Knoxville Bar Association

Employment Law Update

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Edward G. Phillips, Esq.
Kramer Rayson LLP
Phone: (865) 525-5134
email: ephillips@kramer-rayson.com
website: kramer-rayson.com

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Supreme Court Update

2010-2011 Supreme Court Term

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AT&T Mobility LLC v. Concepcion
131 S. Ct. 1740 (U.S. 2011)

- Ninth Circuit applied California's "Discover Bank Rule" which held class action waivers in consumer contracts "unconscionable."
- Plaintiffs bring class action false advertising suit for charging $30.22 sales tax on "free" cell phones.
- AT&T asks D. Ct. to direct **individual** arbitration per its contractual class action waiver. D. Ct. refuses. Ninth Circuit affirms.
- S. Ct. reversed. FAA preempts California law declaring class action waivers unconscionable.
- § 2 of FAA cannot be used to frustrate purposes of FAA.

Borough of Duryea v. Guarnieri
131 S. Ct. 2488 (2011)

- Guarnieri's filed successful grievance over his termination. Upon reinstatement, Borough imposed "onerous requirements." He claimed retaliation in violation of the 1st Amendment ***Petition Clause***.
- Contrary to multiple other circuits, Third Circuit held his ***private grievance*** was nevertheless protected by the Petition Clause.
- Supreme Court reverses. Holds job-related ***Petition Clause*** protection is limited to matters of ***public concern***.
- Public employers are saved from every employee grievance becoming a "federal case."

Kasten v. Saint-Gobain Performance Plastics Corp., 130 S. Ct. 1890 (U.S. 2010)

- Kasten was fired shortly after ***oral internal complaint*** that "time clocks were illegally placed."
- District Court and Seventh Circuit held that intra-company complaints ***are*** protected by FLSA, but ***not*** oral complaints. Protection limited to "***filing*** a complaint."
- Supreme Court reversed. FLSA anti-retaliation provision protects internal complaints, even oral ones.
- Must have a "degree of formality" where "a reasonably objective person" would understand its an FLSA complaint.

Staub v. Proctor Hosp.
131 S. Ct. 1186 (2011)

- USERRA action by Staub over being fired because of military duty. Jury awards damages. Seventh Circuit reverses; decisionmaker "not biased" and made "independent investigation." Rejected "cats paw" theory.
- Supreme Court reversed. If a supervisor performs act ***motivated by animus*** that's ***intended to cause harm*** and it is ***a proximate cause*** of the harm, employer is liable.
- Employer has no blanket "immunity" because non-biased manager conducts independent investigation.

Thompson v. N. Am. Stainless, LP
131 S. Ct. 863 (2011)

- Regaldo files a sex discrimination charge; then Thompson, her fiancée, is terminated. He sues for Title VII retaliation.
- Sixth Circuit *en banc* dismisses Thompson's case because *he* did not engage in protected activity.
- Supreme Court reverses. Firing Thompson was illegal retaliation against Regaldo, per S. Ct.'s *White* decision.
- Title VII prohibits retaliation against Regaldo's "***close associate***," who was in the "***zone of interests***" protected by Title VII.

Wal-Mart Stores, Inc. v. Dukes
131 S. Ct. 2541 (U.S. 2011)

- Massive gender discrimination class action against Wal-Mart – ***1.3 million*** plaintiffs seeking "***billions***" of $$.
- Ninth Circuit affirmed class action certification under Rule 23; ***Rule 23 (a)*** commonality requirement satisfied; back pay claim properly certified under ***Rule 23 (b)(2).***
- Supreme Court (5-4) reverses. Plaintiffs' "***supervisory discretion***" ***argument*** cannot satisfy Rule 23 (a) commonality; and Rule 23 (b)(2) inapplicable because damages ***predominate*** over injunctive relief.

NASA v. Nelson
131 S. Ct. 746 (U.S. 2011).

- California scientists sue NASA over mandated background checks allegedly violating Constitutional "***informational privacy***" rights.
- Ninth Circuit agrees, enjoins background checks as unconstitutional.
- Supreme Court reverses. Government's questions were reasonable in its role as "***proprietor***," not as "***sovereign power***."
- Privacy Act protection sufficiently limited any potential public disclosure.

2011-2012 Supreme Court Term

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EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School, 597 F.3d 769 (6th Cir. 2010), *cert. granted* 131 S. Ct. 1783 (U.S. 2010).

- Religious employers enjoy an "exception" to employment laws for "ministerial" employees.
- Ministerial employees include (1) clergy and (2) lay employees whose "***primary duties***" are "***ministerial***."
- Ministerial duties include teaching religion, spreading the faith, participating in worship services, etc.
- Sixth Circuit construed "primary duty" based almost solely on ***time spent*** on lay versus religious functions.
- Thus a "***commissioned minister***" was not "ministerial" – 6¼ hours of lay duties out of 7.

