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the Checkoff

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IN THIS ISSUE

New Tipping Regulations Delayed

By Mitchell Herring and Jeff Slanker, Tallahassee

On December 30, 2020, the Wage and Hour Division of the U.S. Department of Labor (DOL or "Department") published a Rule titled Tip Regulations Under the Fair Labor Standards Act ("Rule") that would dramatically change the way the Department regulates the classification of tipped workers and tip pooling and would permit the DOL to assess civil penalties against employers for violations of the Fair Labor Standards Act (FLSA). The purpose of the Rule was to address amendments made to section 3(m) of the FLSA by the Consolidated Appropriations Act of 2018 (CAA). While initially scheduled to become effective on March 1st of this year, the DOL has delayed the effective date of the Rule until April 30th, in keeping with President Biden's regulatory freeze memorandum. Furthermore, a lawsuit filed by Pennsylvania and several other states has challenged the validity of the Rule, which is likely to further delay its implementation.

As explained below, these potential changes to the payment of tipped employees present new hurdles and opportunities for restaurants and other hospitality industries.

Elimination of the 80/20 Rule

Since the 1966 amendments to the FLSA, employers have been able to take a tip credit,

See "New Tipping Regulatons Delayed," page 10

The Fate of "But-For" Causation Under the ADEA

By Howie Waldman, Orlando

The protections afforded employees through federal anti-discrimination statutes have recently garnered significant attention following actions by all three branches of the federal government. These employee protections could be extended even further if President Biden's administration achieves one of its goals: to combat workplace discrimination and harassment through legislation that would allow for age discrimination claims under the Age Discrimination in Employment Act of 1967 (ADEA), which currently require "but-for" causation, to be established under the more lenient "motivating factor" causation standard applicable to status-based discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII).[1] Whether President Biden can successfully change the ADEA's judicially created causation standard[2] to make it easier for employees to prove age discrimination remains to be seen, but his stated objective occasions this review of the history of causation under the ADEA, the differences between causation standards under the ADEA and Title VII, and case law interpreting the ADEA's but-for causation following the United States Supreme Court's (SCOTUS) lengthy explanation of the but-for standard in a recent 2020 opinion.[3]

See "The Fate of "But-For" Causation," page 11

CHAIR'S MESSAGE

Robyn S. Hankins

Even in a year where we all experienced limitations of one sort or another, the section has accomplished an ambitious agenda. And there is more on the horizon as we head down the homestretch of the Bar year toward the Annual Convention in June.

Successfully adapting to the challenges posed by the pandemic, the section has offered a variety of CLE options with various formats and topics of interest to our members. Thanks to CLE Director Gregg Morton for making this happen.

In the last quarter of 2020, we held multiple successful GoTo Webinars with distinguished speakers. In early fall, we presented an update on U.S. Supreme Court cases dealing with Title VII and LGBTQ discrimination and an update on the NLRB.

In November, we hosted "Keeping Tabs on the COVID Crisis," which explored the challenges presented to employers due to the COVID-19 outbreak.

In December, "Hot Topics in Public Sector Bargaining" focused on the public sector bargaining activities and events that continue to shape the challenges that government employees and employers face in the public sector labor arena.

If you missed any of these fall/winter 2020 webinars, you can order the complete set on CD by clicking here.

A free Zoom webinar in January covered the CARES Act expansion of federal funding for Short-Term Compensation Plans, where our 103 attendees learned how a short-term compensation plan through the Florida Department of Economic Development could be an effective tool to manage the transition back to full operation from COVID shutdown or slowdown.

Our two-day Advanced Labor and Employment Law Annual Update and Certification Review, also held in January, benefitted the 120-plus practitioners who attended virtually.

Looking ahead, on **April 27th** Bob Turk and Lisa Berg will present **Part II of the NLRB Update GoTo Webinar**. With the new administration, the NLRB has already seen some big changes and there may be more to come, so you won't want to miss this Update. To register, click here.

Then on **May 21st**, there will be a virtual version of **Advanced Labor Topics**. To register, click here.

Our publications subcommittee has continued to provide us both breaking L&E news in the form of *E-Updates* and longer articles in *The Florida Bar Journal* and *The Checkoff*. The articles in this particular issue of *The Checkoff* reflect the breadth of our field and depth of our membership, running the gamut from Biden administration moves that could dramatically affect labor and employment law, to continuing fallout from the pandemic, to recent Wage and Hour Division opinion letters, and, finally, to how the *Bostock* opinion can impact ADEA and USERRA cases. There is even an anecdotal piece by one of our esteemed retired colleagues reflecting on the local bench and bar early in his career.

On a sad note, in 2020 we lost section member Donald T. Ryce, Jr. An influential advocate for victims' rights and an L&E lawyer whose career spanned forty years, Mr. Ryce was posthumously inducted into the section Hall of Fame in October. We also sadly lost William E. ("Bill") Powers, Jr. earlier in 2020, after a distinguished career in labor and employment law, both in private practice and in the public sector. He was inducted into the Hall of Fame in April of last year.

So, our section has experienced both losses and accomplishments this year. The latter could not have occurred without the tireless work of our executive council and our volunteer committee members, as well as all who wrote articles, spoke at events, supported our CLEs, and otherwise invested time, money, and energy in the section. Whether you were involved behind the scenes or out in front, thank you.

the CHECKOFF

The Checkoff is prepared and published by
The Florida Bar Labor and Employment Law Section.

Editor's Note: On this page, we recognize authors who have made significant contributions to section publications. As a previous editor has noted, "*The Checkoff *is an excellent resource because of the consistent dedication and hard work of contributors, the quality of their articles and case notes, and the pride of ownership they exhibit." The authors we highlight exemplify these traits.

