up meeting was scheduled with the psychologist. It did not go well.

Denhof brought her lawyer to the appointment, and Dr. Peterson declined to see her. He later made written treatment recommendations suggesting that Denhof had a

personality disorder and needed counseling and medication. The plaintiff, in conformity with the treatment recommendations, saw both her psychiatrist and psychologist, who disputed Peterson's conclusions regarding the alleged personality disorder and her fitness for duty. Her treating psychiatrist declined to prescribe medication. Denhof provided her care-givers' opinions to the City.

The City did not respond. Three months later Denhof received a letter stating that her reinstatement was not available because she "refused to follow the treatment recommendations" of the police psychologist.

Renee LeClear, another state court claimant was involved in a 1998 fatal shooting of a suspect. The Chief received a copy of a report prepared by LeClear's psychiatrist and psychologist as part of the discovery process. The report indicated she had symptoms "consistent with Post-traumatic Stress Disorder (PTSD)." The Chief wrote Dr. Peterson inquiring whether a fitness for duty evaluation was warranted. Peterson recommended both immediate referral to a PTSD specialist and an evaluation. One month later, LeClear's badge and firearm were confiscated and she was instructed to see Peterson.

Dr. Peterson declared LeClear unfit for duty, but not because of PTSD. Instead, he concluded she had a personality disorder. No treatment recommendations were made. LeClear's providers declared her fit for duty. The City Manager then wrote back, explaining that, since she'd not been provided treatment options, another meeting with Peterson was scheduled. When LeClear showed up with her lawyer in tow, Peterson cracked open the office door, told her he had no recommendations, and her appointment was canceled.

Notwithstanding, three weeks later, Peterson provided recommendations including group and individual therapy sessions and consultation with her treating doctors. After her physicians disputed Peterson's diagnosis, the City did not respond.

The district court concluded the evidence could only support a finding that Chief Dolan reasonably relied on Dr. Peterson's opinion that the plaintiffs were unfit for duty and his reliance was reasonable. The Sixth Circuit has previously held that where an employer takes an adverse action in the honest belief of information provided by a third party, the plaintiff cannot prevail by showing that the belief was mistaken. To prevail the plaintiff must show that the employer's reliance was unreasonable. *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998). This has been known as the "honest belief" rule.

The Sixth Circuit held that under these circumstances, a reasonable jury could have concluded that Dolan's reliance on Peterson was *unreasonable*. The decision was based on a number of factors including: that Peterson had prejudged Denhof, showing that he was predisposed to declare her unfit; that Dolan waited two months to suspend

Denhof after the injunction hearing, belying his expressed concern that she posed a workplace danger; that Peterson had recommended that LeClear be immediately referred to a specialist but Dolan did not follow that recommendation; that Peterson's behavior during his appointments with the plaintiffs was suspect and he told LeClear that he had no treatment recommendations but then issued recommendations. In short, there was ample evidence that reliance on Peterson was unreasonable and that his decisions were result oriented, which a jury could have concluded was predetermined.

Several lessons can be learned from this case. If an employer is relying on a physician's opinion to take an adverse employment action, it should ensure that it is not too cozy with the physician; if the physician issues recommendations they should be followed (i.e. don't choose the ones you like and ignore the rest); and if the employer makes decisions based on an avowed concern over work-place safety, don't sit on them for weeks or even days – act promptly.

Under Pregnancy Discrimination Act and Title VII, decision to characterize leave as not creditable toward retirement was discrete, time-barred act, though impact was delayed until plaintiff's job was eliminated.

Leffman v. Sprint Corp., 481 F.3d 428 (6th Cir. 2007).

From 1973 until 2000, Linda Leffman worked for Sprint. Prior to the Pregnancy Discrimination Act's passage, she took maternity leave, losing time from creditable service. In 1978, Sprint docked her creditable service again when she had another child. Though she complained to her union representative, she took no other action.

In 1986, in response to an EEOC enforcement action, Sprint restored her 1978 creditable service. She inquired about whether she would receive credit for the earlier leave, but took no action when Sprint informed her that it would not.

In 2000, Leffman's job was eliminated and she was told that she could not receive Special Early Retirement ("SER") benefits under the company's pension plan because she did not meet the minimum established for eligibility. If the 1976 leave period counted, Leffman would have been eligible for benefits. She filed a discrimination charge and then suit.

The district court held that *United Airlines, Inc. v. Evans*, 431 U.S. 533 (1977) mandated dismissal of Leffman's claims because they were time-barred. In *Evans* the plaintiff flight attendant was terminated because she got married.. The policy violated Title VII, but the plaintiff did not file a timely charge. She was later rehired but United refused to take her prior service into account in determining her seniority. The plaintiff filed suit alleging the denial of seniority revived her old claim. The Supreme Court disagreed, finding that the discriminatory act was the termination. In now well known language, the Supreme Court held that, "A discriminatory act which is not made the basis

for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute period. It may constitute relevant background evidence . . . but separately considered, it is merely an unfortunate event in history which has no present legal consequences." *Id.* at 448.

The Sixth Circuit affirmed the district court's holding that *Evans* controls here. The act of discrimination was deducting the credited service from Leffman when she had her child in 1976, not applying that decision to severance benefits upon her layoff in 2000.

Employer has no duty to offer light duty work only to pregnant employees, just obligation to treat employees uniformly with regard to ability to perform job duties.

Tysinger v. Police Department of Zainesville, 463 F.3d 569 (6th Cir. 2006).

Patrol officer Teresa Tysinger learned she was pregnant in August of 2000, and almost immediately requested temporary reassignment out of concern for her fetus. No action was taken. In September, after having been involved in an altercation with a suspect, she presented a physician's note prescribing light duty work for the duration of her pregnancy. The employer responded that the Department had no light duty work and that she should remain off work until able to return to full duty.

Tysinger remained out on leave during the remainder of her pregnancy. Upon return, she filed a charge of discrimination, alleging pregnancy discrimination under Title VII, 42 U.S.C. §§2000e-(2)(a)(1) and 2000e-(k). She then brought suit under Title VII and the Ohio Pregnancy Discrimination Act (PDA).

Tysinger claimed she should have been accommodated by being permitted to work light duty and that she was treated differently than two "similarly situated" non-pregnant colleagues. The district court granted summary judgment in favor of the City, and the Sixth Circuit affirmed.

In order for her claim to survive summary judgment, Tysinger first needed to establish that 1) she was pregnant, 2) she was qualified for her job, 3) she was subjected to an adverse employment decision, and 4) a causal nexus existed between the pregnancy and the decision. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000).

The Sixth Circuit held that Tysinger came up short as to the fourth element. To prove causation, Tysinger relied almost exclusively on what she claimed was disparate treatment of similarly situated non-pregnant employees. In order to give rise to an inference that the differing treatment was discriminatory, the comparables need to be similarly situated "in all relevant aspects," *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 353 (6th Cir. 1998). For pregnancy discrimination claims, the "relevant

aspects" are individuals' "ability or inability to work." *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996).

Two other employees who sustained non-work related injuries continued to work in spite of their inability to perform all their job functions. Both could not fully perform their jobs, and one went to significant lengths to conceal his injury from his supervisor. Importantly, neither requested any accommodation of their limitations, in spite of the fact that they could not run. They did have temporary infirmities; however, they presented themselves (albeit falsely) as capable of performing full duty work. Thus, they were not similarly situated to Tysinger.

The PDA does not require employers to give preferential treatment to pregnant employees. It does require employers to treat pregnant workers the same as similarly situated non-pregnant employees. *Ensley-Gaines,* 100 F.3d at 1226. The Sixth Circuit explained that the law only mandates that Tysinger be treated no differently than other non-pregnant workers, not that her pregnancy be accommodated.

The Sixth Circuit next held that, even assuming the other officers were permitted *de facto* light duty work while Tysinger was denied such a request, she could not rebut the legitimate, non-discriminatory reason articulated by her employer -- namely -- that it had no policy permitting light duty assignments for police officers. To the contrary, the City's policy prohibited such assignment (which probably explains the behavior of the other two officers). Tysinger claimed the policy was an "insufficient" explanation for the denial of her request, based on the *de facto* modified duty policy she claimed existed for the two male officers discussed above. The argument was rejected.