Knox v. SEIU, Local 1000, 628 F.3d 1115 (9th Cir. 2010), *cert. granted* 2011 U.S. LEXIS 4827 (June 27, 2011).

- Public employee union imposed $12M in "fees" for "***non-chargeable***" political expenses after required *Hudson* notice.
- Public ***non-union*** employees have Constitutional right to not contribute to union's political activities.
- Ninth Circuit held SEIU could dramatically raise non-chargeable fees without giving a second *Hudson* notice.
- At stake is the ability SEIU use non-chargeable fees to subsidize its broad political agenda.

Sixth Circuit Update

Age Discrimination

Bartlett v. Gates
2010 U.S. App. LEXIS 23559 (6th Cir. 2010)

- Judge Clay authors opinion holding that run-of-the-mill age conscious statements by decisionmaker and supervisor unrelated to the decision constituted ***direct evidence.***
- Decisionmaker and supervisor told plaintiff "you had a bad reputation in Dayton. You have 34 years and that is enough," suggested and joked about his retirement.
- Judge Clay mistakes this for direct evidence; that is, evidence that compels the jury to find the promotion decision was discriminatory, ***without requiring any inferences***.

Disability Discrimination

Stansberry v. Air Wis. Airlines Corp.
No. 09-2499, 2011 U.S. App. LEXIS 13659 (6th Cir. July 6, 2011)

- Stansberry's wife had rare disabling and expensive illness.
- Air Wis. fired him for poor performance at a time her condition had flared up.
- Stansberry sued under the ADA's "associational disability" theory, 42 U.S.C. § 12112 (b)(4). Three theories: expense, association or ***distraction***.
- Stansberry chose distraction, but lacked any evidence that his wife's disability was a *determining factor* in his termination.

Baker v. Windsor Republic Doors
414 Fed. Appx. 764 (6th Cir. 2011)

- Baker returned from medical leave with pacemaker and requested restrictions to avoid contact with "magnetic fields."
- Employer declined, but gave Baker option to return if he signed a W/C heart waiver. Baker declined, brought ADA action for discrimination and retaliation.
- D. Ct. jury found Baker was "***regarded as disabled***" and Windsor refused a reasonable accommodation.
- Sixth Circuit reversed in part. Under established 6th Circuit precedent, a "regarded as" plaintiff is ***not*** entitled to reasonable accommodation; but affirmed on retaliation for asserting ADA rights.

Jakubowski v. The Christ Hospital and Phillip Diller
627 F.3d 195 (6th Cir. 2010)

- Jakubowski, a medical resident with Asperger's, was terminated from his residency due to his poor communication skills. His proposed accommodations: inform the staff, train them on Asperger's, and work on communication.
- Hospital refused; offered different residency.
- The Sixth Circuit affirmed summary judgment, noting that the plaintiff did ***not*** explain how his proposed accommodation would help him perform the essential functions of his position.
- Rule: a plaintiff who fails to propose a ***workable*** reasonable accommodation is not "otherwise qualified" for the position.

Bates v. Dura Automotive Systems
625 F. 3d 283 (6th Cir. 2010)

- Dura's policy prohibited its employees from using prescription drugs (e.g. Xanax, Lortab, Oxycontin), that adversely affect "safety, property, or performance" ***even with a prescription***.
- Six non-disabled plaintiffs sued under ADA, 42 U.S.C. § 12112 (b)(6) (which prohibits ***qualification standards*** that screen out disabled individuals).
- Sixth Circuit held that § 12112 (b)(6) unambiguously protects ***only*** disabled employees.

Lewis v. Humboldt Acquisition Corporation, Inc.
634 F. 3d 879 (6th Cir. 2011), vacated by, rehearing granted by, *en banc*, 2011 U.S. App. LEXIS 11941 (6th Cir. June 2, 2011)

- Registered nurse Lewis' medical condition required a wheelchair.
- She was fired for a profane outburst with her supervisor.
- She sued under ADA claiming that her disability was a "***motivating factor***;" D. Ct. charged "***sole reason***."
- Sixth Circuit ***reluctantly*** affirmed jury verdict for ER because under *Monette*, she had to prove disability was the "***sole reason***."
- Sixth Circuit granted an *en banc* hearing to decide the proper standard.

Lee v. City of Columbus
636 F.3d 245 (6th Cir. 2011)

- Police Dept. policy required those returning from three days of sick leave to provide doctor's slip specifying "***nature of the illness***."
- Plaintiff class sued under Rehabilitation Act (which incorporates ADA § 12112 (d) limitations on employer ***medical inquiries***.)
- Sixth Circuit held that a universal requirement to "disclose the nature of the illness" was ***not*** a medical inquiry prohibited by § 12112 (d) .
- Per EEOC Guidelines, a universal sick leave policy requiring doctor's slips for such leave does not violate ADA.

