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Insight
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Can Non-Compete Agreements With Low-Wage Employees Pass Judicial Scrutiny?

National fast-food sandwich shop Jimmy John's recently came under fire for requiring its employees — including sandwich makers and freaky-fast delivery drivers — to sign non-compete agreements. The contracts prohibited the employees from working, both during and for two years after their Jimmy John's employment, at any other business that earned more than 10% of its revenue from selling "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches" within two miles of any Jimmy John's location in the United States.

Critics, including the attorneys general of Illinois and New York, claimed that these non-competes improperly chained Jimmy John's workers to their low-paying jobs. Jimmy Johns ultimately settled those claims and scrapped the agreements. The State of Illinois then passed the "Freedom to Work Act," prohibiting employers from entering into non-compete agreements with employees earning $13 or less per hour.

While Michigan does not have a comparable law banning non-compete agreements with low-wage workers, a recent opinion from the Michigan Court of Appeals illustrates how those agreements are analyzed under Michigan law. In *BHB Investment Holdings d/b/a Goldfish Swim School v. Steven Ogg and Aqua Tots*, the plaintiff operated a Goldfish Swim School in Farmington Hills. The defendant Ogg, when hired as a swim instructor at Goldfish for $10 per hour, signed a contract that prohibited him from: (1) working for a competitor within a 20-mile radius of any Goldfish location for one year after his employment ended; and (2) soliciting any Goldfish employees or customers for 18 months after his employment with Goldfish ended. Goldfish terminated Ogg's employment. He was thereafter hired as a swim instructor by Aqua Tots, a direct competitor within a 20-mile radius of more than one Goldfish location.

After its cease-and-desist letters were ignored, Gold-

Inside This Edition

- Dogs, Horses, Snakes, And Peacocks On the Job? Must Support Animals Be Allowed On Your Premises? 3
- Michigan Civil Rights Commission Extends Act To Sexual Orientation And Gender Identity 4
- Things Are Not Always As They Might Seem 5
- U.S. Supreme Court Decides *Janus v. AFSCME* Case As Expected 5
- Is Your Personal Attorney A "Public Body" For Whistleblower Purposes? 7
- Resumé Fraud Can Turn the Table On An Employee's Lawsuit 8
- Wage And Hour Developments Keep On Motoring 10
- 80th Anniversary Of The Anachronistic FLSA 12
- Recent ADA And FMLA Decisions Of Note . . . 13
- What Will Follow *Epic*'s Resolution Of The Struggle Over Class Arbitration? 15

Can Non-Compete Agreements With Low-Wage Employees Pass Judicial Scrutiny? *from page 1*

fish sued Ogg and Aqua Tots. Goldfish requested a preliminary injunction that would prohibit Ogg from working as a swim instructor for Aqua Tots, given that Goldfish had trained Ogg extensively (and at significant expense) in the allegedly unique Goldfish techniques for teaching children how to swim. Goldfish also argued that Ogg could unfairly lure customers away from Goldfish, and to his new employer, because children and their families become attached to swim instructors and often follow them from job to job. Aqua Tots responded that it had taught Ogg its own distinct teaching method and that Ogg had not taken any Goldfish documents, customers, or employees with him to Aqua Tots.

The trial court granted Goldfish the preliminary injunction. But the case was then reassigned to a new trial judge, who vacated the injunction and dismissed Goldfish's claims on the grounds that Goldfish had failed to demonstrate that its teaching curriculum was either proprietary or a trade secret, and had further failed to show that it had been harmed by Ogg through lost customers or the disclosure of confidential information. Goldfish appealed.

The Michigan Court of Appeals began its analysis with a reminder that, while most contracts are presumed to be legal, valid, and enforceable, all non-compete agreements are disfavored as restraints on commerce and are only enforceable in Michigan to the extent that they are reasonable. A Michigan statute provides that non-competes must: (1) protect the employer's legitimate competitive business interest; and (2) be reasonable as to duration, geographic area, and the type of employment or line of business that is prohibited.

The court found that Goldfish's non-compete with Ogg, an entry-level swim instructor, did not serve a protectable interest because Goldfish's instructional methods were not truly proprietary or trade secrets. Those methods were observed daily by family members (and the general public) during children's swimming lessons at Goldfish. Because Goldfish's stated competitive business interest was not reasonable, the non-compete that Ogg signed was unenforceable under Michigan law.

The court noted, however, that the contract's provision that prohibited Ogg from soliciting Goldfish customers was reasonable and enforceable. But because there was no evidence that Ogg had in fact solicited any customers to leave Goldfish and join him at Aqua Tots, that claim was dismissed too.

In a concurring opinion, one Court of Appeals judge offered the following fast-food analogy:

> Preventing Ogg from being a swim instructor for a one-year period to protect Goldfish secrets is akin to making a teenaged minimum-wage McDonald's employee promise not to work for Burger King in the future. Certainly, a person learns some generalized skills at a fast food restaurant that would reduce training time if the person accepted employment at another fast food establishment. But the employee's understanding of how to cook a hamburger and operate a cash register would not give Burger King an "unfair advantage." The McDonald's transferee could not use the secret of the Big Mac to alter the Whopper.

This analogy encapsulates the skepticism with which courts view non-compete agreements with low-wage employees. Employers should carefully consider the nature and extent of all restrictive covenants (such as non-competition and non-solicitation provisions) with the various types and pay levels of their employees. There is no one-size-fits-all approach. Any non-compete agreements with entry-level or low-wage employees will be subject to substantial judicial scrutiny, and, if found to be over-reaching and unreasonable, could even taint and jeopardize the enforceability for higher-level employees with whom a non-compete may actually be reasonable and defensible.

William B. Forrest III

Dogs, Horses, Snakes, And Peacocks On The Job? Must Support Animals Be Allowed On Your Premises?

> ". . . it's like there's a horse loose in a hospital. I think eventually everything's going to be OK, but I have no idea what's going to happen next. And neither do any of you, and neither do your parents, because there's a horse loose in the hospital. That's never happened before!"
> – John Mulaney, Kid Gorgeous at Radio City (Netflix 2018).