AUTHOR SPOTLIGHT

Meet Carly Stein

Carly has been practicing employment law on behalf of management at the law firm of Allen Norton & Blue since 2015. She specializes in defense of employment claims for public entities. When she is not litigating, she gives presentations for clients, writes articles for *The Checkoff*, and enjoys the local legal community. She is a member of the Cheatwood Inn of Court and the Hillsborough County Bar Association Young Lawyers' Division. Carly regularly serves as a pro bono attorney for the Guardian ad Litem's Defending Best Interests Program and the 13th Judicial Circuit's Teen Court juvenile diversion program.

Carly is a proud Florida Gator and lives in Tampa with her fellow–Gator husband, Dr. Max Stein, and their two cats (Gators by proxy). In her free time, Carly enjoys running long distances that her husband says "normal people would just drive," scrapbooking cards and doing other crafts for her friends and family, and reading horror novels and books about public policy, which in today's day and age are sometimes indistinguishable.

Carly is also active in her local community. She is a Big Sister in Big Brothers and Big Sisters, a board member for the Tampa Bay Network to End Hunger, and a member of Congregation Schaarai Zedek and the Congregation's Sisterhood.

Carly can be reached at cstein@anblaw.com and would love to discuss employment policy or co-write articles with employment attorneys from all backgrounds.

GoToWebinar

Click HERE to Register

The Florida Bar Continuing Legal Educaton Committee and the Labor and Employment Law Section present

NLRB Update: Where Do We Stand Now? (Part II)

April 27, 2021

12:00 p.m. - 1:30 p.m.

Presented by

Bob Turk, Miami and Lisa Berg, Miami

In Part 1 of this update, speakers Bob Turk and Lisa Berg covered a number of changes by the National Labor Relations Board during the Trump administration. With the new administration, the NLRB has already seen some big changes and there may be more to come. In Part 2 of this update, Bob and Lisa will address what has occurred so far and where the NLRB may be headed in the near future when it comes to the changing landscape of federal labor law.

CLE Credit

General: 1.5 hours

Certification Credit

Labor and Employment Law: 1.5 hours

The PRO Act: A Dramatic Change in the Labor Landscape May Be on the Horizon

By Carly Stein, Tampa

A political shift in administration means changes in the labor and employment law arena, and in 2021, some of the biggest potential changes are contained in the Protecting the Right to Organize (PRO) Act.

On February 4, 2021, Representative Robert Scott of Virginia and a large contingent of his Democratic peers introduced the Protecting the Right to Organize Act in the 117th House of Representatives. A similar version of the Act was passed by the House in 2020 but died in committee while in the Senate.

The current iteration of the PRO Act is expected to gain more traction in the Biden administration. On March 9, 2021, the Act passed the House by a vote of 225–206. A Senate vote is likely to come by this summer.

The proposed bill would amend the National Labor Relations Act (NLRA) to make numerous pro-labor changes including:

- Amending the definition of a "Joint Employer" to follow the definition outlined by the Obama-era National Labor Relations Board in *Browning Ferris*.[1]
- Expanding the definition of an "employee" to include all individuals "performing services within the usual course of the business of the employer."[2]
- Barring employers from requiring employees to agree to mandatory arbitration of employment disputes.[3]
- Prohibiting employers from permanently replacing or threatening to permanently replace employees or otherwise discriminating against employees who participate in strikes.[4]
- Allowing employees, regardless of citizenship status, who are subject to unfair labor practices, to collect back pay for the entirety of their time out of work without considering an offset for any mitigation by the employee and also to recover liquidated damages for any claims.[5]
- Instituting civil penalties for individuals who fail to obey orders from the National Labor Relations Board.[6]
- Requiring employers to post notices informing employees of their rights under the NLRA.[7]
- Providing private rights for civil actions in federal courts for violations of the NLRA and attorneys' fees for prevailing parties.[8]
- Banning right-to-work laws that prevent forced union dues withdrawals for employees.[9]

If passed, these amendments would have immediate consequences for both union and non-union employers in Florida, directly threatening Florida's status as a right-to-work state. The status of the "gig economy" would also be greatly affected. With the expansive proposed definition of "employee," individuals working for ride share companies and as freelancers will no longer be permitted to continue as independent contractors. With the potential private right of action for aggrieved employees under the NLRA, and its enticing attorneys' fees provision, we could see a rise in federal employment litigation regarding matters previously addressed through arbitrations or before the NLRB.

Employment lawyers should closely track the progress of H.R. 842 through the House and Senate. While a similar bill died in Senate committee in 2020, the new Democratic-controlled Congress and the shift in party leadership provide a real potential for the PRO Act to become law and dramatically change the labor landscape nationwide.

C. STEIN

***Carly Stein** is an associate attorney in the Tampa office of Allen Norton & Blue. She represents employers in both the public and private sector in matters pertaining to state and federal employment and labor laws.*

Endnotes

1 H.R. 842, 117th Cong. § 101(a) (2021).
2 *Id.* at § 101(b).
3 *Id.* at § 104(3)(e).
4 *Id.* at § 104(1)).
5 *Id.* at § 106.
6 *Id.* at § 107.
7 H.R. 842, 117th Cong. § 104(7) (2021).
8 *Id.* at § 109(12)(d).
9 *Id.* at § 111.

Requiring Workers to Receive a COVID-19 Vaccine? Not So Fast

By Jay P. Lechner, Tampa

It has become accepted employment law gospel, supported by EEOC guidance, that employers may require employees to submit to COVID-19 vaccinations, provided the employers' policies comply with the ADA, Title VII, and other anti-discrimination laws.[1] A lawsuit filed on February 28, 2021, in federal court in New Mexico challenges that tenet. *See Legaretta v. Macias,* No. 2:21-cv-179 (D.N.M.).

Fernando Macias, county manager for Dona Ana County, New Mexico ("the County"), issued a "Mandatory COVID-19 Vaccination Directive" requiring first responders to receive vaccinations as a condition of ongoing employment. The plaintiff received a "coaching and counseling" write-up for not complying with the directive. After the write-up, he was "in imminent danger of being terminated from his job for refusing to accept the vaccine"; hence, the filing of the complaint.