So what does this all mean? Take the time to develop integrated leave and light duty policies which will be applied consistently and uniformly to all employees. Had the facts been slightly different here, i.e., the coworkers reported their medical conditions and were granted temporary job changes, *or* the supervisor had instructed Tysinger to stay home out of his concern for her health/fetus rather than vice versa, this case could have gone the other way.

Temporal proximity alone suffices to show causal nexus at prima facie stage in pregnancy case.

Asmo v. Keane, Inc., 471 F.3d 588 (6th Cir. 2006)

Corporate headhunter Susan Asmo was laid off in December 2001, shortly after her announcement in September 2001 that she was pregnant with twins. Her subsequent suit alleged her termination was the result of her pregnancy. After the district court granted her former employer's motion for summary judgment, Asmo appealed.

The Sixth Circuit concluded that Asmo had met her prima facie case burden, demonstrating 1) she was pregnant, 2) she was qualified, 3) she was subjected to an adverse employment action and 4) there is a *nexus* between her pregnancy and the decision. *Cline v. Catholic Diocese*, 206 F.3d 651, 658 (6th Cir. 2000) (emphasis added).

In age-based reduction in force cases, plaintiffs can meet the fourth element only if they show evidence tending to indicate that the employer singled out the plaintiff for the RIF for impermissible reasons. *Barnes v. Gencorp Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990). The court declined to determine whether that requirement applies in the pregnancy discrimination setting, because even if it did apply, showing a "nexus" should suffice, said the court, to meet the heightened burden in a RIF case.

The court held, for the first time as far as we can tell, that temporal proximity alone was sufficient to establish the required *nexus* to prove the *prima facie* case. As Judge Gibbons' dissent points out, this conclusion is contrary to abundant prior Sixth Circuit case law requiring the proximity in time to be coupled with other indicia of retaliatory conduct. Indeed the Sixth Circuit has continued to require evidence beyond temporal proximity. *Michael v. Caterpillar Fin. Svcs. Corp.*, 2007 U.S. App. LEXIS 18154 (July 31, 2007).

Moving on to the pretext issue, the court reversed the district court's finding for the employer. Asmo's supervisor claimed he looked at three factors in the decision: 1) tenure, 2) number of 2001 hires made by the recruiters, and 3) forecasted hiring needs for 2002. This was problematic for two reasons. First, Asmo testified that, in addition to those factors, he told her she was being terminated because of salary concerns, her expenses being higher than other recruiters, and because she had less "face time" with clients than others. However, by the time the company responded to the administrative charge, these reasons disappeared. Not only did they disappear as justification, they were false. Second, the stated reasons appeared inconsistent with the company's policies on reductions in force, which pointed to skills and performance history as factors.

In disturbing reasoning, the court focused significant attention on what it characterized as "ominous silence" to the announcement by Asmo at a staff meeting that she was pregnant with twins. While her colleagues responded with spontaneous well-wishing, her supervisor made no comment then or later, never inquiring whether she had questions about employee resources or leave. It is troubling that a supervisor's focus on the business at hand rather than congratulating the plaintiff on her pregnancy was deemed to be evidence of animus.

In addition, the court considered that a comment by the Regional Sales Vice President, who was not involved in the decision, was circumstantial evidence of a discriminatory atmosphere and hence, of animus against Asmo. When she informed the vice president of her termination and told him she was seeking legal counsel based on her belief that she was being terminated because of her pregnancy, he replied, "I don't blame

you, Susan. Do what you need to do." This too is contrary to existing Sixth Circuit case law which holds that a statement such as this by a non-decisionmaker constitute hearsay, because the statement is outside the scope of the quoted manager's employment. *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921, 927 (6th Cir. 1999); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983).

Finally, the court held that while the temporal proximity, standing alone, was not sufficient to prove *pretext* (as opposed to establishing the fourth prong of the prima facie case), it could, when combined with all the other evidence, permit a reasonable jury to find that the stated reason was pretextual.

Judge Griffin, writing a dissent, strongly disagreed with the majority's analysis that temporal proximity can suffice, without other indicia, to meet the causation requirement.

Bottom line here? Temporal proximity, <u>especially</u> in pregnancy discrimination cases, is dangerous territory. Make RIF decisions in a deliberate, defensible manner, in conformity with existing policies. Create a documentary trail, and keep your messages (to the affected employee, and to those outside) consistent and truthful. Finally, while it might be tempting to adopt an "ostrich" approach to an employee's announcement of pregnancy, this is just as problematic as over-solicitous and nosy inquiries. Had Asmo's supervisor been able to respond to the announcement with a simple, "Wow, a double blessing, how nice for you. Let me know if you have benefit and leave questions or, better yet, call Benefits," the tale might have ended differently.

D. National Origin Discrimination

Manager's statements regarding employee's accent and speech patterns considered direct evidence of discrimination, shifting burden of persuasion and production to employer to show it would have made the decision not to promote him even absent the decisionmaker's bias.

Rodriguez v. FedEx Freight East, Inc., 487 F.3d 1001 (6th Cir. 2007).

Truck Driver Jose Rodriguez worked under the Human Resource Manager Rodney Adkinson. In June of 2002, he told Adkinson he was interested in becoming a supervisor, who recommended he enroll in a required leadership course. As three positions became open he applied but was rejected. The interviewing manager and another manager were told by Adkinson that Rodriguez was unsuitable because of his speech patterns and accent.

Rodriguez learned of the alleged statements and complained to Adkinson's direct supervisor and to other FedEx managers. No investigation or corrective action was taken.

Rodriguez did not complete the leadership course and resigned a year after he expressed interest in becoming a supervisor. His resignation letter and charge referred to race discrimination rather than national origin, but the Sixth Circuit recast Rodriguez's claims as being based on national origin. Rodriguez brought failure to promote and hostile work environment, as well as alleging constructive discharge.

With regard to his failure to promote claim, the court declined to apply the *McDonnel Douglas* burden-shifting framework and instead characterized Adkinson's comments as direct evidence of discrimination. It concluded that if the evidence was believed, the conclusion that unlawful discrimination was a motivating factor is inescapable. Hence, the burden of both production and persuasion shifted to the employer to prove it would have taken the same action even if it had not been motivated by impermissible discrimination. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

The court was less sympathetic to Rodriguez's hostile work environment and constructive discharge claims. Rodriguez claimed that hearing of Adkinson's remarks, and having been given the "run around" by him and being encouraged to keep taking classes, constituted a hostile work environment so humiliating and degrading he was forced to quit. Simply put, those facts do not add up to a hostile work environment. An individual's work environment has to be more than frustrating for the working terms and conditions to change so significantly that they will be characterized as a hostile environment. And, relying on *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996), (no constructive discharge where plaintiff perceived employer failed to promote him to his rightful position), the court granted summary judgment to FedEx on the constructive discharge claim as well.

E. Race Discrimination

Failure to timely provide training can be an adverse action, and employer can lose honest belief defense if it cannot show <u>reasonable</u> reliance.

Clay v. United Parcel Service, Inc., No. 04-1262 (August 31, 2007).

A recent Sixth Circuit race discrimination decision raises troublesome issues for employers in disparate treatment claims. *Clay* involves an appeal by three UPS employees, only one of whom, Olin Clay, is notable. The district court granted summary judgment on Clay's discrimination and retaliation claims and the Sixth Circuit reversed. In doing so, the Court addressed the "honest belief" rule in new and somewhat cryptic ways.

Clay, an African American, was a "feeder driver" for UPS, an entry level position. He claimed that his supervisor's failure to train him for a "long-distance" driving job was

discriminatory. On December 18, 2000, Clay filed a race discrimination charge with the EEOC over the lack of training which would have led directly to a $1 per hour higher paying position. In April 2001, Clay was advised by a psychiatrist to stay off work due to depression. Clay received a right to sue letter on his charge on June 19, 2001. On July 27, 2001, Clay secured a work release from his psychiatrist. UPS management told Clay that his release was "no good" and to submit additional medical details. Clay's physician faxed his diagnosis to the company on August 7, 2001. Clay was not returned to work. On August 22, 2001, UPS sent Clay a termination letter, terminating him for an "unauthorized leave of absence."