It turns out that Netflix comedians—even really popular ones—get it wrong. An Americans with Disabilities Act regulation dealing with public facilities and accommodations requires "reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability."

Thus, not only have (miniature) horses been in hospitals before – a "Wonder Horse" named Amos reportedly brought smiles to children and elderly in 200 yearly visits to Florida hospitals and nursing homes — the law may require the admission of such animals, including to places of employment, even if it does not qualify as a "service animal." So long as the animal provides emotional support for a medical condition, a request to bring such an animal to work may trigger the ADA, and its requirement of reasonable accommodation.

The EEOC, in fact, has recently sued CRST International on behalf of a putative employee because it would not allow a psychiatrist-prescribed "emotional support dog" to accompany him on a training exercise. The EEOC's position, as stated in its opposition to CRST's pending motion for summary judgment, was: "[W]hether an animal (a service dog, an emotional support dog, or *any other animal*) is required in any specific employment situation turns on a standard reasonable accommodation analysis" under the ADA.

If so, the italicized phrase "any other animal" could have a host of interesting employment applications. The use of trained horses for therapeutic work, and consequent requirement that they be allowed into public facilities and accommodations, has now been codified into the ADA regulations, as described above—and the ADA does not necessarily rule out any other animal from being permitted or required in a workplace.

The United Kingdom's National Health Service has recruited "therapy snakes" to assist with depression, finding they are "a great motivator . . . for male patients who often don't want to look after furry animals." And recently, United Airlines was in the news for refusing to allow a woman to board a plane with her "emotional support peacock" named Dexter. But might Dexter be permitted to come to work in the office or manufacturing facility with his owner? Perhaps.

Notably, although the EEOC's position vis-à-vis emotional support animals in the workplace may be of recent vintage, there is authority holding that "reasonable accommodation" of disability in other contexts can extend to emotional support animals. In *Overlook Mut. Homes, Inc. v. Spencer*, a U.S. District Court in Ohio held that "emotional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities" and that these untrained emotional support animals "can qualify as reasonable accommodations" under the federal Fair Housing Act. And nothing about the ADA preclude an emotional support animal from being a reasonable accommodation that allows the employee to perform his or her work duties.

That is not to say that every employee is entitled to have an emotional support animal in every workplace. An employee is entitled to a reasonable accommodation, not his or her preferred accommodation; likewise, an emotional support animal may constitute an undue hardship to the employer. Earlier this year, a U.S. Dis-

Must Support Animals Be Allowed On Your Premises? *from page 3*

trict Court in Virginia granted summary judgment to the employer in *Maubach v. City of Fairfax* where the plaintiff's emotional support dog caused several employees to suffer allergies, and where the plaintiff refused to consider alternative accommodations.

Even a trained service animal may not be a reasonable accommodation in some circumstances, such as an automobile assembly plant. The U.S. Court of Appeals for the Sixth Circuit recently affirmed a Michigan U.S. District Court's finding in *Arndt v. Ford Motor Co.* that there was insufficient evidence that the plaintiff's service dog would assist him with performing assembly line functions.

The bottom line for employers: You must, at a minimum, engage in a good faith interactive process, no differently than any other ADA situation, if an employee requests an accommodation related to an emotional support animal.

Thomas J. Davis

Michigan Civil Rights Commission Extends Act To Sexual Orientation And Gender Identity

Discrimination or harassment based on a person's sexual orientation or gender identity is not explicitly proscribed by Michigan's Elliott-Larsen Civil Rights Act (ELCRA). In fact, Michigan's legislature has expressly rejected efforts to add classifications to ELCRA eleven times since 1999. In the face of that, the Michigan Civil Rights Commission announced that, starting May 22, 2018, it will interpret ELCRA's ban on "discrimination because of . . . sex" to include discrimination on the basis of sexual orientation or gender identity.

After the Commission's announcement, the Michigan Department of Civil Rights has taken complaints of sexual orientation/gender identity discrimination, but has yet to hold hearings.

The Commission's announcement came shortly after the U.S. Court of Appeals for the Sixth Circuit's ruling in *EEOC v. RG & GR Harris Funeral Homes* (petition to the Supreme Court pending), that discrimination on the basis of transgender and transitioning status violates Title VII, and that the employer's religious belief did not allow it to discriminate on that basis.

The Commission had considered this interpretation before the Sixth Circuit's ruling, but held off on two earlier occasions after the Michigan Attorney General opined that the Commission did not have the legal authority to insert sexual orientation and gender identity into ELCRA. On July 20, 2018, the Michigan Attorney General opined once again that only the Michigan legislature, not the Commission, has authority to expand ELCRA's coverage.

On June 4, 2018, shortly after the Commission's order expanding ELCRA, the U.S. Supreme Court issued its decision in the "gay wedding cake" case — *Masterpiece Cakeshop v. Colorado Civil Rights Commission* — arguably drawing into question the Sixth Circuit's conclusion in the *Harris Funeral Homes* case. In the *Masterpiece Cakeshop* case, the owner and baker had refused to create a wedding cake for a same-sex couple because of his religious opposition to same-sex marriage. The couple filed a charge with the Colorado Civil Rights Commission pursuant to the Colorado Anti-Discrimination Act (CADA), which expressly prohibits a person from denying an individual, because of sexual orientation, the full and equal enjoyment of goods or a place of public accommodation.

The Colorado Civil Rights Commission had rejected the baker's claim that requiring him to create a cake for a same-sex wedding would violate his First Amendment rights to free speech and free exercise of religion, and ordered the baker to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wed-

Sexual Orientation And Gender Identity *from page 4*

ding cakes or any product [he] would sell to heterosexual couples." The Colorado Court of Appeals affirmed, and the case worked its way to the U.S. Supreme Court.