The plaintiff asserts that a policy requiring workers to take vaccines that are not yet fully approved by the federal Food and Drug Administration (e.g., all COVID-19 vaccines) violates the Food, Drug and Cosmetic Act (FDCA); specifically, 21 U.S.C. § 360bbb-3, which addresses the "emergency use of an unapproved product." That section provides that recipients of experimental products must, among other things:

(1) Be advised of the "known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown"; and

(2) Be given "the option to accept or refuse administration of the product."

The plaintiff asserts that the FDCA "does not permit [his employer] to coerce [him] to accept an unapproved vaccine on penalty of termination or other sanctions." He argues that the County violated the law because he was not advised of the "known and potential benefits and risks" of the experimental COVID-19 vaccine. More importantly, the employer "did not inform Plaintiff that he had an option to refuse the vaccine. Quite the opposite, he was advised that he would be fired if he did so."

The complaint seeks injunctive relief enjoining the termination of the plaintiff's employment on the grounds that the policy (issued by a government official) is preempted by the federal law. It is not entirely clear whether the plaintiff asserts that the FDCA creates a private right of action against his employer, or employers in general. The more obvious cause of action under this theory would be pursuant to a state whistleblower statute that prohibits retaliation against an employee for objecting to a policy, such as Dona Ana County's, that purportedly violates a federal statute.

The case is still in the early stages. The plaintiff's request for a temporary restraining order was denied on procedural grounds but, as of the date this article was written, the court has not addressed the substantive merits of the plaintiff's arguments.

J. LECHNER

Jay P. Lechner *owns his own firm in Tampa and is Board Certified by The Florida Bar in Labor and Employment Law.*

Endnote

[1] Communicating with coworkers regarding concerns about such a policy would likely be deemed protected concerted activity under the NLRA.

Employers May Be Required to Provide Paid Leave to Employees Taking Short-Term Military Leave

By Aaron Tandy, Miami

In *White v. United Airlines, Inc.*, a case of first impression decided on February 3, 2021, a panel of the Seventh Circuit determined that the 2010 amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA) may, under certain circumstances, require employers to provide paid leave to their employees who take short-term military leaves of absence in the same way that those employers compensate employees for other absences, such as sick leave or jury duty.[1]

In 1994, Congress passed USERRA with the goal of prohibiting civilian employers from discriminating against employees because of their military service.[2] Section 4316(b)(1) provides that, when a person is absent from employment because of required service in the armed forces (whether on active or reserve duty), the person is deemed furloughed during such service and "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service."[3] Section 4303(2) defines "rights and benefits" as "the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice . . . ."[4]

White, a commercial airline pilot and a reservist in the United States Air Force, sued United Airlines for failing to pay him for absences to complete required periodic military training sessions (usually no longer than a day or two at a time) in order to maintain his reservist status. White argued that short-term military leave should be accorded the same treatment as comparable nonmilitary leave, such as jury duty and sick leave. Because United's policy and practice was to pay employees who were absent from work for jury duty and sick leave, White argued that USERRA required United to pay him for his short-term military leave as well. After the district court dismissed his class-action lawsuit, finding the leave comparison lacking, White appealed to the Seventh Circuit. The Seventh Circuit reached the opposite conclusion; that is, paid leave counts as one of the "rights and benefits" of employment under USERRA.

Recognizing that it was the first appellate court to answer the question, the Seventh Circuit relied on the recent United States Supreme Court directive in *Bostock v. Clayton County*: "[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule."[5] Because Section 4303(2) defines the term "rights and benefits" broadly, the Seventh Circuit concluded, paid leave is included within that definition, requiring employers to pay employees compensation at the normal rate during a leave of absence for military service just the same as for nonmilitary leaves of absence.[6] In so doing, the Seventh Circuit rejected United's interpretation of Section 4303(2) that United was not required to pay for work when the employee performed work for a third party such as the military.[7]

In returning the case to the district court for further proceedings, the appellate court noted: "USERRA itself says nothing about the specific benefits that an employer must provide. It is up to the employee to demonstrate that any given stretch of military leave is comparable to a form of nonmilitary leave that is accorded a benefit."[8] On remand, White will therefore have to demonstrate that United's policy of providing paid leaves of absence for certain types of leave, such as sick leave or jury duty, would compare favorably to short-term military leave under the Department of Labor's implementing regulations.[9]

While the case will need to proceed further for an appropriate factual record to be developed, the decision nevertheless should give employers pause as to how to handle payments to employees who are absent from work because of required short-term military service, especially if those employers provide full compensation for other leaves of absence.

A. TANDY

***Aaron Tandy** heads Pathman Lewis, LLP's employment law practice, helping employers and employees navigate complex employment issues.*

Endnotes

1 987 F.3d 616 (7th Cir. 2021).

2 38 U.S.C. § 4301(a).

3 38 U.S.C. § 4316(b)(1)(B) (emphasis added).

4 Emphasis added. In response to the Eighth Circuit's decision in *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002), Congress amended Section 4303(2), the definition of "rights and benefits," to specifically include "wages or salary for work performed," as the definition now reads. See Veterans' Benefits Act of 2010, Pub. L. No. 111-275, Title VII, § 701(a), 124 Stat. 2864, 2887.

5 140 S. Ct. 1731, 1747 (2020).

6 *White v. United Airlines, Inc.*, 987 F.3d 616, 621 (7th Cir. 2021).

continued, next page

[7] *Id.* at 621–22.

[8] *Id.* at 624.