In a post termination grievance proceeding, UPS told Clay that he could return if he was cleared by the UPS doctor. He was seen by the doctor on September 21, 2001, but not told to report to work. Wisely or not, Clay turned his cell phone off from September 21 to September 26. On September 26, he retrieved several messages from dispatch calling him back to work. On October 1, Clay received a letter dated September 26, advising that he was terminated or had voluntarily quit due to a 3-day "no-call, no show." Unfortunately for UPS, its manager testified that Clay was not recorded as released to work until September 25 – thus the letter went out after only two days.

Clay sued for discrimination over the training and retaliation for his termination after he filed his EEOC charge. The district court granted summary judgment. Judge Karen Nelson Moore reversed on both claims. As to the training, the court found UPS's stated reason, that it suspended long-haul training because it had hired forty new feeder drivers who needed training was pretextual because the company records arguably reflected far fewer new hires. Also, the supervisor had stated that the failure to train Clay was merely a "mistake", which was at odds with the excuse that he was too busy training new drivers.

As to the retaliation claim, UPS relied on its "honest belief" that Clay had missed three days. Judge Moore held (correctly) that to establish its honest belief, UPS had to establish its "*reasonable reliance* on particularized facts that were before it at the time of the decision.' *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707-08 (6th Cir. 2006). Judge Moore held, for apparently the first time in the Sixth Circuit, that "the *burden is on the employer"* to point to specific facts that it had at the time the decision was made which would justify its belief in the proffered reason. Given its manager's testimony that Clay was only considered available for two days, not three, when UPS sent its termination letter, UPS failed to meet its "burden" of establishing the good faith defense.

In light of a vigorous dissent by Judge Batchelder that Judge Moore was engaging in burden shifting that was contrary to prior case law, Judge Moore elaborated that the employer must "demonstrate" honest belief as a "last ditch defense" if the plaintiff has established that the employer's reason was "mistaken, foolish, trivial, or baseless." The court held, "The honest belief rule is, in effect, one last opportunity for the defendant to prevail on summary judgment. The defendant may rebut the plaintiff's evidence of

pretext, by demonstrating that the defendant's actions, while perhaps 'mistaken, foolish, trivial or baseless,' were not taken with discriminatory intent." Thereafter, Judge Moore indicated that this rationale was not improperly shifting the burden to the defendant. Whether this rationale will be followed broadly by the Sixth Circuit remains to be seen - - it appears to be contrary to well-established Supreme Court and Sixth Circuit case law that the employer only has to articulate its legitimate non-discriminatory reason for its actions and then the burden lies with the plaintiff to prove pretext. Stay tuned.

Placement on administrative leave and/or improvement plan could be adverse action for retaliation purposes, but employee could not rebut employer's explanation.

Michael v. Caterpillar Fin. Svcs. Corp., 2007 U.S. App. LEXIS 18154 (July 31, 2007).

Shonta Michael brought a race discrimination, hostile work environment and race-based retaliation lawsuit against her employer after a series of conflicts with her supervisor and the grumblings of her subordinates bubbled over, resulting in her being placed on a 90 day performance improvement plan. Michael claimed her employer's actions violated Title VII of the Civil Rights Act of 1965, *42 U.S.C.* § 2000e *et seq.*, § 1981 of the Civil Rights Act of 1991, *42 U.S.C. § 1981*, and the Tennessee Human Rights Act (THRA), *Tenn. Code Ann*. § 4-21-101 *et seq.* The district court granted summary judgment in favor of Caterpillar, and the Sixth Circuit affirmed.

The conflict between Michael and her supervisor began when she was allegedly late to a departmental meeting. Only a few days later, however, she received a positive written performance evaluation at which she received an "Eye on Quality" $50 cash reward for customer service and for demonstrating the virtues of "responsibility," "care for others," and "exceeding expectations."

After the performance review, Michael was late to a second departmental meeting held, but there was no contemporaneous documentation. Two days later, Michael worked from home in order to complete a time-sensitive report without seeking supervisory approval. The same day, one of Michael's subordinates complained that she made him perform personal tasks and called him at home regarding work as early as 5:00 a.m. An investigation followed, and a meeting was scheduled on January 20th to discuss the "absence." True to form, she was fifteen minutes late for the meeting.

The meeting went down hill from there. Michael claimed her supervisor jumped up and down on her chair, pointed her finger in her face and got so close she could smell tobacco on her breath. The supervisor claimed Michael was the aggressor, slapping the desk, screaming and refusing to leave the room.

Human Resources investigated the conflicting complaints and interviewed all of Michael's subordinates. Another subordinate related similar personal errand issues, and an individual who overheard the confrontation confirmed the supervisor's version, i.e. that Michael was screaming at the meeting. Other non-subordinates expressed frustration that Michael was frequently late to meetings, had trouble completing tasks on time, and sometimes missed scheduled training sessions altogether.

Next, a meeting was held with management representatives. Michael asserted she was mistreated by her supervisor, but made no reference to race. Two days later she spoke to a Human Resources representative complaining of race discrimination. One day after meeting with Human Resources, Michael was placed on administrative leave pending further investigation. Four days later, she was offered the option of being placed on a ninety (90) day performance plan or accepting a lateral transfer with the same pay and benefits. Michael accepted the performance plan.

The improvement plan, which identified seven areas of needed improvement, included weekly feedback sessions with her supervisor. Michael resented her supervisor asking her subordinates about her actions, and filed an additional internal complaint alleging race discrimination.

The ninety day period was nonetheless successfully completed. Several months later, a company-wide reorganization resulted in the elimination of Michael's supervisory duties. About the same time, she was offered and accepted a transfer and 3% increase in pay to a position in Georgia. Nonetheless, Michael maintained her lawsuit.

With respect to her discrimination claim, Michael had to prove 1) protected group membership; 2) an adverse employment action; 3) her qualification for the position; and 4) different treatment than other similarly situated non-protected individuals. *See Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 728-29 (6th Cir. 1999).

Neither the confrontation with the supervisor, nor her brief placement on administrative leave and the requirement to turn in her laptop, constituted adverse actions for the purpose of a discrimination claim. The performance improvement plan was likely not an adverse action, focusing as it did on communicating specific performance expectations. However, even assuming for argument's sake the action was materially adverse, the Sixth Circuit concluded there was no issue as to pretext.

The Sixth Circuit next analyzed the retaliation claim. There, the test of whether an action is materially adverse is whether it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern v. White*, 126 S.Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006).

The company was aware of Michael's internal assertions of the race discrimination prior to her placement on leave and on the performance plan. The court

concluded both that her brief placement on leave with pay and the performance plan might well dissuade a reasonable employee from making mistakes, and so, for retaliation purposes sufficed to meet "this relatively low bar."

The remaining element, that of causation, requires evidence sufficient to raise the inference that the protected activity was the likely cause of the adverse action. *Dixon v. Gonzales*, 481 F.3d 324, 334 (6th Cir. 2007). Temporal proximity, when coupled with other indicia, may be enough to establish a causal connection, said the court. *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th Cir. 2006). The temporal proximity between the complaint, combined with the fact that the supervisor was not warned or reprimanded, as well as the very recent positive evaluation and performance award, sufficed to establish a prima facie case.

Michael could nonetheless not defeat her employer's proffered reasons for its action. She needed to show that either the reasons 1) had no basis in fact; 2) did not actually motivate the decision; or 3) were insufficient to warrant the actions. *Hopson v. Daimler Chrysler Corp.*, 306 F.3d 427, 434 (6th Cir. 2002).

The court held that she could not establish that the reasons for 90 day probation were pretextual. Michael's disagreement with the facts uncovered in the investigation could not defeat summary judgment "as long as an employer has an honest belief in its preferred non-discriminatory reason." *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001). Notably, Judge Gilman correctly states the honest belief rule and placed the burden on the plaintiff to establish pretext which she could not do because of Caterpillar's honest belief in her performance deficiencies.

Federal agency's delay in responding to Freedom of Information Act Request for records regarding decision not to rehire FBI agent tolls the limitations period.

Dixon v. Gonzales, 481 F.3d 324 (6th Cir. 2007).

James Dixon, an African American FBI agent, worked in the Detroit field office and between 1981 and 1982 served as its Applicant Coordinator. Robert Reutter was his direct supervisor. Dixon complained Reutter behaved inappropriately toward him and another minority agent because of their race. Reutter was subsequently relieved of duties related to the Applicant Program by Anthony Davis, another African American.