The Supreme Court reversed, finding that the Colorado Commission's decision violated the First Amendment because it was inconsistent with the state's obligation of religious neutrality. Justice Kennedy, writing the majority opinion, explained that the Commission had exhibited hostility toward religion based on statements Commissioners had made during a public meeting that implied that religious persons and their beliefs are less than fully welcome in Colorado's business community. The Court also found a lack of neutrality evidenced by the Colorado Commission's earlier inconsistent treatment of three bakers who had refused to make a cake for a customer who requested images that conveyed disapproval of same-sex marriage. In that case, the Commission had found that the bakers' refusal did not violate the Colorado Act on a religious basis because the requested images were "derogatory" and "hateful," and they would be attributed to the bakers.

In contrast to the Colorado statute, the Michigan statute prohibits the denial to an individual the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or services because of certain characteristics, including religion, but not including sexual orientation or gender identity.

Putting aside the legal sustainability of the Michigan Commission's May 22 attempt to expand ELCRA's coverage, when faced with a religious defense to a discrimination claim, heed should be paid to Justice Kennedy's admonition in the *Masterpiece Cakeshop* case that ". . . these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

Sarah L. Nirenberg

Things Are Not Always As They Might Seem

We frequently take comfort in making decisions based on what makes sense. In most instances, the result comports with the law, but not always.

Two recent decisions by U.S. Courts of Appeals — the Seventh Circuit in *Kleber v. CareFusion Corp*. and the Ninth Circuit in *Rizo v. Yovino* — provide a caution against personnel decisions that may in the past have been made reflexively.

In *Kleber*, the Seventh Circuit addressed problems associated with hiring an overqualified candidate. In the

U.S. Supreme Court Decides Janus v. AFSCME *Case As Expected*

Just before taking its summer 2018 recess, the U.S. Supreme Court, with the addition of Justice Neil Gorsuch, issued its long-anticipated 5 to 4 decision in Janus v. AFSCME (June 27, 2018), *holding that it violates the First Amendment rights of public sector employees to compel payment of "fair share agency fees" to unions for representational activities. The majority reasoned that such fees could not be justified by promoting "labor peace" or avoiding "free riders." The Court reversed its 41-year-old precedent in* Abood v. Detroit Bd. of Ed. (1977), *which had allowed such fees. The* Janus *decision will have a limited impact in roughly half of the states, including Michigan, that have passed "right to work" laws.*

Theodore R. Opperwall

Things Are Not Always As They Might Seem *from page 5*

past, employers may have rejected such job applicants based on the common-sense notion that hiring an overqualified candidate can lead to job dissatisfaction, which serves the interest of neither the employer nor the employee.

Kleber, a 58-year-old highly experienced lawyer, lost the last of several leadership positions he had held over the years. He applied for positions in law departments, but was routinely rejected. In the last instance he sought a position as staff counsel with CareFusion, which had posted for applicants with "3 to 7 years (no more than 7 years) of relevant experience." Kleber was rejected though he was admittedly qualified. CareFusion defended against Kleber's resulting age discrimination claim on the basis that Kleber's overqualification had led to the "reasonable concern that an individual with many more years of experience would not be satisfied with less complex duties . . . which could lead to issues with retention."

The main issue before the court was whether the federal Age Discrimination in Employment Act's (ADEA's) adverse impact doctrine applies to applicants, as opposed to just employees. In the past, the Seventh Circuit had suggested that it does not extend to applicants, and no other decision, to our knowledge, has held that the adverse impact analysis of the ADEA does extend to job applicants. In a 2-1 panel decision, the Seventh Circuit held that the adverse impact claim asserted by Kleber was legally sustainable and that it should survive summary judgment.

While that panel decision was vacated in April 2018 as a result of the grant of rehearing *en banc* (*i.e.*, before the entire bench of the Seventh Circuit), the decision provides a caution regardless of the eventual outcome. Employers may want to refrain from articulating a firm position against hiring an overqualified candidate — until the issue is finally resolved by the U.S. Supreme Court, which may find occasion to revisit its prior holding that the adverse impact theory applies generally to the ADEA.

It has also been common for employers, when making starting salary offers, to take into consideration an applicant's current or prior salary. After all, the applicant is likely to accept a reasonable bump in pay, and why should one offer more than necessary?

In the *Rizo v. Yovino* case, a California school system had adopted a procedure that a new hire's salary would be determined by adding five percent to an applicant's prior pay. When Rizo learned that male employees were paid more than she was upon hire, she brought a lawsuit under the federal Equal Pay Act (EPA).

The school system responded that the pay differential was based on "a factor other than sex" (namely, prior salary), which is generally a defense to an EPA claim. The trial court denied the school system's motion for summary judgment because it found reliance on prior pay to constitute a *per se* violation of the EPA. Because this holding conflicted with a prior Ninth Circuit decision that use of prior pay could, under proper circumstances, be considered as a defense, the decision was reversed on appeal by a three-judge panel of the Ninth Circuit. However, that holding was subsequently set aside by the Ninth Circuit *en banc*.

The *en banc* court then endorsed the trial court's holding that prior pay could not, under any circumstance, form the basis of a new employee's salary. This holding puts the Ninth Circuit at odds with all other Circuits that have considered the issue. Most Circuits permit some consideration of prior pay. Even the EEOC's compliance manual provides that if "the employee's prior salary accurately reflects ability, based on job-related qualifications," prior pay can be considered. The Seventh Circuit had even gone so far as to hold in one of its opinions that prior salary always involved "a factor other than sex."

It remains to be seen whether the *Rizo* decision holds up if a petition for *certiorari* is filed with the U.S. Supreme Court. Ninth Circuit Judge Reinhardt, who wrote the *en banc* majority opinion in *Rizo*, is perhaps the most reversed federal Court of Appeals judge in the United States. Given that a conflict exists between Circuits, a petition for *certiorari* stands a good chance of being granted, and with the Supreme Court's more con-

Things Are Not Always As They Might Seem *from page 6*

servative majority now, it would probably adopt the view of the other Circuits, perhaps even the Seventh Circuit's. For the time being, however, employers in the Ninth Circuit should be careful in using prior salary as a measure for what an applicant's salary offer should be.