Race and Sex Discrimination

Williams v. CSX Transp. Co.
643 F.3d 502 (6th Cir. 2011)

- Williams sued CSX for a discriminatory transfer and sexual and racial harassment.
- D. Ct. dismissed her sexual harassment claim for failure to exhaust administrative remedies.
- Her "Charge Information Form" ("CIF") detailed harassment, but not under oath; and her "Charge" was under oath but omitted harassment.
- Sixth Circuit reversed, broadly interpreting her CIF and Charge filings, ***both*** were sufficient "charges" to exhaust administrative remedies.

Gilbert v. Country Music Assn., Inc.
2011 U.S. App. LEXIS 15933 (6th Cir. 2011)

- Gilbert was homosexual in the union; complained about being called a "faggot" and threatened.
- Union thereafter quit referring him.
- Gilbert sued claiming gender discrimination because of his "sexual orientation."
- Sixth Circuit held Title VII does ***not*** cover a "sexual-orientation claim;" and Gilbert did not allege a "contra-gender" (sex stereotyping) claim.

Retaliation

Evans-Marshall v. Board of Educ. Of The TIPP City Exempted Village School District
624 F.3d 332 (6th Cir. 2010)

- English teacher Evans-Marshall was terminated following parent complaints about textbook selection and "controversial teaching methods," (probing sexuality, suicide and other sensitive issues).
- Plaintiff brought 1st A. Free Speech right to select books and determine instruction methods.
- Sixth Circuit ultimately held her speech was part of her ***official duties*** and thus not protected.

Hoffman v. Solis
636 F.3d 262 (6th Cir. 2011)

- Hoffman, a NetJets pilot, had engaged in protected safety complaints to NetJet and FAA for years.
- When he was denied a promotion to instructor, he filed a retaliation complaint with OSHA.
- The DOL's ARB held that while Hoffman established protected activity and adverse action, NetJets met its burden of providing "***clear and convincing evidence***" it would have made the same decision anyway. Sixth Circuit affirmed.
- Road map to employers facing this heightened burden.

Warn Act

Bledsoe v. Emery Worldwide Airlines, Inc.
635 F.3d 836 (6th Cir. 2011)

- FAA forced Emery to suspend flight operations, and it laid off 575 employees in August for "60 days."
- FAA's increasing requirements forced Emery to permanently close in December. Emery wrote three letters explaining increasingly grim prospects.
- Laid off employees brought WARN action and requested jury trial.
- Sixth Circuit held plaintiffs did not have a "**reasonable expectation of recall**" when Emery closed based on Emery's increasingly gloomy letters.
- A WARN Act claim is for equitable relief and does ***not*** provide the right to a jury trial

Constitutional Due Process

Kizer, et al. v. Shelby County Gov't, et al.
No. 10-51-61 (6th Cir. Aug. 17, 2011)

- Three plaintiffs held appointed positions in County Clerk's office not included in classified positions by Civil Service.
- New Clerk fired them, they sued claiming they ***should have been*** in classified position, and their due process rights were violated.
- Sixth Circuit held that appointed positions are ***not*** classified positions, and plaintiff had no property interest to support due process claims.

Tennessee Update

Hannan v. Alltel Publishing Co.
270 S.W.3d 1, (Tenn. 2008)

- This 2008 Supreme Court opinion authored by Justice Holder severely restricted summary judgment in state court.
- To win MSJ under *Hannan* the moving party must either:

  (1) ***affirmatively negate*** an essential element of the nonmovant's claim; or

  (2) show that the nonmoving party cannot prove an essential element of its claim ***at trial***.
- *Hannan* eliminates *Byrd v. Hall's* "put up or shut up" motions.

Gossett v. Tractor Supply Co.
320 S.W.3d 777 (Tenn. 2010)

- In 2010, Justice Holder held that *McDonnell Douglas* burden-shifting analysis at summary judgment violates *Hannan.*
- Articulating a legitimate non-discriminatory reason does not "**negate an essential element**" of plaintiff's claim because it does not prove **absence of retaliatory motive**.
- Eliminated established formula for analyzing employment cases; and set no standard. Virtually all employment cases would go to trial based on allegations, not evidence.

HB 1358 and HB 1641 Legislation

- In June 2011, General Assembly expressly overruled *Hannan* and *Gossett* in two new statutes.
- HB 1358 mandates summary judgment where defendant demonstrates the plaintiff's evidence is insufficient to establish an essential element.
- HB 1641 expressly requires that *McDonnell Douglas* paradigm applies at ***all stages*** of employment discrimination and retaliation cases, including summary judgment.

What's the Impact of HB 1358 and 1641?

- Reinstates the *Byrd v. Hall* "put up or shut up" motions for summary judgment. Burden now shifts to plaintiffs to produce *evidence* of challenged essential elements.
- Employment law cases will be considered the same in federal or state courts, utilizing *McDonnell Douglas* burden shifting.
- "***We've Only Just Begun***" (Carpenters, 1970).
- Look for Supreme Court to declare statutes unconstitutional violation of separation of powers.