A few months later, Dixon transferred to the White Collar Crime unit, where he remained until he left the Detroit office in 1986. Five months after Dixon's arrival, Reutter became the unit's head. Though the two did not have direct contact, Reutter was Dixon's second-line supervisor. Reutter had the authority to approve or disapprove of Dixon's evaluations, which were always favorable, including ratings of "superior" and "excellent."

Dixon resigned from the FBI in 1988 but applied for reinstatement in 1991. As part of its routine, the FBI began reference checking, including interviewing individuals identified by Dixon as references. John Anthony, who worked with Dixon in the 1980s, recommended against rehire based on an incident in which Dixon had admittedly changed a minority applicant's interview panel results from negative to positive. The FBI interviewed the other panel member who added that he had reported the behavior to Reutter. This member shared Anthony's concerns, stating it would be a "grave mistake" to rehire Dixon.

Reutter was then interviewed, and he recalled the incident and Dixon's admission that he had changed the interview score. Reutter recommended against rehiring Dixon On the other hand, a former supervisor and co-worker listed as Dixon's referrals both recommended reinstatement.

After review, the FBI wrote a later dated April 14, 1992, stating Dixon would not be reinstated. Dixon denied receiving the letter and claimed he did not learn of the decision until 1994 when he called to inquire about the status of the application. The FBI would only reveal that its decision was based upon some negative evaluations from some former colleagues and supervisors. Dixon submitted a request under the Freedom of Information Act ("FOIA") for his personnel file.

The FBI took **three years to respond**, providing him a copy in May of 1997. One month later, Dixon filed a formal EEO complaint, alleging that Reutter and the FBI retaliated against him for his earlier complaint of race discrimination. He then filed suit. The district court granted summary judgment in the FBI's favor on the ground that Dixon had not established a prima facie case. The Sixth Circuit affirmed.

The Attorney General argued Dixon's case was untimely. Federal employees only have forty-five days after the date of the alleged discriminatory act to make EEO contact. 29 C.F.R. §1614.105(a)(1). However, since it is merely a prerequisite and not a jurisdictional requirement, this period is subject to equitable tolling, waiver and estoppel. *Mitchell v. Chapman*, 343 F.3d 493, 498-500 (6th Cir. 2001).

Equitable tolling acts as a stop-watch, interrupting the running of the period, but not delaying the beginning of the "race." The Attorney General argued Dixon "should have known" Reutter played a role in the decision. The Sixth Circuit disagreed, stating the cursory information provided was not enough to alert Dixon to the possible taint of racial animus. His failure to earlier seek EEO counseling was due to circumstances beyond his control - - namely, a three year delay in providing the requested information. In spite of this, Dixon did not prevail.

Dixon alleged retaliation in violation of 42 U.S. C. §2000e-3(a), based on indirect evidence. Dixon engaged in protected activity and later suffered an adverse employment action. But in order to establish the necessary causal link, he needed to provide evidence

"sufficient to raise the inference that the protected activity was the likely reason for the adverse action." *EEOC v. Avery Dennison Corp.,* 104 F.3d 858, 861 (6th Cir. 1997). The burden is not very high, but the evidence has to be credible. *Id. at 861.*

In an opinion by District Judge Algenon L. Marbley, the Court held that Dixon failed to establish a causal connection between his race discrimination complaint against Reutter and a decision ten years later to reject his request for rehire. The court (correctly) held that temporal proximity alone is insufficient to establish causation; rather it must be "coupled with other indicia of retaliatory conduct." *Randolph v. Ohio Dep't. of Youth Servs.,* 453 F.3d 724, 737 (6th Cir. 2006.) The Court held that there was no temporal proximity. However, according to the court, this did not absolutely foreclose a finding of causation. Fortunately for the employer, the court found insufficient evidence of a causal connection in the record.

Reutter had been the second-line supervisor over Dixon for four years after his complaint and did not take any retaliatory action towards him. To the contrary, Reuttter approved a series of positive performance appraisal, which undercut the causal connection argument. Moreover, plaintiff failed to show that Reutter's negative comments likely caused the denial of his reinstatement request. It was the agent reviewing the request who called Reutther not the other way around, and this was only after two others and recommended against rehire.

Just how broadly the equitable tolling aspect of this decision will be applied is unknown. Private employees, unlike public employees, do not have rights under the FOIA or the Tennessee Public Records Act to obtain copies of their personnel files. Thus, presumably, it would not apply to private employers. Public employers, however, should timely respond to appropriate requests for public records, lest they inadvertently lengthen the statute of limitations.

F. Disability Discrimination

Employee whose injury rendered him incapable of job performance properly terminated, even if interactive process less than ideal.

Kleiber v. Honda, 485 F.3d 862 (6th Cir. 2007).

Michael Kleiber, a production worker, suffered a major head injury, and after lengthy hospitalization and rehabilitation, attempted to return to work while working with a state vocational rehabilitation specialist. Eleven months after the injury, he submitted a "Work Capacity Form" to Honda. Honda's representatives, including the plant placement leader and in-house nurse, immediately began identifying potential positions.

The Work Capacity Form was not specific enough, so Honda scheduled a meeting with Kleiber's vocational liaison. Honda asked for a fitness for duty examination by its

physician, who conducted a memory test and studied an earlier neuropsychological evaluation. The physician concluded there was no reason to expect significant future improvement in Kleiber's condition, that Kleiber couldn't work independently, needed a job where balance wasn't an issue, and couldn't perform rapid cyclical work or jobs requiring fine to motor medium dexterity. He also recommended a gradual return to work because of anticipated endurance and aural sensory overload problems.

After reviewing the physician's report, Honda concluded it had no appropriate Production Assistant positions to meet Kleiber's needs. Shortly thereafter, Kleiber's employment was terminated pursuant to a uniformly applied twelve month limitation on leaves of absences. Kleiber's vocational rehab liaison sent a follow-up letter asking for the results of the evaluation and exam, as well as on the jobs for which he was considered.

Kleiber filed a charge with the EEOC and later filed suit under the ADA for Honda's alleged failure to accommodate and refusal to participate in an interactive process. The district court granted Honda's motion for summary judgment on the grounds that Kleiber was not qualified for any position at Honda and he was not terminated because of his disability. The Sixth Circuit affirmed.

The ADA, at 42 U.S.C. § 12112(a), defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." Honda admitted it made no accommodation, but claimed Kleiber was simply not qualified for any of its vacant jobs.

To prevail on a failure to accommodate theory, an individual must show 1) he or she is disabled, 2) otherwise qualified a) without accommodation, b) with the removal of a non-essential job function or c) with reasonable accommodation. Then the employer bears the burden of showing 3) the challenged criterion really is essential or that the proposed accommodation will unduly burden it. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 452 (6th Cir. 2004) *cert. denied* 543 U.S. 817, 125 S.Ct. 68, 160 L. Ed. 2d 25 (2004).

Kleiber sought transfer to another position as a reasonable accommodation under 42 U.S.C. § 12111(9)(B). Employers do not have to "bump" existing employees or create new positions. Honda's claim that it was not seeking any Production Associates during the relevant time was accepted, and Kleiber produced no evidence to the contrary. However, assuming *arguendo* one did exist, Kleiber could not actually perform any Production Associate job.

Kleiber claimed he could have done the exterior "wipe-off job" if given a job coach to help. The problem? Even the wipe-off job required dealing with raised platforms and uneven grates, which were beyond Kleiber's capabilities.

Next, Kleiber claimed he could not identify a particular job he was suited for because Honda "failed to engage in the required interactive process." The ADA regulations require employers and disabled applicants to participate as necessary to help identify appropriate reasonable accommodations. 29 C.F.R. § 1630.2(a)(3). This, said the court, "is mandatory and both parties have a duty to participate in good faith."

While the court recognized that the interactive process in this case was not ideal, Honda did engage in ongoing dialogue with Kleiber's vocational liaison. At the time, Kleiber appeared content to operate in that fashion. Ultimately, the court held that Honda had engaged in the interactive process in good faith, albeit without meeting personally with Kleiber. Finally, the court declined to opine whether, in an "interactive process" claim, a plaintiff must demonstrate that a reasonable accommodation would have been a possibility.