Thomas G. Kienbaum

Is Your Personal Attorney A "Public Body" For Whistleblower Purposes?

The Michigan Supreme Court recently denied leave to appeal in *McNeill-Marks v. MidMichigan Medical Center-Gratiot*, a published Court of Appeals opinion holding that reports of legal violations made to practicing attorneys constitute protected activity under Michigan's Whistleblower Protection Act (WPA). The application for leave had been pending for nearly two years when the Court issued an order on June 15, 2018, stating that leave was being denied "because we are not persuaded that the question presented should be reviewed by this Court."

The order was signed by just three of the Court's seven Justices: Richard Bernstein, Bridget McCormack, and David Viviano. Justice Kurt Wilder, who was a member of the *McNeill* panel during his tenure on the Michigan Court of Appeals, did not participate. Justice Elizabeth Clement, who was appointed to the Michigan Supreme Court after the Court heard oral argument on the application for leave to appeal, also did not participate. Justice Brian Zahra wrote a lengthy dissent, joined by Chief Justice Stephen Markman.

This is a significant development for Michigan's WPA, having potentially widespread consequences, which deserved to be decided by more than a minority of the Court's seven Justices.

Plaintiff Tammy McNeill-Marks, who worked for defendant MidMichigan Medical Center-Gratiot (MMCG), was subjected to threats to kill her and her children by Marcia Fields. This led Ms. McNeill to seek and obtain a Personal Protection Order (PPO) against Ms. Fields from the local Circuit Court that prohibited Ms. Fields from "stalking" her as defined by Michigan law.

Shortly after the PPO was entered, and before it was served, Ms. McNeill unexpectedly encountered Ms. Fields in the hallway at MMCG, where Ms. Fields was an inpatient and was in a wheel chair. Ms. McNeill did not know that Ms. Fields was a patient, and did not recognize her until Ms. Fields said "Hello, Tammy." This was the only interaction between them.

Ms. McNeill informed her personal attorney, Richard Gay, of her chance encounter, saying that "[Ms. Fields] showed up today at my workplace," without telling him that Ms. Fields was a patient at MMCG where she worked. Ms. McNeill told Mr. Gay that he should not serve Ms. Fields with the PPO at MMCG because she had learned that Ms. Fields was "really, really ill," would require heart surgery, and her life was in danger. Despite that instruction, Ms. Fields was served in her hospital room by Mr. Gay's process server.

Ms. Fields then filed a HIPAA complaint against the hospital, which sparked an investigation by MMCG into Ms. McNeill's conduct. MMCG concluded that she had violated HIPAA and its privacy policies by "disclos[ing] that the patient [Ms. Fields] was at the hospital," and terminated her employment. The termination notice cited Ms. McNeill's telephone conversation with Mr. Gay as a "severe breach of confidentiality and violation[] of HIPAA privacy/practices."

Ms. McNeill sued MMCG for violating the Michigan WPA and Michigan public policy. Following discovery, the trial court granted MMCG's motion to dismiss the lawsuit. With regard to Ms. McNeill's WPA claim, the trial court found that her private conversation with her attorney was not a report to a public body. She appealed.

Is Your Personal Attorney A "Public Body"? *from page 7*

A three-judge panel of the Court of Appeals reversed regarding the WPA violation and remanded the case to the trial court for further proceedings. The panel held that Ms. McNeill's phone call to Mr. Gay regarding her chance encounter with Ms. Fields at the hospital was a "report to a public body" and thus a protected activity under the WPA — because Mr. Gay, as a member of the State Bar of Michigan (SBM), was a member of a "public body" as defined in the WPA. The panel reasoned that the SBM qualifies as a "public body" since it is "created by" and "primarily funded by or through" state authority.

MMCG applied for leave to appeal to the Michigan Supreme Court, which heard oral argument on the application in June 2016. At the time of the argument, the Chief Justice was Robert Young. At the time the Court denied the application for leave, on June 15, 2018, Justice Young had been replaced by Justice Wilder, and former Justice Joan Larsen had been replaced by Justice Clement. Only five members of the seven-member bench participated in the decision denying leave to appeal, with three Justices voting to deny leave and two dissenting.

In a lengthy and compelling dissent, which is a model example of textualist reasoning, Justice Zahra dissected the flaws in the Court of Appeals panel's reasoning. He wrote that the catchall definitional language in the WPA does not support the panel's finding that the SBM can be considered a "public body." Being a pragmatist, though, he also recognized that the only near-term remedy for this problem is for the Michigan legislature to step in and "reexamine this inartfully drafted statute, particularly the 'public body' definition."

Justice Zahra noted in his dissent other problems with the WPA's definitional provisions. The clause that "a report to '[t]he judiciary [or] any member or employee of the judiciary' is a report to a 'public body' under the WPA," is equally troubling because it could lead to the result that the WPA's reporting requirement is satisfied whenever a witness testifies in court before a judge or a court employee (*e.g.*, a clerk or court reporter), or simply tells one of them, that he or she observed a suspected violation of the law or a court order. It is doubtful that this is what the legislature intended, but unless corrected, Michigan employers should expect WPA claims to expand exponentially.

Justice Zahra's dissent also focused on the panel's conclusion that Ms. McNeill's private report (*i.e.*, her phone call) to her personal attorney (Mr. Gay) was a "report" under the WPA. It is clear factually that she did not report her encounter with Ms. Fields to Mr. Gay because she wanted him to take action due to an alleged illegality; to the contrary, she told him not to take action by serving the PPO, and he had no authority to act without her consent. Furthermore, her conversation with Mr. Gay could not be treated as a "report" under the WPA unless she waived her attorney-client privilege – a consideration that was not addressed by the panel, and would create a Hobson's choice for a prospective plaintiff and his or her attorney.