[9] *See* 20 C.F.R. § 1002.150(b) (listing three factors that should be considered, including duration of leave, purpose of leave, and ability of employee to schedule the leave). In passing, the appellate court noted that reservists often receive a stipend from the military while performing their reserve duties. However, the court also noted that White's complaint alleged that United paid employees their full salaries and wages during jury duty leave and sick leave, even though the government provides a stipend for jury duty service.

Two Recent DOL Wage and Hour Division Opinion Letters

By Jonathan E. O'Connell, Falls Church, VA

Life Science Company Account Managers Qualify for the Administrative Exemption to FLSA's Overtime Requirements

Introduction

On January 8, 2021, the U.S. Department of Labor, Wage and Hour Division (DOL), issued WHD Opinion Letter FLSA2021-1[1] to a life science products manufacturing company[2] regarding whether its account managers qualify for the administrative exemption under the Fair Labor Standards Act (FLSA or "the Act"). According to the company, its life science account managers receive over $107,432 per year, work with significant autonomy, and are not required to follow a specific sales process. Rather, the managers work with scientist–clients to learn about their requirements and how the company's products might satisfy their technical needs. The managers also assist clients in developing scientific protocols in connection with the use of products purchased from the company. While the managers do engage in sales work, according to the company, sales is ancillary to their account management role. Notably, managers are also required to have a minimum of a life science degree or a business degree with experience in the life science industry.

Background

The "administrative exemption" is among the so-called "white collar" exemptions to FLSA's overtime requirement. In order to qualify for the administrative exemption, an employee must be paid $684 per week on a "salary basis" and satisfy the exemption's duties test. The duties test requires that: (1) the employee's primary duty be the performance of "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers [or clients]" (e.g., not "production" work), and (2) the employee's primary duties involve the exercise of "discretion and independent judgment with respect to matters of significance."[3] As most labor and employment law practitioners know, the administrative exemption is the most frequently misapplied exemption in the FLSA realm.

DOL's Opinion

Prior to engaging in its analysis, DOL cited the relatively recent United States Supreme Court decision in *Encino Motorcars, LLC v. Navarro*[4] for the proposition that in rendering its opinion, DOL gives the relevant text of the exemption "a fair (rather than a narrow) interpretation," because "[the] exemptions are as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]."[5]

DOL began by quickly addressing the fact that the account managers were paid well in excess of the requisite weekly salary necessary on a "salary basis." Continuing its analysis, DOL examined whether the employees' primary duties involve performing "office or non-manual work related to the management or general business operations of the company (or its clients)." In finding that the manager position also satisfied this second requirement, DOL relied in part on the Seventh Circuit's decision in *Schaefer-LaRose v. Eli Lilly & Co.*,[6] where the court held that job duties performed by pharmaceutical company sales representatives were "properly characterized as administrative."[7] The court found that while the pharmaceutical representatives' job functions did not fit neatly within the example functions set forth in relevant DOL regulations, "the core function of the drug makers . . . is the development and production of pharmaceutical products," and that "plaintiff's work *supports* that function, but is distinct from it," and, thus, constituted administrative work.[8] Applying the *Schaefer-LaRose* analysis to the life science account manager position, DOL opined that "[t]he account managers' duty of promoting sales through

a sophisticated consultative marketing process, in which they engage with highly educated scientists and other professionals to assess their research needs and to recommend products for purchase, is not 'production' work, and is instead related to the management of [the company's] client[] operations."[9]

Regarding whether the managers engaged in the exercise of "discretion and independent judgment with respect to matters of significance," DOL began by noting that an "employee's ability to evaluate needs and interests . . . is a strong indicator of discretion." DOL further observed that a number of courts have held that an employee's ability to financially bind the employer constitutes a significant decision under this element of the administrative exemption. DOL reasoned that the managers' wide autonomy with respect to promoting products, assessing product needs, advising, and designing portfolios of solutions and products for existing and prospective clients all supported the existence of discretion and independent judgment. Further, DOL observed that the managers were responsible for building the relationships with professional points of contact, ultimately resulting in an increase in the company's market share, "a very consequential duty for the company."[10]

Thus, DOL concluded that the account manager position qualified for the administrative exemption and was therefore exempt from the overtime requirements of the FSLA.

"Ministerial Exception" Extends to FLSA's "Salary Basis" Requirement

Introduction

On January 8, 2021, the U.S. Department of Labor, Wage and Hour Division (DOL), issued WHD Opinion Letter FLSA2021-2[11] to a private religious daycare/preschool regarding the scope of the "ministerial exception" to employment discrimination claims. The school inquired whether it may pay a teacher, who otherwise qualifies under the ministerial exception, in a manner that is inconsistent with the Fair Labor Standards Act's (FLSA or "the Act") "salary basis" test.

Background

The ministerial exception is a judicially created doctrine that precludes employees who perform bona fide ministerial duties for religious employers from bringing suit under certain generally applicable employment laws. The doctrine is rooted in the First Amendment's Free Exercise and Establishment Clause and is designed to protect the autonomy of religious organizations, including with respect to personnel decisions.

In order to qualify for the so-called "white collar" exemptions from FLSA's overtime requirement, an employee must perform certain qualifying job duties *and* generally satisfy the salary basis test under the Act. As to the salary basis test, employees must be paid at least $684 per week, which may not be reduced because of variations in the quality or quantity of the employee's work.

DOL's Opinion

DOL opined that if a teacher indeed satisfies the highly fact-specific requirements associated with the ministerial exception, then a religious employer would not be required to pay the employee according to the salary basis requirement. DOL's opinion relied heavily on the United States Supreme Court's decision last year in the consolidated cases of *St. James School v. Biel and Our Lady of Guadalupe School v. Morrisey-Berru*, in which the Court examined the scope of the ministerial exception in the context of the Americans with Disabilities Act and the Age Discrimination in Employment Act, respectively.[12] Notably, DOL's opinion is also consistent with a number of earlier federal court decisions that have considered the scope of the "ministerial exception" in various contexts involving federal employment statutes, including FLSA.[13]


J. O'CONNELL

***Jonathan E. O'Connell**, SPHR, SHRM-SCP, is a member of The Florida Bar and the owner of O'Connell Law, PLLC in Falls Church, Virginia. His practice focuses on representing management clients with respect to labor, employment, and personnel-related matters in the northern Virginia and Washington, D.C. area.*

Endnotes

1 2021 DOLWH LEXIS 2 (Dep't of Labor Wage & Hour Div. Jan. 8, 2021).