Head injury or not, employer may demand same behavioral standards of affected employee.

Macy v. Hopkins County School Board of Education, 484 F.3d 357 (6th Cir. 2007).

In April 2007, a panel the Sixth Circuit upheld a grant of summary judgment against a Kentucky teacher who claimed she was not reasonably accommodated and was retaliated against for filing an EEOC claim. The decision illustrates the reality that employers are entitled to apply standards of behavior to employees, even if the misbehavior is the result of an undisputed disabling condition.

Sharon Macy suffered two brain injuries in separate accidents about ten years apart. When she returned to work, the Board developed a written plan detailing her conditions and a list of accommodations. Over time, Macy and her principal butted heads about her needs, resulting in at least ten complaints. All issues save one were resolved to Macy's satisfaction. Macy requested a teacher's aide which was denied.

Macy also filed an EEOC charge, claiming she was sent a reprimand regarding tardiness when other non-disabled teachers engaged in similar conduct with no consequences. Eight months later, Macy was involved in an incident which led to her criminal conviction and eventual termination.

On November 1, 2000, Macy confronted a group of unsupervised middle school boys playing basketball. According to them she threatened to kill them and told them that "she meant it." She also berated them about their illegitimacy and their own sexual activities, claiming men raped women, got them pregnant, and abandoned them. Macy was later convicted of terroristic threatening, and the administrative tribunal which heard her appeal of the termination decision also concluded the event occurred.

The superintendent immediately investigated the boys' charges and conducted a broader inquiry into whether there were other similar problems. There were, and the Board determined that this incident was consistent with a number of prior incidents of inappropriate conduct.

Macy had previously left work without signing out or getting her "bus duty" covered, pushed a chair off a stage, called a student "a total loser," violated grading policy, kicked a trash can in anger, denigrated a parent and other employees to a classroom full of students (and another parent), sent a fake detention note to the assistant principal, had a violent, derogatory outburst at a meeting, and declared she wouldn't follow discipline policies. The Board terminated Macy.

The Sixth Circuit assumed Macy met her prima facie burden and focused on whether the legitimate, nondiscriminatory reasons for her termination were pretextual. Macy argued first that the charges had no basis in fact. *Cf. Abbott v. Crown Motor Co.*, 348 F.3d 537, 544 (6th Cir. 2003). On this point, Macy was constrained by issue preclusion. Both the administrative tribunal and the criminal court found she actually had made the threats against the boys, and the administrative tribunal also concluded that many of the other allegations lodged against her were true. Macy could not argue to the contrary as a matter of law.

Next, Macy argued the incidents did not actually motivate the termination decision, emphasizing that she had never been placed on a corrective action plan in the past. However, the information about her other inappropriate behavior was only gathered after the threatening incident and in connection with its investigation.

Finally, Macy argued the articulated reason was insufficient to motivate her termination on the grounds that another nondisabled employee was treated differently for the same behavior. The Sixth Circuit noted that the two situations were distinguishable on the grounds that making a comment to a teacher's aide was far less severe than making repeated, direct threats to the students themselves.

G. Age Discrimination

Sixth Circuit overrules prior ADEA decision requiring additional proof of discriminatory animus in cases involving facially discriminatory policies.

EEOC v. Jefferson Cty. Sheriff's Dep't., 467 F.3d 571 (6th Cir. 2006).

In October of 2006, the Sixth Circuit, sitting en banc, reversed a panel decision which had granted summary judgment to an employer whose disability-retirement benefits plan excluded employees who were still working beyond retirement age from

collecting disability benefits.[7] Instead, the Sixth Circuit concluded that the EEOC had established a prima facie ADEA claim because the plan, on its face, is facially discriminatory on the basis of age. Further, the court held that where the plan is facially discriminatory, no additional proof of discriminatory animus is required in order to establish the prima facie disparate treatment claim. In so doing, the court overruled an earlier decision, *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995).

Charles Licktieg was a Deputy Sheriff with school-age children who kept working after he turned 55 the normal retirement age for workers with hazardous jobs. At 61, he became disabled and sought disability benefits. In response, the Kentucky Retirement Service replied,

> Our laws state that you must have at least 60 months of service credit, *be under age 55*, and apply within 12 months of you last day of paid employment in a regular full-time position to qualify for Disability Retirement. Therefore, you are not eligible to apply for Disability Retirement since you are over age 55 and in a hazardous position. (Emphasis added)

Neither party disputed the reality that youthful disabled workers were at a distinct advantage over their older colleagues. The EEOC did not challenge the "years of service" component of the criterion, but rather focused on the age limitations on disability retirement benefits.

The Sixth Circuit reasoned that the retirement plan's terms were facially discriminatory because it categorically excluded those over normal retirement age from participating.

The County argued that it was entitled to summary judgment on the grounds that the EEOC needed to demonstrate proof of discriminatory animus in order to prevail, relying on language in the Hazen Paper: "a disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role* [in the employer's decision making process] and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610 (emphasis added). The Sixth Circuit pointed out, however, that immediately prior to that language, the *Hazen* decision gave a formal, facially discriminatory policy as its first example of an intentional action.

More importantly, before *Hazen*, Congress passed the Older Worker Benefit Protection Act (OWBPA) in response to the Supreme Court's decision in *Public*

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[7] *EEOC v. Jefferson County Sheriff Dep.*, 424 F.3d 467 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006).

Employee's Retirement System v. Betts, 492 U.S. 158 (1989). *Betts* had upheld a disability benefit plan which excluded covered employees from disability retirement benefits once they reached 60 years of age, on the grounds that a then existing ADEA provision permitted age-based decisions pursuant to bona fide employee benefit plans provided there was no intent to evade the purposes of the ADEA. The OWBPA rolled back that language, removing the need for proof of subterfuge. 29 U.S.C. § 621. The Sixth Circuit held that this disability plan ran afoul of the OWBPA.

The Sixth Circuit reversed and remanded the case back to the district court for further proceedings. In so doing, it joined the Second, Seventh, Eighth, and Ninth Circuits in finding prima facie violations under similar circumstances.

In age claim, labeling a replacement as a "temporary worker" does not defeat conclusion that plaintiff was replaced. Sixth Circuit restores jury verdict in case where irksome older employee faced tougher consequences than similarly situated young employees, supervisor failed to complete her performance review as required, stripped her of job duties and made her "Supervisor of the Fridge."

Tuttle v. Metro Gov't of Nashville and Davidson Cty., 474 F.3d 307 (6th Cir. 2007), petition for cert. filed at 07/10/07.

The Metro Government of Nashville and Davidson County (Metro) learned the hard way how expensive the combination of a sympathetic plaintiff, poorly chosen words, conflicting stories, and inconsistent application of performance standards can be. The Sixth Circuit overturned a judgment as a matter of law in favor of the employer and restored a $199,200.00 (not including attorneys' fees) verdict in favor of a former accounting clerk in the Public Works Department.

Tuttle began working with Metro in 1994, working her way up to Account Clerk III, and receiving positive employment reviews. When a new supervisor arrived in 2000, Tuttle resisted instructions to correct payroll errors made by another employee and made a complaint to the human resources department that the new supervisor was shredding documents along with another coworker. That claim was investigated, but the result was inconclusive.

In October of 2000, the supervisor who had been the object of Tuttle's report submitted a negative job evaluation, rating her "below expectations" in peer relations. That supervisor retired. The newly arrived supervisor began hearing complaints about Tuttle, some of which involved disagreements with the other employee Tuttle had implicated in the previous shredding complaint.

In response, the new supervisor deprived Tuttle of all payroll responsibilities and began documenting Tuttle's performance issues. He also gave Tuttle the mock title

"Supervisor of the Fridge," requiring her to clean out the office refrigerator on a weekly basis.

Tuttle's new supervisor did not complete her performance evaluation, though he timely completed the performance evaluations of every other employee he supervised. He transferred Tuttle to an isolated job with twelve-hour shifts in October of 2001. Several weeks later, Tuttle filed an EEOC charge alleging age discrimination. The supervisor told her at the time of the transfer that it was temporary and would last no longer than 30 days. Five months later, when Tuttle was informed by the human resources manager that she must transfer out of the Department or receive an unfavorable evaluation and face demotion or termination, she was still working in the job.