We believe Justice Zahra's reasoning in his dissent is spot-on, though it will take some time to see if WPA claimants try to take advantage of the Court of Appeals panel's plaintiff-friendly decision, or whether the legislature amends the WPA's definitional provisions to reflect the statute's actual intent.

Elizabeth Hardy

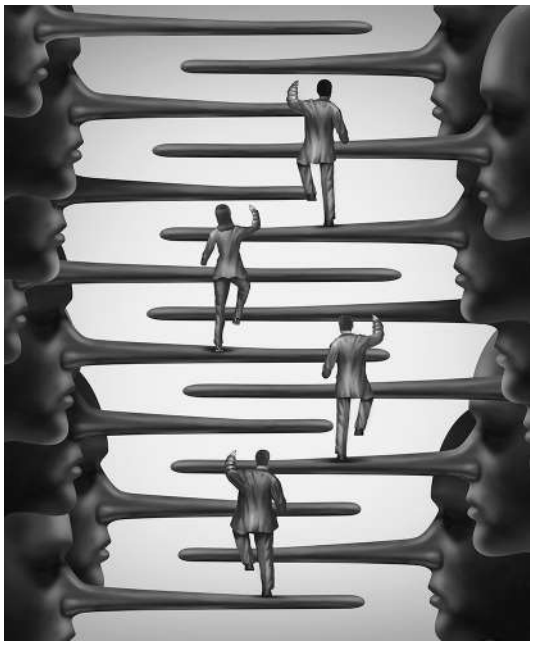
Resumé Fraud Can Turn The Table On A Lawsuit

Many employers are unaware of the Michigan Authentic Credential in Education Act (ACEA). The Act became law in 2005, and provides that an individual "who does not have an academic credential shall not knowingly use or claim to have that academic credential to obtain employment or a promotion or higher compensation in employment."

Resumé Fraud Can Turn The Table On An Employee's Lawsuit *from page 8*

Violations of the ACEA can be costly. It provides for potential statutory damages in the amount of $100,000, or actual damages, whichever is greater, plus recovery of attorney fees for "a person [including a business] damaged by a violation" of the Act.

Earlier this year, the Michigan Court of Appeals, in *Estate of Cheryl Ann Buol v. Hayman Company*, provided guidance on what an employer must prove to show a violation of the ACEA and to recover the $100,000 statutory minimum or actual damages.



Buol worked for Hayman Company for 23 years. She was hired in 1991 by falsely representing she had earned a bachelor's degree from the University of Wisconsin. Throughout her employment, Buol received numerous promotions, pay raises, and bonuses, and ultimately achieved the position of chief operating officer. In 2014, Buol left her employment. She claimed she was forced to resign due to the company's age, gender, and religious discrimination.

Buol filed a lawsuit against Hayman for wrongful termination under the Michigan Elliott-Larsen Civil Rights Act. During the litigation, Hayman discovered that she had lied about her degree, and it filed a counterclaim against her under the ACEA. The trial court dismissed all of Buol's discrimination claims and granted judgment as a matter of law to Hayman on its ACEA claim, awarding the company the $100,000 statutory minimum.

On appeal, Buol argued the ACEA did not apply to "resumé fraud," and, if it did, it was unconstitutional. The Michigan Court of Appeals held that the plain language of the ACEA "proscribe[s] false claims, in an employment context, that an individual possesses an academic credential that he or she does not possess." The court also held that the ACEA was constitutional.

However, the court ultimately ruled that the case had to be sent back to the trial court for further proceedings regarding damages. Buol argued that the ACEA did not come into effect until 2005 and could not be applied retroactively to her 1991 fraud. Hayman argued it was damaged because, after 2005, it created promotional materials that spread Buol's false credential, and also promoted her and gave her salary increases and bonuses—all based on her false resumé. But Buol claimed these increases and promotions were because of her strong job performance, not her false bachelor's degree claim.

The ACEA provides a statutory minimum award of $100,000 for "a person damaged by a violation" of the Act. The Court of Appeals held this requires "proof of an actual injury or loss." The court then ruled the trial court would have to make specific findings on whether Hayman was "a person damaged by a violation" and provided guidance as to what qualifies as a "loss or injury" under the ACEA. *First*, actions that occurred before the ACEA went into effect (2005) cannot be relied on to show damages. *Second*, an assessment of loss or injury is limited by the Act's six-year statute of limitations. *Third*, within these time limits, Hayman would have to show that Buol "used or claimed" her false academic credential to obtain her promotions and raises or that her silence constituted a "use or claim."

In assessing this third point, the court instructed the trial court to address specific factual issues, including "the relative effects of the 1991 resumé fraud" versus Buol's "work performance or demonstrated merit, or of other considerations" that went into Hayman's decisions

Resumé Fraud Can Turn The Table On An Employee's Lawsuit *from page 9*

to retain, promote, and give raises to Buol. Hayman could also show it was harmed by its publication of promotional materials that reflected Buol's false credential, including damages to its business reputation.

It is not uncommon that during post-discharge litigation, an employer first discovers an employee-plaintiff's resumé fraud. It is our firm's practice to check a plaintiff's background to verify the accuracy of applications and resumés. If fraud is found (which is surprisingly common), it can be used as an affirmative defense to a discharge claim, limiting the damages available to the plaintiff. *Buol* demonstrates that, in addition to an affirmative defense, a Michigan employer that can demonstrate the plaintiff's resumé fraud, and some measure of harm to the business, may be able to counter-sue for substantial damages under the ACEA.

Ryan D. Bohannon

Wage And Hour Developments Keep On Motoring

Rejecting the long-applied principle that exemptions to the overtime provisions of the Fair Labor Standards Act (FLSA) should be construed narrowly, the U.S. Supreme Court held on April 2, 2018, in *Encino Motorcars v. Navarro,* that service advisors — employees at car dealerships who consult with customers about their servicing needs and sell them services — are exempt from overtime requirements under the FLSA. The case was before the Supreme Court a second time.