2 The life sciences industry consists of companies operating in the fields of pharmaceuticals, biotechnology, medical devices, biomedical technologies, nutraceuticals, cosmeceuticals, food processing, and others that dedicate their efforts to creating products to improve the lives of organisms (human, plant, animal).

3 29 C.F.R. § 541.200(a).

4 138 S. Ct. 1134 (2018).

5 *Id.* at 1142 (internal quotations omitted).

6 679 F.3d 560 (7th Cir. 2012).

7 *Id.* at 576.

8 *Id.* at 574.

9 2021 DOLWH LEXIS 2, *6 (Dep't of Labor Wage & Hour Div. Jan. 8, 2021).

10 Id. at *7–11.

11 2021 DOLWH LEXIS 1 (Dep't of Labor Wage & Hour Div. Jan. 8, 2021).

12 140 S. Ct. 2049 (July 8, 2020).

13 *See, e.g., Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (affirming summary judgment in favor of a Jewish nursing home against an employee serving as Mashgiach (kosher supervisor) as to employee's overtime claims under FLSA); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (affirming summary judgment in favor of a church as to plaintiff's ADA claim, based on conclusion that the choir director was a "minister" for purposes of the ministerial exception under the First Amendment); *FASSL v. Our Lady of Perpetual Help Roman Catholic Church*, 2005 WL 2455253 (E.D. Pa. 2005) (dismissing FMLA claim brought by employee employed as church's director of music, citing lack of subject matter jurisdiction based on application of the ministerial exception).

effectively permitting employers to pay tipped employees less than the minimum wage, provided that the employees receive sufficient tips to cover the difference. Current regulations limit the tip credit to $5.12 per hour and require that the tip credit not exceed the tips earned by the employee. Moreover, revisions to the 1988 Department of Labor Field Operations Handbook limited the classification of tipped employees to those who spend a minimum of 80% of their time performing tipped work. This eventually became known as the 80/20 rule. The minimum tipped work requirement was almost rescinded in January of 2009 through an Opinion Letter issued by the DOL during the waning days of President George W. Bush's administration, which specifically sought to repeal the 80/20 rule. However, in March of 2009, this Opinion Letter was formally withdrawn by the Department under President Obama's administration, which effectively reinstated the 80/20 rule. Though the Opinion Letter rescinding the 80/20 rule was reissued by the Department in 2018 under President Trump's administration, courts were reluctant to abolish the 80/20 rule and have continued to use it in determining whether an employee is properly tipped in FLSA cases. This led the DOL to propose the Rule in late 2019.

The Rule requires only that an employee's designation as a tipped employee be based on either the examples contained in 29 C.F.R. § 531.56 or on the Occupational Information Network (O*NET), a database operated by the Department that contains job classifications based upon duties performed. Because of the dramatic shift in position, Pennsylvania, along with several other states, brought suit against the DOL, stating that the elimination of the 80/20 rule was arbitrary and capricious. This suit is still in its earliest stages.

New Tip Pooling Regulations

A tip pool arrangement is an arrangement that permits employees to share tips among themselves. While there are no regulations on employees voluntarily sharing their own tips, an employer may only require employees to share their tips under specific circumstances pursuant to the FLSA. In 2010, the Ninth Circuit Court of Appeals held in *Cumbie v. Woody Woo, Inc.* that an employer using the tip credit could only have a tip pooling arrangement that shares tips among customarily tipped employees. The court also held that an employer that does not take advantage of the tip credit had no restrictions on who could participate in a tip pool. In 2011, the DOL issued a rule to specifically address the *Cumbie* ruling and prohibited tip pools from having any participants who were not customarily tipped. This resulted in a slew of lawsuits seeking to overturn the 2011 rule and ultimately resulted in *Cumbie* being overturned by the Ninth Circuit in 2016. In 2017, the DOL switched course and sought to rescind the 2011 rule. However, the DOL failed to prohibit managers, supervisors, or the employer from participating in the tip pool. Congress intervened in 2018 and passed the CAA, which limits tip pools to tipped employees at employers who take the tip credit, and prohibits employers, managers, and supervisors from participating in tip pools at employers who do not take the tip credit.

The new 2020 Rule permits all employees, aside from supervisors and managers, to participate in tip pools. However, the portion of the Rule defining which supervisors and managers are excluded has been called into question. The Rule defines these types of employees solely as those who have the duties of executives under the executive exemption test defined in 29 U.S.C. § 213. Pennsylvania and its co-plaintiffs have claimed that this clause is arbitrary and capricious due to the lack of a salary test to determine the status of an employee as a manager or supervisor. Specifically, the plaintiffs have claimed that this test is overbroad and will result in the exclusion of non-managerial employees from participating in a tip pool.

New Civil Penalties

The CAA amendments also permit the DOL to assess a civil fine of up to $1100 against entities found to be in violation of the tipping provisions of the FLSA. Notably, the assessment of this fine is at the discretion of the DOL Secretary; this makes it seemingly discretionary in nature. In implementing this statute, the DOL limited the assessment of fines to those employers that are found to have engaged in willful or repeated violations. The suit brought by Pennsylvania also seeks to require that this provision be broadened beyond a requirement of repeated violations and willfulness.