When the evaluation was finally completed, it chastised Tuttle for her "poor social skills," "poor work habits," and "lack of honesty." Tuttle was terminated. She filed a second EEOC charge.

In a trial lasting four days, Tuttle testified about discriminatory age related statements made to her, including a supervisor's rhetorical query, "How old are you?. . .You will be retiring quicker than you think." A coworker who was sporadically delegated supervisory authority wrote an email stating, "This woman has no business on a PC." Another time, when Tuttle asked a supervisor whether he was trying to get rid of her, his response was, "There have been others, and they took their retirement or pension." He also remarked during a meeting with her that "I want to apologize to you for causing you stress. I wouldn't want anything to happen to my mom and dad."

Tuttle also claimed her job review was discriminatory, pointing to others who were treated more generally. One young employee was given the opportunity to correct documented deficiencies in working with others without suffering negative consequences. Another young employee made multiple payroll entry mistakes without ever being disciplined.

The supervisor who transferred her and recommended her termination gave conflicting explanations regarding his tardy review. First, he claimed it "slipped his mind." Next, he claimed he was "too busy." Finally, at trial, he claimed he did not complete it because he did not want to harm her chances of being able to transfer out of the department.

To establish her prima facie ADEA case, Tuttle needed to show 1) that she was at least 40 years old; 2) she was subjected to an adverse employment action; 3) she was otherwise qualified for the job; and 4) she was replaced by a younger worker. *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 547 (6th Cir. 2004). Metro claimed she had not been replaced. In fact, Tuttle's job duties were absorbed by a twenty-something female worker that the Department labeled "temporary." The Sixth Circuit was

unimpressed with the label, finding that for prima facie purposes, Tuttle was replaced with a non-protected worker.

As to pretext, the supervisor's inconsistent statements and the combined effect of age conscious statements made by Tuttle's two supervisors were enough for a jury to reasonably conclude the transfer and termination decisions were motivated by discriminatory animus.

On Tuttle's retaliation claim, temporal proximity between the initial EEOC charge and the completed negative evaluation, the threats she received and her subsequent termination, together sufficed to meet the causal connection requirements.

Lessons learned here abound: Be consistent in how you treat employees and in the way you communicate unpleasant realities. Document performance issues as they arise, not months later, when memories are stale and the stakes are high. Do not substitute humiliating job responsibilities for tough but real ones. Low performers should be dealt with firmly but with respect. Finally, always take a last, gimlet-eyed look at the documentation and facts before taking final action against an employee who has already filed an EEOC charge. Chances are good that someone other than the EEOC will be reviewing the record as well.

IV. FEDERAL LEGISLATION AND REGULATION

Fair Labor Standards Act

First hike in minimum wage rate in a decade takes effect in stages. Minimum wage raised to $5.85; will rise to $6.55 in 2008 and $7.25 in 2009.

Effective July 24, 2007, the new minimum wage was raised 70 cents per hour to $5.85. In July of 2008, the rate rises again to $6.55, and finally changes to $7.25 in July of 2009. The Department of Labor has issued new required workplace posters, copies of which may be found at www.dol.gov/esa/regs/compliance/posters/flsa.htm. Tennessee is one of the twenty-six states which do not have a minimum wage which is already above the federal minimum.

VI. TENNESSEE STATE COURT CASES OF NOTE

No privilege to interfere with contract where parent company does not have sole control.

Cambio Health Solutions, LLC et al., v. Reardon, 213 S.W.3d 785 (Tenn. 2006).

The Supreme Court of Tennessee recently settled an important question - - whether a tortious interference with contract claim can be based on directions from a parent corporation to a subsidiary where the subsidiary is not wholly owned by the parent. The answer is "yes."

Thomas Reardon owned Cambio which he sold to IRG, a wholly owned subsidiary of QHR, a wholly owned subsidiary of QHG. Reardon retained a 10% ownership in Cambio and extracted an agreement to pay him severance pay upon a "change in control" of Cambio or IRG. Triad subsequent purchased QHG. Reardon resigned and requested his severance pay. Triad, IRG, and QHR directed Cambio to deny the request and file for a declaratory judgment action in federal court. Reardon counterclaimed for breach of contract and tortious interference with contract under common law and Tenn. Code Ann. § 47-50-109.

At trial, the jury hit the employer with an award of $815,000 for breach of contract, and the parent companies with punitive damages ranging from $200,000 to $3,000,000. The Tennessee Supreme Court accepted certification of the question from the Sixth Circuit whether a parent can be liable tortious interference with contract where it has only majority, and not complete control, over the subsidiary.

The parent companies alleged they could not commit tortious interference with contract because of the Tennessee Supreme Court's decision in *Waste Conversion Systems, Inc. v. Greenstone Industries, Inc.*, 33 S.W. 3d 779 (Tenn. 2000). In that case the court held that a "parent corporation has a privilege pursuant to which it can cause a wholly-owned subsidiary to breach a contract without becoming liable for tortiously interfering with a contractual relationship." *Id. at 780.*

Here Tennessee Supreme Court declined to extend this privilege to subsidiaries which are not wholly-owned by a parent company. Wholly-owned parents and subsidiaries share a "complete unity of interest." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L.Ed. 2d 628 (1984). The same cannot be said of corporations with minority shareholders, in which differing and frequently antagonistic interests are at stake.

Tortious interference with contract, which calls for treble damages, exists in addition to the rights of contracting parties, and protects against third party interference. The companies in question availed themselves of the benefits of separate corporate

identities, and, when hiring Reardon, created the minority shareholder situation they later found so vexing.

The Tennessee Supreme Court adopted a bright line rule against extension of the privilege where the corporation is not a wholly owned subsidiary, rejecting a case by case inquiry into whether the interests of the parent and subsidiary are actually aligned, noting that plaintiffs already face a steep battle in proving the tort of intentional interference with contract.

Tennessee Supreme Court holds that whether or not recreational activities are voluntary does not determine whether injuries occur in the course of and arise out of employment

Gooden et al., v. Coors Technical Ceramic Co., No. E2006-00836-SC-R3-WC, 2007 Tenn. LEXIS 779 (Sept. 6, 2007).

This case may place a serious damper on employee's down-time fun, if employers decide the risk of workers' compensation losses don't justify the productivity benefits gained when employees get a chance to play at work.

Greg Gooden, a night shift worker, died of a heart attack while playing a game of pick-up basketball during his thirty minute paid break. His widow sought workers' compensation benefits, which were denied. On appeal, the Tennessee Supreme Court concluded that Gooden's injuries qualified under Tenn. Code Ann. §50-6-103(a) (2005), i.e., they arose out of and occurred in the course of his employment.

"Arising out of" relates to causation, and is satisfied when a causal connection occurs between the working conditions and the injury. Whether an injury is "in the course of" employment necessitates an inquiry into the time, place and circumstances of the injury, and depends upon whether it occurs during working hours, where he may reasonably be expected to be, or whether he is fulfilling work duties or other incidental tasks.

Though Gooden had very bad arteries, the medical evidence indicated that the strenuous activity contributed to the event. Thus, the real question was whether he was injured in the course of employment.

Two years previous, the Tennessee Supreme Court barred recovery for a worker injured in a three-legged race at a company picnic, and indicated that its voluntary nature was the "touchstone" for determining whether recovery was appropriate. *Young v. Taylor-White, LLC*, 181 S.W.3d 324, 329-30 (Tenn. 2005). To the extent that language created the impression that voluntariness alone determined compensability, the Tennessee Supreme Court backtracked.

Here, Coors' required its employees to stay on premises during their breaks. It knowingly *permitted* the games, which occurred three to four times per week, acquiesced in the installation of the goal, and permitted supervisors to participate on occasion. All these factors, taken together, combined to make the games a regular incident of employment.

Don't fire the Good Samaritan - - Court of Appeals refuses to dismiss claim under public policy exception to at-will employment doctrine where employee left store to aid woman under assault.