In 2012, current and former service advisors of Encino Motorcars, a Mercedes-Benz dealer, sued for unpaid overtime, alleging that they were misclassified as exempt employees. The trial court found they fit into an exemption for "salesmen" contained in Section 213(b)(10)(A) of the FLSA, which exempts "any salesman, parts-man, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements." The U.S. Court of Appeals for the Ninth Circuit reversed, deferring to a 2011 U.S. Department of Labor (DOL) rule that excluded service advisors from the definition of exempt salesmen.

When the case went to the Supreme Court the first time in 2016, the Court held that the Ninth Circuit erred in relying on the DOL rule because that rule was procedurally invalid. It sent the case back to the Ninth Circuit for reconsideration. But the Ninth Circuit again held that the service advisors were not exempt because they did not fit within the salesman exception.

In April 2018, the Supreme Court reversed the Ninth Circuit a second time. The Court examined the text of the salesman exemption and concluded that the service advisors "obviously" met the dictionary definition of "salesman" because they sell customers services for their vehicles. They also spend time servicing them because they are integral to the servicing process, even if they are not performing actual repair work.

The Ninth Circuit had used a canon of statutory construction (the "distributive canon," for those who are interested), which linked salesmen to selling and partsmen and mechanics to servicing; the Supreme Court found that this analysis ignored the plain meaning and usage of the word "or" in the exemption, and that it did not make sense, as there were three jobs in the first phrase and only two activities in the second phrase. It was impossible to pair each job with an activity.

Most significantly, though, the Supreme Court rejected the Ninth Circuit's reliance on the longstanding principle that exemptions to the FLSA's overtime provisions should be "construed narrowly." Nothing in the text of the FLSA requires this, and the Court stated that "[t]he narrow-construction principle relies on the flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs.'" The Court noted that the more than two dozen exemptions in Section 213(b) "are as much a part of the FLSA's purpose as the overtime-pay requirement," and that courts "have no license to give the exemption anything but a fair reading."

Wage And Hour Developments Keep On Motoring *from page 10*

Not surprisingly, the decision was 5-4; the dissenters argued that the majority was overruling a half century of precedent in rejecting the principle that exemptions should be narrowly construed. The Court's decision could have far-reaching consequences beyond the realm of automobile dealership service advisors.

Employee v. Contractor. In July 2018, the Acting Administrator of the Wage and Hour Division issued a Field Assistance Bulletin entitled "Determining Whether Nurse or Caregiver Registries are Employers of the Caregiver." The bulletin provides guidance on when nurse and caregiver "registries," which match nurses and caregivers with clients, are considered employers of the caregivers under the FLSA – versus having an independent contractor relationship with them. The bulletin states, for example, that performing such activities as conducting background screening, verifying credentials, introducing the caregiver to the client, and handling payroll services, should not be regarded as indicative of an employment relationship. But making determinations as to whether one caregiver would do a better job than another caregiver, setting policies that require a caregiver to provide services in a particular manner, visiting the worksite to monitor the caregiver's behavior, and conducting performance evaluations of the caregivers, are indicators of employment status.

The bulletin emphasizes that the DOL will consider the totality of the circumstances in evaluating whether an employment or independent contractor relationship exists and gives us an early and likely reliable look at how the DOL will decide this issue in other contexts.

Travel Pay. The Acting Administrator recently issued two opinion letters interpreting the FLSA. The first (FLSA 2018-18) concerns payment for travel time for hourly technicians who work at various customer locations each day, repairing, inspecting, and testing cranes. The details and specific conclusions set forth in the opinion letter are complex, but the opinion is a helpful illustration of a variety of principles regarding payment for travel time, including that travel cutting across the regular workday is deemed worktime, ordinary home-to-work travel is not compensable, and travel away from home outside of regular working hours as a passenger is not considered worktime.

Rest Breaks. The second opinion letter (FLSA 2018-19) concerns the compensability of rest breaks required by an employee's medical condition. The employer requesting the opinion had several non-exempt employees whose medical conditions required them to take 15-minute breaks every hour, which meant they would take eight breaks per day. The employer asked whether those breaks were compensable, as the DOL regulations state that "[r]est periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked." The DOL advised that these breaks were given to accommodate the employee's health condition and predominantly benefited the employee; therefore, they are noncompensable. However, if other employees receive paid breaks, employees needing breaks due to their medical conditions should receive the same amount of paid break time, and any additional breaks could be unpaid. Thus, if employees normally received two paid 15-minute breaks, two of the eight breaks would be paid and the other six would be unpaid. This is much-needed guidance for employers facing requests for accommodation or FMLA leave consisting of break time.

Sonja L. Lengnick

80th Anniversary Of The Anachronistic FLSA

What do you get when you cross a 1930s industrial era workplace model with the modern American workplace? A compliance nightmare.

The Fair Labor Standards Act (FLSA) recently marked its 80th anniversary. Enacted on June 25, 1938, the FLSA has undergone a number of changes since its enactment, but it has hardly kept pace with the modern workplace. And as the pace of change in workplace conditions grows – think working from home, alternative work schedules, 24-7 connectivity, the "gig economy" – the law and the U.S. Department of Labor's (DOL's) interpretive regulations simply do not fit.

Although FLSA litigation was dormant for many decades, the past 20 years have witnessed an explosion of costly litigation against employers. Individual claims may not amount to much, but relatively easy-to-certify collective actions and DOL investigations have resulted in billions of dollars in judgments, settlements, and defense costs. According to the blog *TSheets*, the top ten 2017 FLSA settlements exceeded $180 million. Diverse industries such as insurance, restaurants, banking, retail, government, and health care all felt the pain. The law firm Seyfarth Shaw reported that wage and hour settlements over the past two years totaled $1.2 billion. Even "exotic dancers" at Déjà Vu got $6.5 million.

Plaintiffs' attorneys take a big share. And employees are often unhappy with the changes needed to achieve compliance, preferring a more flexible and family-friendly compensation system.