Conclusion

Since the Rule has been delayed by executive order and is currently the subject of a legal challenge, uncertainty surrounds its implementation. In the interim, employers should be cautious about implementing tip pooling procedures that include individuals with managerial duties and about exceeding the DOL's 80/20 rule when taking the tip credit. More importantly, the civil fines that may be assessed by the DOL are likely to see increased implementation during the current administration under the DOL's instructions to pursue wage and hour violations more vigorously.


M. HERRING

Mitchell Herring *is an associate attorney at Sniffen and Spellman, P.A., in Tallahassee. His practice areas include labor and employment law, immigration, administrative law, local government law, and intellectual property. His experience includes representing employers in Department of Labor and Immigration and Customs*

Enforcement audits, transactional matters, and employment-based immigration applications.


J. SLANKER

***Jeffrey D. Slanker** is a shareholder at Sniffen and Spellman, P.A., in Tallahassee. His practice areas include labor and employment law, appellate law, civil rights defense, local government law, and administrative law. His litigation experience includes handling matters involving Title VII of the Civil Rights Act, the Fair Labor Standards Act, and other employment statutes.*

Endnotes

1 85 Fed. Reg. 86756 (Dec. 30, 2020).

2 86 Fed. Reg. 11632 (Feb. 26, 2021).

3 U.S. Dep't of Labor, Wage & Hour Div., Field Operations Handbook, Rev. 563 (Dec. 12, 1988).

4 U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Jan. 16, 2009).

5 U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Nov. 8, 2018); *Belt v. P.F. Chang's China Bistro, Inc.*, 401 F.Supp.3d 512 (E.D. Penn. 2019).

6 *Pennsylvania v. Scalia*, Case No. 2:21-cv-00258 (E.D. Penn. filed Jan. 19, 2021).

7 *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010).

8 *Id*.

9 *Oregon Rest. & Lodging Assn. v. Perez*, 843 F.3d 355 (9th Cir. 2016).

10 82 Fed. Reg. 57395 (Dec. 5, 2017).

11 85 Fed. Reg. 86756, 86763 (Dec. 30, 2020).

12 Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 1201.

13 85 Fed. Reg. 86756, 86791 (Dec. 30, 2020).

14 *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, Biden Harris, https://joebiden.com/empower-workers/ (last accessed March 3, 2021).

THE FATE OF "BUT-FOR" CAUSATION, *continued from page 1*

Background

The ADEA prohibits discrimination against an individual "because of such individual's age."[4] In 1993, in *Hazen Paper Co. v. Biggins*, SCOTUS stated that in a disparate treatment claim under the ADEA, liability depends upon whether the employee's age "actually motivated the employer's decision."[5] The Court elaborated that such a claim requires that the employee's age must have played a role in the employer's decision-making process "and had a determinative influence on the outcome."[6] Consistent with the Court's language in *Hazen Paper*, the Eleventh Circuit interpreted the ADEA to require an employee to show that age discrimination was a determinative factor in the adverse employment action.[7] Then in 2009, SCOTUS issued its landmark decision in *Gross v. FBL Financial Services, Inc.*, which held that the ADEA requires an employee to prove that age was the but-for cause of the adverse action.[8] In reaching its conclusion that the ADEA's prohibition against age discrimination required but-for causation, the Court cited to *Hazen Paper's* standard that age had a "'*determinative influence on the outcome*.'"[9]

In contrast to an ADEA plaintiff, a Title VII plaintiff alleging status-based discrimination—i.e., discrimination based on race, color, religion, sex, or national origin—need only establish causation under the more plaintiff-friendly motivating factor standard.[10] This lessened causation standard requires only that the plaintiff show that "the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision."[11] In other words, the plaintiff does not need to "show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act."[12]

Further highlighting the varying causation standards among the federal anti-discrimination statutes is the differing standard that applies under the federal sector provision of the ADEA as compared to the private sector provision of the ADEA that was addressed in *Gross*.[13] In April 2020, SCOTUS held in *Babb v. Wilkie* that the federal sector provision of the ADEA imposes liability upon a federal sector employer even when but-for causation does not exist.[14] In other words, unlike the private sector provision of the ADEA, a federal sector employer can violate the ADEA even if age is not a but-for cause of the adverse action.[15] Relying upon the statutory text, SCOTUS distinguished the federal sector provision from the private sector provision by reasoning that the but-for causal language in the federal sector provision—i.e., the "based on age" language—modifies the term "discrimination," whereas the but-for causal language in the private sector provision—i.e., the "because of such individual's age" language—modifies the adverse employment action.[16] Although a federal sector employee can establish that an employer violated the federal sector provision of the ADEA merely by showing that the adverse action was tainted by any consideration of the employee's age, the employee's remedies would be limited to injunctive relief or other forward-looking relief.[17] In order to obtain reinstatement, backpay, or compensatory damages, the federal sector employee must prove that age discrimination was a but-for cause of the adverse action.[18] Thus, while two different causation standards apply under the different provisions of the ADEA, in order for a federal sector employee to receive the full arsenal of remedies available under the ADEA, such employee must satisfy the same but-for causation standard applicable to a private sector employee, as announced in *Gross*.