Little v. Eastgate of Jackson, LLC, 2007 Tenn. App. LEXIS 242 (April 24, 2007)

Jason Little, a clerk at a beer and tobacco store, saw a woman being attacked outside the store where he worked. He ran outside with a baseball bat that was stored under the counter and scared the assailant away. He brought the woman inside and called the police. Two days later, along with his paycheck, Little received a separation notice stating

> [Little] took a baseball bat and left company property, while still on time clock and got involved in a fight across street from the store. This was none or our business, store cannot be put in this kind of liability situation.

Little filed suit, alleging he was terminated in violation of the public policy of the State of Tennessee. The company filed a motion for failure to state a claim, asserting that he was not terminated in violation of any clearly established public policy or for attempting to exercise statutory or constitutional rights. The trial court disagreed, relying in part on Tenn. Code Ann. § 39-11-612 (2003) (Defense of Third Person).

Though the Court of Appeals acknowledged that the exception to the at-will doctrine is to be narrowly applied so that the exception does not swallow up the rule, it nonetheless concluded that an exception was necessary in situations where an employee acts to rescue or protect another person he or she reasonably believes to be in imminent danger of death or serious bodily harm. In doing so, the court relied heavily on the only factually similar reported case which held it was a violation of public policy for an armored car company to fire its driver for getting out of the armored car to stop a knife wielding assailant attacking a victim. *Gardner v. Loomis Armor*, 913 P.2d 377 (Wash. 1996).

Under Tennessee Human Rights Act and Tennessee Handicap Act, no liability for employer where bullying supervisor was obnoxious to everyone.

Frye v. St. Thomas Health Services, 227 S.W.3d 595 (Tenn. Ct. App. 2007).

Joan Frye, a 54-year old accounting services manager for a large hospital system, learned recently that working for a horrible, abusive boss does not necessarily translate

into a courtroom victory. Frye filed suit under the Tennessee Human Rights Act, alleging age-based hostile work environment, retaliation, and wrongful disability-based discharge. The Court of Appeals at Nashville upheld the trial court's decision to enter summary judgment in the employer's favor and dismiss her claims.

Frye did not get along with Catherine Doyle, vice president of finance and controller at St. Thomas. While Doyle was out on maternity leave, Frye requested a lateral transfer from Doyle's supervisor, Ken Venuto. Doyle returned to work, and, upon learning of the contemplated move, met with Frye and demanded the transfer take place within two weeks, threatening to fire Frye for "chemistry." Frye speedily informed Venuto she would immediately accept a transfer to Baptist.

Venuto transferred Frye to a position managing the budget and reimbursement process at Baptist. The position had equivalent pay and benefits. Frye, however, claimed it was a demotion because she only supervised three instead of seven employees and because she reported to the controller instead of to Venuto.

Several months later, Frye took Family and Medical Leave for a physical and mental breakdown she attributed to the hostile work environment at St. Thomas. After the expiration of FMLA, she remained on leave. After having been absent for more than seven months and with no indication to her employer of her intent to return, Frye was terminated.

In a very employer-friendly decision, the Court of Appeals concluded that while Frye advanced evidence that the work environment was potentially hostile, there was no evidence (other than some conclusory deposition testimony by Frye) that Doyle was hostile toward her or anyone else *based on their age*. Doyle was found to be "an equal opportunity oppressor," using her dominant, abrupt, rude and oppressive management style on all employees with regard to age.

Plaintiff also alleged she was retaliated against for having complained about age discrimination. The court dispensed with Frye's argument by holding that lateral transfer was not an adverse employment action for the purposes of establishing a hostile work environment and hence, was not an adverse action for retaliation purposes. It would not be wise to assume that this opinion means that plaintiffs advancing only THRA retaliation claims will have to meet a higher standard for adverse action than those proceeding under Title VII theories. The opinion does not even mention *Burlington Northern and Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 165 L.Ed 345 (2006), under which the Supreme Court made it clear that, for retaliation purposes, the question is whether a reasonable person would be deterred by the activity in question.

VII. TENNESSEE LEGISLATIVE UPDATE

Physician non-competes. . . *They're baaaaack!*

For good or ill, the Tennessee legislature largely undid the work of the Tennessee Supreme Court in *Murfreesboro Medical Clinic, P.A. v. Udom*, 166 S.W. 3d 674(Tenn. 2005). That decision declared physician non-competes unenforceable unless specifically authorized by statute.

The new law addresses covenants not to compete in employment or contract for services settings. It deals separately with restrictions on competition in connection with the sale or purchase of a practice or its assets, which are given broader berth.

Restrictions on competition may be included in employment contracts, professional services contracts, shareholder and partnership arrangements and other contracts as long as they are 1) in writing, 2) signed by the parties, and 3) reasonable in scope.

To be reasonable, the restriction must be two years or less and either be restricted to a 10-mile radius of the physician's primary practice location or the county in which it is located, whichever is larger; or be limited to facilities where the employing contracting entity provided services while the physician was under contract.

Radiologists and emergency room physicians, along with osteopathic physicians, cannot be bound by non-competes. All other physicians, as well as podiatrists, chiropractors, dentists, psychiatrists and ophthalmologists can be. Also a non-compete agreement is not binding on a health care provider who has been employed or under contract with the employing or contracting entity for at least six years.

Non Smoker Protection Act snuffs out most workplace smoking.

Many Tennessee employers have opted for smoke-free workplaces for years, but smoking persisted in a few offices and a much larger number of manufacturing facilities, service businesses and restaurants. The passage of the Tennessee Non-Smoker Protection Act ("NSPA" or the "Act") during the legislature's latest session took some observers by surprise. After all, Tennessee is a state that bans employers from discharging employees solely because they use tobacco products. *Tenn. Code Ann*. § 50-1-304(e)(1). On October 1, 2007, however, nearly every workplace in the state will be "smoke-free" by law, and employers should be alerted both to the new requirements and the potential costs of ignoring them.

The Act is one of several recent victories for non-smoking advocacy groups, and its provisions most closely mirror Arkansas' "Clean Indoor Air Act of 2006."[8] When NSPA's provisions become effective this Autumn, employers, employees and the general public are in for some significant changes.

(A) What places are covered?

Found at *Tennessee Code Annotated* §39-17-1801 *et seq*., NSPA bans smoking in all "enclosed public places,"[9] subject to certain limited exceptions. It requires employers to notify existing employees and applicants of the restriction, as well as anyone who lights up in violation of the Act. Tennessee's Department of Health and its Department of Labor share investigatory responsibility and impose forms of "progressive discipline" against employers who permit smoking or fail to follow their notice obligations.[10]

"Places of employment," both public and private, are included in a long, non-exhaustive list of enclosed "public places" in which smoking is banned.[11] A "place of employment is any enclosed area under an employer's control and which employees normally frequent during employment."[12] Specifically excepted from "place of employment" are private residences, unless used for child, adult or health care facilities.[13] Additionally, some "public places" are not subject to the smoking restriction, namely: 1) businesses that employ three or fewer employees and at which the employer designates a restricted access smoking room; 2) private clubs; 3) age restricted venues; 4) nursing homes and long-term care facilities (with regard to residents only); 5) tobacco-related businesses; 6) commercial vehicles occupied solely by the operator; and 7) properly designated smoking rooms in hotels and motels.[14]

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[8] *Ark. Code Ann*. §20-27-1801 *et seq*.

[9] *Tenn. Code Ann*. §39-17-1803(a).

[10] The Act, at Section 2, also empowers both agencies to develop rules and regulations to effectuate its provisions. As of the date this article, no regulations have been announced.

[11] *Id.* at §1802(10); §1803(a).

[12] *Id.* at §1802(10).

[13] *Id*. at §1802(8).

[14] *Id*. at §1804.

Even where the number of employees is three or below, smoking must be conducted in areas not generally open to the public (an employee break room, for example, or an office which is off limits to clients or customers).[15]

Establishments cannot escape coverage merely by holding themselves out as private clubs. The Act requires they either be tax exempt veterans' organizations or auxiliaries or meet all the following criteria: have a permanent membership screening mechanism; limit access and use to members and guests; be controlled by and operate for the benefit and pleasure of its members; and, with the exclusion of membership drives, advertise only to members.[16] In short, if it looks and smells like a restaurant, it is an enclosed public place, no "butts" about it. On the other hand, smoking is permitted in age-restricted venues (e.g., bars, taverns or dance clubs).[17] Every person who seeks admission to the venue must be required to show identification indicating that he or she is over the age of twenty-one (21).