Efforts at common-sense change, however, have fallen short. In 2004, during the George W. Bush presidency, comprehensive changes were demagogued by politicians, unions, plaintiffs' lawyers, and employers resulting in minimal meaningful change that might have modernized the law. The Obama administration instituted significant changes through regulatory fiat, which a U.S. District Court in Texas enjoined, and the Trump administration quickly reversed.

As a result, the compliance nightmares continue. Employers are wise to audit their compensation systems to ensure compliance. Among the issues to review are:

Exemptions. Just because an employee is paid a salary, as opposed to an hourly wage, does not mean the employee is exempt from mandatory overtime under the FLSA. The employee must also meet a duties test.

Off-the-Clock Work. Are employees being paid for all time worked? This analysis may require employers to review how it handles travel pay, training pay, work-from-home pay, breaks and mealtime, time spent donning and doffing, among other issues.

Tipped Employees. An always complicated area to manage, protections for tipped employees were recently extended under the Tipped Income Protection Act, signed into law by President Trump in March 2018.

Independent Contractors. As we have written in prior issues of *Insight*, the DOL has been aggressively cracking down on the use of independent contractors to avoid FLSA regulations. The definition of the key term "employee" under the FLSA has been noted by many courts to be among the broadest found anywhere in the law.

80th Anniversary Of The Anachronistic FLSA *from page 12*

Recordkeeping and Overtime Pay Requirements. Maintaining accurate records of hours worked is essential. But correctly calculating the regular rate of pay on which overtime is based is also essential, and can be complex where pay rates vary and bonuses are paid.

State Law Issues. Most states have their own wage and hour laws that may differ from, and often exceed, the requirements under the federal FLSA. The FLSA governs minimum wage and overtime, but many states have specific requirements on when and how wages and fringe benefits are paid, special rules for breaks and meals, and a higher minimum wage. Some states also require overtime pay on a more favorable basis.

Some efforts are underway to modernize the FLSA. But the chances of real reform in Congress that would balance the needs of today's employers and the desire for flexibility for employees seem doomed to political dysfunction. While we wait for future reform, employers would do well to closely review their pay practices, especially when providing more liberal or flexible alternatives to traditional work schedules.

Eric J. Pelton

Recent ADA And FMLA Decisions Of Note

Here are some noteworthy federal decisions applying the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA).

Voluntary Work While on FMLA Does Not Violate FMLA. In *D'Onofrio v. Vacation Publications*, the U.S. Court of Appeals for the Fifth Circuit addressed and rejected D'Onofrio's claim that her FMLA rights were interfered with because she worked while on leave. D'Onofrio was a sales representative who requested FMLA leave to care for her husband. Her employer gave her the option of either taking unpaid leave or periodically working remotely to service her existing accounts, so she could keep commissions from her accounts while on leave. D'Onofrio agreed to periodically work. But when D'Onofrio failed to respond to customers during her leave, her employer locked her out of her accounts, and, mistakenly, sent an email to her customers stating that she was no longer employed. D'Onofrio then sued, claiming that her employer had improperly asked if she wanted to work during her FMLA leave. The court held that "giving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment." The court, nevertheless, noted that an employer may violate an employee's FMLA rights by requiring her to work while on FMLA leave.

"100% Healed" Policy Results in $3.5 Million EEOC Settlement. In June 2018, a gaming company that operates slot machine taverns and casinos in Nevada and Montana agreed to pay $3.5 million (and other affirmative relief) to settle an EEOC lawsuit alleging systemic disability discrimination in violation of the ADA. The EEOC alleged that Nevada Restaurant Services' company-wide practice of requiring employees with medical conditions to be 100% healed before returning to work violated the ADA because it was an "unlawful qualification standard that does not allow for reasonable accommodation of qualified individuals with disabilities." The policy did not allow for an interactive process or reasonable accommodation for disabled employees who could perform essential job duties. In addition to paying $3.5 million to the alleged victims of discrimination, the employer agreed to retain a consultant with ADA expertise to review and revise disability policies, implement ADA training for staff, and develop a centralized tracking system for requests for disability accommodations.

Full-Time Attendance at Work Not Necessarily an Essential Job Function. In *Hostettler v. College of Wooster*, the U.S. Court of Appeals for the Sixth Circuit overturned a summary judgment ruling in favor of the

Recent ADA And FMLA Decisions Of Note *from page 13*

employer and held that a jury should decide whether full-time work was an essential function of the employee's job. Hostettler was a Human Resources Generalist who returned from a maternity leave with medical restrictions that required her to work on a part-time basis. She agreed to work in the office half days, and perform some work at home in the afternoons. The college accommodated her reduced schedule for several months but later terminated her when she was unable to return to work in a full-time capacity, claiming that it was placing a strain on the department. There was a dispute, however, about whether Hostettler's schedule was truly problematic. Her manager gave her a performance review that stated she was doing a good job with no mention of problems with her reduced schedule, and could not identify any specific tasks that she failed to complete in a timely manner. The court held that full-time in-office presence is not, *standing alone*, an essential job function. It must be tied to some other job requirement: "An employer cannot deny a modified work schedule as unreasonable unless the employer can show why the employee is needed on a full-time schedule; merely stating that anything less than full-time is *per se* unreasonable will not relieve an employer of its ADA responsibilities."

Overtime Work and Rotating Shifts Can Be Essential Job Functions. *In McNeil v. Union Pacific Railroad*, a Nebraska U.S. District Court affirmed that overtime can be an essential job function. McNeil was a Critical Call Dispatcher who was responsible for coordinating responses to railroad incidents, notifying government agencies about critical incidents, and preparing related reports. Dispatchers were subject to mandatory overtime based on need, and could be called on to begin a shift four hours before the standard start time or remain at work four hours after the standard quit time. Upon her return from a disability leave for depression and anxiety, McNeil submitted medical restrictions that she could only work daytime hours and no overtime. The railroad terminated McNeil because it could not accommodate a permanent overtime restriction and there were no day shifts available. The court granted summary judgment for the employer, noting that overtime requirements have been recognized as an essential job function, and a review of the dispatchers' duties showed that the ability to work overtime was an essential function of her position.