Recent Decisions

Although the historic holding in *Bostock v. Clayton County* relating to sexual orientation and gender identity

continued, next page

was the most discussed aspect of that opinion,[19] the Supreme Court's ruling also provided interpretive guidance on the but-for causation standard.[20] The Court explained that this standard is met when a specific outcome would not have happened "but for" the alleged cause, and "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[21] In particular, SCOTUS noted that events often have more than one but-for cause; thus, an employer cannot avoid liability by simply claiming that "some *other* factor" contributed to the employer's decision.[22] Rather, so long as the plaintiff shows that a protected trait was one but-for cause of the employment decision, that is enough to satisfy the traditional but-for causation standard.[23]

A recent decision from the Sixth Circuit is the most significant court of appeals case interpreting but-for causation under the ADEA in the wake of *Bostock*. In *Pelcha v. MW Bancorp, Inc*. (*Pelcha I*),[24] the Sixth Circuit stated that ADEA plaintiffs "must show that age was *the* reason why they were terminated, not that age was one of multiple reasons."[25] Following the court's affirmance of summary judgment in favor of the employer in *Pelcha I*, the employee petitioned the court for a rehearing on grounds that the court committed a significant error of law when it found that "a plaintiff must prove that age was the sole reason for an adverse action to establish a violation of the [ADEA]."[26] The employee argued that the court imposed a sole-cause standard, which was inconsistent with several SCOTUS decisions, including *Bostock*, that recognized that an event may have multiple but-for causes.[27] Both the Equal Employment Opportunity Commission and the American Association of Retired Persons filed an amicus brief in support of the employee's petition for rehearing, arguing that the court misconstrued the ADEA by requiring the employee to demonstrate that age was the sole cause of the adverse action.[28] Thus, at a time when President Biden had stated his intent to make it easier for employees to establish their age discrimination claims, the employee in *Pelcha* and the amici argued that the Sixth Circuit was doing the opposite by embracing a heightened causation standard under the ADEA that would further widen the gap between the causation standards under the ADEA and Title VII.

In response to the employee's petition for rehearing, the Sixth Circuit issued an Amended Opinion in which the court revised the section of its original opinion addressing the ADEA's but-for causation requirement.[29] Although the court still included language stating that ADEA plaintiffs must prove that age was the reason for the employer's decision, the court elaborated that this requires plaintiffs to demonstrate that "age '*had a determinative influence on the outcome*' of the employer's decision-making process."[30] Despite this change, the court's holding ultimately remained the same, as summary judgment was still affirmed in favor of the employer.[31]

Looking Ahead

The result of an employment discrimination lawsuit can ultimately depend upon the type of causation standard applied by the court.[32] This takes us back to whether President Biden will be able to get Congress to amend the ADEA to allow for a more lenient standard of causation than but-for causation. If he succeeds in having the causation standard changed, this would not be the first time that Congress codified an amendment to the causation standard of a federal anti-discrimination statute. In 1991, in direct response to SCOTUS's decision in *Price Waterhouse v. Hopkins*,[33] Congress passed the Civil Rights Act of 1991, which, in pertinent part, amended Title VII to codify the "motivating factor" standard that was initially adopted by SCOTUS in *Price Waterhouse*.[34] Will Congress now amend the ADEA in a similar fashion and allow a plaintiff to establish the defendant's liability under the ADEA through a lessened causation standard than but-for causation but restrict the relief available to the plaintiff in the absence of but-for causation? Or, will Congress go a step further than it did in amending Title VII in 1991 and allow an ADEA plaintiff to recover all available remedies even in the absence of but-for causation? The answers to these questions remain to be seen, but they should be on the radar of employment law attorneys if President Biden successfully encourages Congress to amend the ADEA.

It is hornbook tort law that a plaintiff must demonstrate that the defendant's conduct caused the plaintiff's injury, and this principle applies equally to claims brought under federal anti-discrimination statutes.[35] In its opening paragraph of *University of Texas Southwest Medical Center. v. Nassar*, which addressed the causation standard applicable to Title VII retaliation claims, SCOTUS noted:

> When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged. The requisite relation between prohibited conduct and compensable injury is governed by the principles of causation, a subject most often arising in elaborating the law of torts.[36]

Although the standard generally applied to this causation requirement requires the plaintiff to establish that the harm suffered would not have occurred in the absence of the defendant's conduct,[37] Congress and SCOTUS have already allowed plaintiffs to establish a violation of law under Title VII and the federal sector provision of the ADEA through a lessened standard than the typical but-for causation. Thus, any legislative amendment to the ADEA's causation requirement that includes a more plaintiff-friendly standard may lead employment law attorneys to wonder whether this will result in additional changes—whether judicially created or legislatively codified—to the causation standard underlying any other federal claims for workplace discrimination or retaliation.


H. WALDMAN

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Endnotes

[1] *See* Ana C. Dowell, Tiffany D. Hendricks, & Sul Kim, *Workplace Changes to Expect Under a Biden Administration: Part I*, HR DEFENSE (Nov. 10, 2020), https://www.hrdefenseblog.com/2020/11/workplace-changes-to-expect-under-a-biden-administration-part-i/.

[2] *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

[3] *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020).

[4] 29 U.S.C. § 623(a)(1).

[5] 507 U.S. 604, 610 (1993).

[6] *Id.*

[7] *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1334–35 (11th Cir. 1999) (holding that the trial court did not err in instructing the jury that the plaintiff needed to prove only that age made a difference in the employer's decision); *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1005 (11th Cir. 1997) (holding that the trial court did not err in instructing the jury that to return a verdict in favor of the plaintiff, the jury must find that age was a determinative factor in the employer's decision).

[8] *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176, 180 (2009).

[9] *See id.* at 176 (quoting *Hazen Paper*, 507 U.S. at 610); *see also Nesbitt v. Candler Cty.*, 945 F.3d 1355, 1359 (11th Cir. 2020) (quoting *Gross*, 557 U.S. at 176 (stating that the Supreme Court in *Gross* held "age must be the but-for cause of the employer's adverse decision: age must have had 'a determinative influence on the outcome' of the employer's decision-making process")).

[10] *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013).

[11] *Id.*

[12] *Id.* Although a Title VII plaintiff may establish a defendant's liability under the motivating factor standard, the plaintiff's remedies would be limited to declaratory relief, attorneys' fees and costs, and some forms of injunctive relief if the employer proves that it would have still taken the same employment action even if it did not improperly consider the employee's protected trait. *See id.* at 348–49. Stated differently, if the employer establishes that but-for causation does not exist between the discriminatory motive and the adverse action, then the employer will not be subject to monetary damages or a reinstatement order. *See id.* at 349.