Though residents of nursing homes may smoke in conformity with whatever requirements the facility dictates, employees may not.[18] Properly designated hotel and motel rooms are not subject to the ban, however, so employees may apparently smoke in unoccupied smoking guest rooms if the employer so permits.[19] The sweep of the "enclosed areas" and "public place" definitions is so broad that smoking is banned in employer owned vehicles, except "commercial vehicles when such vehicle is occupied solely by the operator."[20] If "commercial vehicle" is interpreted in conformity with its U.S. Department of Transportation definition, all smoking is banned in the average company car, but permitted in heavy trucks and buses if occupied by the operator alone.

Non-enclosed areas of public places are not covered by the ban, so open air patios, porches, decks, and tents and awnings with the flaps or vents open are not banned areas, nor are buildings with garage doors, provided the bay(s) are actually completely open.[21]

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[15] *Id*. at §1804(6).

[16] *Id*. at §1802(9).

[17] *Id*. at §1802(2).

[18] *Id*. at §1804(5).

[19] *Id*. at §1804(2).

[20] *Id*. at §1802(5) and (10); §1804(10).

[21] *Id*. at §1804(4).

(B) Employer Responsibilities

Anyone who owns, manages, operates or controls any public place or place of employment where smoking is banned has responsibilities. First, the prohibition on smoking must be communicated to applicants and employees.[22] Second, "no smoking" signs or symbols must be clearly and conspicuously posted at every entrance to every public place and place of employment covered by the act.[23] Third, owners, managers, operators and employees "shall inform persons violating this part of the appropriate provisions thereof."[24]

(C) The consequences for violating the Act

What are the consequences for failing to provide notice to applicants, employees, the public and violators? The Act provides first for an initial written warning, then a one hundred dollar ($100) fine and, finally, a five hundred dollar ($500) fine for violations occurring within any twelve-month period.[25] Each day of a "knowing" violation counts as a separate and distinct violation,[26] so fines can add up quickly for those who have been given an initial warning by either the Department of Labor or the Department of Health.

One final, and very important word of warning to employers is in order. Because the Act so clearly enshrines public policy against smoking in public places, employers must handle employees who complain about violations of the Act with caution. NSPA expressly provides a complaint mechanism to be utilized by "any person."[27] Firing an employee because he or she complains about smoking coworkers or the public may well result in liability under the Tennessee Public Protection Act, *Tenn. Code Ann.* §50-1-304, as well as a potential common law retaliatory discharge claim.

(D) What's an employer to do?

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[22] *Id*. at §1803(b).

[23] *Id*. at §1805.

[24] *Id*. at §1806(e).

[25] *Id*. at §1807(b).

[26] *Id*. at §1807(c).

[27] *Id*. at §1806(c).

So what is an employer to do? Communicate NSPA's restrictions to applicants and employees (a concise, small print line on the application should suffice, as will a company-wide email or posting notices in conspicuous places). Enforce the ban on smoking inside, and create a clear policy regarding whether and where it is permitted anywhere outside. Post the required signs and symbols, or at least make sure the signs are posted at the entrances to the building in which the employer has offices. Consider a written policy in the employee handbook which communicates the above and encourages employees to report problems to management. And, in the event of a complaint, avoid characterizing the employee who makes the report as a "troublemaker" or "whiner" and prevent retaliation against the complainant.

VIII. TENNESSEE ATTORNEY GENERAL'S OFFICE

Vacation Pay policies control whether employee is paid for unused time at termination of employment.

The payment of final wages for **private** employees in Tennessee is governed by T.C.A. § 50-2-103(a)(3) and (g), which mandates payment "in full [of] all wages or salary" earned at the time of separation and all "vacation pay or other compensatory time that is owed to the employee by virtue of company policy or labor agreement" no later than twenty-one days following the date of separation. One frequent question posed to counsel is: "Can we deduct amounts from final paychecks for expenses such as uniforms, tuition or equipment costs?" Even more frequent are inquiries regarding whether, and under what circumstances, employees are entitled to be paid for vacation upon termination.

Employers frequently deduct amounts from employee paychecks for a variety of costs, but it is dangerous to do so without written evidence of an employee's consent. The statute mandates payment "in full [of] all wages or salary." To overcome the absolutist language of the statute, employers must demonstrate agreement to any wage payment deductions. This requirement applies even where an employer suspects employee theft. While explaining that the police have been notified while handing over the final check may not be particularly appealing, it will keep an employer from committing a criminal misdemeanor and subjecting itself to civil penalties and fines under this statute.

The proactive approach? Include a written agreement to deduct costs for uniforms, equipment replacement, lost keys and other security devices, travel or vacation advances, and the like as part of the hiring process. For existing employees, require a separate signed agreement when the next handbook or other major policy revisions are issued.

The greatest source of ongoing confusion is the vacation pay language, added in 1999. Many employers adopted an aggressive interpretation of the provision, refusing to pay accrued vacation in "for cause" terminations, for failure to give notice, or based on a "use it or lose it" policy. The Tennessee Department of Labor (TNDOL) responded to a

1999 Tennessee Attorney General opinion letter by taking the position that accrued vacation must be paid **regardless** of an employer's policies to the contrary. The opinion letter stated, "an employee who has accrued vacation leave under his or her employer's employment policy pertaining to the accrual of vacation leave is entitled to receive payment …upon termination of employment." Op. Att'y Gen. No. 00-132, 2000 Tenn. AG LEXIS 133 (August 17, 2000). The TNDOL's position essentially equated "accrued" with "earned."

Then, in November of 2006, the Attorney General's office issued another opinion letter, concluding that the language of the statute calls for the payment of "accrued" vacation only when the text of the employer's policy or collective bargaining agreement so dictates. Op. Att'y Gen. No. 06-169, Tenn. AG LEXIS 189 (November 13, 2006). The Attorney General's opinion directs attention at the "text" of an employer's policy, though the statute expressly does not require a written policy. Subsequent to the Attorney General's opinion the state is speaking with a single voice. Within a short period of time, the TNDOL's "Frequently Asked Questions" web page was altered to reflect the Attorney General's opinion.

In the context of terminations and final paychecks Tennessee employers are now free to apply vacation pay policies that do not permit payment of unused but accrued vacation, which permit payment only when the employee gives a certain amount of notice, or which deny payment in "for cause" terminations, without fear of facing an administrative enforcement action. Though that news is of great comfort, this interpretation of the statute still does not foreclose the possibility of a contract claim for payment of accrued vacation.

In *Vargo v. Lincoln Brass Works, Inc.*, 115 S.W.3d 487,492, 494 (Tenn. 2003), the Tennessee Supreme Court upheld an award of severance pay to a laid off employee on the theory that the company's ambiguous handbook language, the absence of a contractual disclaimer, and its prior record of routinely making such payments created a vested right.

The *Vargo* decision, in a footnote, cites to *Gaines v. Response Graphics, Inc.*, 1992 Tenn. App. LEXIS 895, No. 01A01-9204-CV-00181, at * 2 (Tenn. Ct. App. Nov. 6, 1992), for the proposition that courts decline to enforce handbooks as contracts where the document includes a specific disclaimer. In *Gaines*, the employer argued there was no agreement to pay employees for accrued but unused vacation and that its written policy providing for forfeiture was contractually binding. Citing *48A Am.Jur.2d Labor and Relations § 1822*, Judge Ben H. Cantrell upheld a vacation pay award to a laid off employee under the theory that "paid vacation is a form of compensation" and, once earned, must be paid, absent some agreement to the contrary. "If the employer is not bound by the handbook, the employee is not either. Therefore, the forfeiture provisions of the handbook cannot defeat the employee's right to accrued vacation pay." Id. at **3-5.

The bottom line: create a written policy including contract disclaimer language that makes clear the method for awarding or accumulating for vacation pay, when it begins accumulating, when it can be used, whether and how it may be carried forward from calendar or anniversary year, and whether and under what circumstances accrued vacation pay will be paid out upon termination of employment. If the employer has restrictions or forfeiture provisions, avoid describing vacation as "earned" or as "compensation." Distribute the policy in the company's handbook and require employees to sign acknowledgements of receipt and review of the handbook. As always, counsel employers that whatever policy they choose to adopt, uniform application is the key.