Similarly, in *Faidley v. UPS*, the U.S. Court of Appeals for the Eighth Circuit held that UPS did not violate the ADA by refusing Faidley's request for an eight-hour shift limitation, because that accommodation would have rendered him unqualified to perform the essential functions of his driver position, which required working 9.5 hours per day. If a UPS driver could not work overtime, other drivers would have to complete his deliveries after their own, or his deliveries would be untimely, both of which would negatively impact business. The court relied on the facts that the overtime requirement had been collectively bargained and was specified in the job description.

The U.S. Court of Appeals for the First Circuit found that working rotating shifts can be an essential job function. In *Sepulveda-Vargas v. Caribbean Restaurants*, an Assistant Manager at a Burger King requested assignment to a fixed schedule to accommodate his depression and PTSD after being attacked at gunpoint while making a bank deposit for the restaurant. The employer initially complied with his request, but later

Recent ADA And FMLA Decisions Of Note *from page 14*

informed him that he would have to go back to rotating shifts, which were necessary for fair and equal work distribution among the managerial staff. The court held that he was not a "qualified individual" under the ADA, and that the employer's temporary compliance with the requested restriction did not render rotating shifts a non-essential function, stating "[t]o find otherwise would unacceptably punish employers from doing more than the ADA requires. . . ."

Model FMLA Forms Expire. Employers who use the U.S. Department of Labor's (DOL's) model forms to meet notice and other requirements under the FMLA may have seen that the DOL's model forms expired on May 31, 2018. That date was extended to July 31, 2018, and will be extended on a month-by-month basis until the Office of Management and Budget completes its review. Every three years the DOL is required to submit its FMLA forms to the OMB for approval. The DOL has asked the OMB to approve the existing model forms for another three-year period (to 2021), and thus no changes are presently expected. Employers may use the DOL's current model forms until new ones are released. Updates can be tracked on the DOL's FMLA website.

Shannon V. Loverich

What Will Follow Epic*'s Resolution of the Struggle Over Class Arbitration?*

On May 21, 2018, a divided U.S. Supreme Court decided a trio of cases consolidated under the name *Epic Systems Corp. v. Lewis*. The 5 to 4 majority held as a matter of law that an employee's waiver of his or her right to participate in a class or collective action, incorporated into an employer's "voluntary" arbitration program, was enforceable notwithstanding the provisions of the National Labor Relations Act that protect employees' right to engage in "concerted" activity.

After almost a decade of conflicting decisions by the NLRB and the federal appeals courts, it is now settled that arbitration agreements or policies, which are usually presented to employees as non-negotiable terms, can lawfully be used to prevent employees from pursuing employment-related claims in any forum other than a one-at-a-time arbitration in which they will likely face a sophisticated and better funded employer.

Because *Epic* has generated voluminous commentary in the past few months, we will address this question: What is likely to come next regarding the enforceability of employer-mandated arbitration agreements or policies that bar class or collective claims?

Scope of the *Epic* Decision. The three cases decided in *Epic* were Fair Labor Standards Act wage and hour "collective" actions, in which the typical plaintiff's claim is small. Justice Gorsuch's majority opinion did not address whether the same outcome would apply to non-FLSA claims, but his reasoning seems to apply across the full range of employment claims. Justice Ginsburg's dissent, joined by all members of the Court's "liberal" wing, warned that the majority decision would inevitably result in "the under-enforcement of federal and state statutes designed to [protect] vulnerable workers" and undermine the role that legal actions brought by groups of plaintiffs play in eradicating workplace discrimination. Justice Ginsburg stressed that it would be anomalous to forbid group claims of disparate impact discrimination which, by their nature, require proof of disadvantage for a protected group with many members. Some courts have held that single plaintiffs cannot sue alleging disparate impact discrimination.

Potential Drawbacks and Backlash? Wishes that are granted sometimes bring unexpected consequences. Some employee advocates predict that employers will find themselves inundated with individual arbitrations that, in the aggregate, will prove as burdensome to defend as litigating a class or collective action. That

What Will Follow *Epic*'s Resolution of the Struggle Over Class Arbitration? *from page 15*

prospect seems unlikely, however, for it is not economically rational for plaintiffs' attorneys to pursue a multitude of small individual claims.

Employee advocates may also try to marshal public opinion and consumer pressure against companies that restrict employee lawsuits through allegedly "coerced" waivers of the right to take concerted action. Here, too, it seems unlikely that a technical procedural issue can generate the level of public pressure necessary to bring about widespread change.

But in the "me too" era, the area of sexual harassment could prove to be an exception. Some states (*e.g.*, New York) have passed laws that exclude harassment claims from the reach of mandatory arbitration. But can they survive a federal preemption challenge? Some large employers have already voluntarily redrafted their policies to make arbitration of harassment claims optional, and more are expected to follow.

Congressional objection to the *Epic* decision appears unlikely, at least in the near term.

Meanwhile, the governor of Washington has issued an executive order directing state agencies to try to contract only with companies that do not require employees to waive the right to participate in collective or class actions. If more states were to follow, that could create pressure on corporate bottom lines.

Arbitration Procedure Details. The most recent pro-arbitration decisions have only paid lip service to the principle that an arbitration agreement must satisfy general state law requirements for an enforceable contract. In light of *Epic*, employers should expect arbitration agreements to be carefully scrutinized as to whether the text of the agreement or policy was provided or made available to employees, and whether employees were adequately informed as to when their conduct (or silence) would communicate consent. A local example of such analysis is Michigan U.S. District Judge Laurie J. Michelson's post-*Epic* opinion in *Williams v. FCA US LLC*, finding that Chrysler/FCA's communications to employees did not adequately inform them that continuing employment would manifest assent to the company's arbitration policy. Other procedural features of arbitration policies are also likely to be fly-specked, such as: Is there a genuinely unbiased decision-maker, an adequate opportunity for an employee to develop evidence, and available remedies as provided in a governing statute?

Noel D. Massie

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