[13] The relevant language in the private sector provision states that it is "unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). On the other hand, the relevant language in the federal sector provision states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a).

[14] 140 S. Ct. 1168, 1171 (2020).

[15] *See id.*

[16] *See id.* at 1176.

[17] *See id.* at 1171, 1178.

[18] *Id.* at 1177–78.

[19] The Court held that an employer violates Title VII when it fires an individual for being homosexual or transgender. 140 S. Ct. 1731, 1753 (2020).

[20] Although the claims at issue in *Bostock* involved Title VII status-based discrimination, which can be proven under the motivating factor causation standard and do not require but-for causation, the Court noted that it focused on the "more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII" because nothing in the Court's analysis depended upon the motivating factor standard. *See id.* at 1740.

[21] *Id.* at 1739; *see also Burrage v. United States*, 571 U.S. 204, 211 (2014) ("The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.").

[22] *Bostock*, 140 S. Ct. at 1739.

[23] *See id.*

[24] 984 F.3d 1199 (6th Cir. 2021) [*Pelcha I*], *opinion amended and superseded by* No. 20-3511, 2021 WL 650854 (6th Cir. Feb. 19, 2021) [*Pelcha II*].

[25] *Pelcha I*, 984 F.3d at 1205.

[26] *Pelcha v. MW Bancorp, Inc.*, No. 20-3511, Plaintiff-Appellant's Petition for Rehearing and Rehearing *En Banc*, Doc. 32 at 5 (6th Cir. Feb. 3, 2021).

[27] *Id.*

[28] *Pelcha v. MW Bancorp, Inc.*, No. 20-3511, Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Rehearing, Doc. 35 at 6 (6th Cir. Feb. 10, 2021); *Pelcha v. MW Bancorp, Inc.*, No. 20-3511, Brief of Amici Curiae AARP, AARP Foundation, and National Employment Lawyers Association Supporting Plaintiff-Appellant's Petition for Rehearing and Rehearing *En Banc*, Doc. 42 at 16 (6th Cir. Feb. 11, 2021).

[29] *See Pelcha II*, 2021 WL 650854, at *1.

[30] *See id.* (quoting *Gross*, 557 U.S. at 176).

[31] *See id.* at *6. At the time of writing this article, the employee in Pelcha has not informed the court whether, in light of the Amended Opinion, she intends to withdraw the petition for rehearing, she wishes to file a new memorandum of law supplementing the original petition, or she wishes to seek rehearing of the Amended Opinion. *See Pelcha v. MW Bancorp, Inc.*, No. 20-3511, 6th Circuit Letter to the Parties, Doc. 45 (6th Cir. Feb. 19, 2021).

[32] *Cf. Nesbitt v. Candler Cty.*, 945 F.3d 1355, 1358 (11th Cir. 2020) (stating that the result of the plaintiff's retaliation claim under the False Claims Act "depends on the choice between [applying] the but-for and the motivating factor causation standards").

[33] 490 U.S. 228 (1989).

[34] *See Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348 (2013).

[35] *See id.* at 346.

[36] *Id.* at 342.

[37] *See id.* at 346–47.

Thank You, Judge George Orr

By Andy Hament

I first appeared before the (now-late) Honorable Dade County Circuit Court Judge George Orr in 1981. I was a first-year associate with a small Miami boutique law firm that specialized in labor and employment law.

In those days, the Dade County Circuit Court was housed in an ancient building on West Flagler Street in downtown Miami. From our law offices at One Biscayne Tower, I walked five long blocks to the courthouse. The journey was hellish. It was hot and steamy. Pungent smells wafted up from the street food vendors and out of cafes. By the time I reached the courthouse steps, my new blue pinstriped Joseph A. Bank suit was soaked with perspiration. I was certain I smelled like a vagrant. This was my first hearing ever. I can't remember what that hearing was about, but I am sure it was something quite simple or my firm would not have assigned me. I do remember being scared stiff.

The ancient elevators took forever to reach Judge Orr's chambers. I was on Judge Orr's motion calendar—or what the local bar called the "cattle call." This was a process reserved for routine motions that could be argued in five to ten minutes. As I entered the anteroom to the judge's chambers, there were at least a dozen attorneys milling about. I could hear conversations and peals of laughter emanating from the adjoining chambers. The judge's bailiff would pop out of chambers every few minutes and bellow, "Do I have a pair?" When my opposing counsel arrived, I replied in the affirmative, and the bailiff ushered us into chambers.

Judge Orr sat at a large wooden desk at the far end of the room. A wooden table stretched perpendicular from his desk with ten to twelve chairs lining the two sides of the table. Another ten to twelve chairs lined the walls behind those chairs. As a "pair" arrived, the bailiff would escort them in and seat them opposite each other along the table. Once the chairs along the table were filled, the bailiff would direct counsel to the seats lining the walls behind the table. As a pair completed their argument, they would exit the chamber, and everyone else would slide down a chair until they reached the judge's desk. Court reporters would file in and station themselves in close proximity to the judge and attorneys and, like the attorneys, ebbed and flowed with the arguments.

It was a scene straight from Charles Dickens. Judge Orr was a tall, lean, gray haired man with a long, intelligent face. He appeared to know everyone—except me. He greeted and referred to attorneys by their first names. He seemed to be engaged in as many as five conversations at a time, not only with "the pair" whose motion was up for hearing, but with many of the attorneys awaiting their turn to argue. While Judge Orr conducted the hearings, the waiting attorneys were busy chatting among themselves, sometimes in reference to what the pair was arguing and sometimes totally unrelated.

Despite the chaos, it was readily apparent that Judge Orr was an experienced jurist and in full command. At the same time, he was quick-witted and kept it light. He often poked fun at the attorneys or their arguments, which then invoked a hearty round of laughter by everyone in the room and sometimes a joking comeback by the arguing attorney or one of the waiting attorneys.

When my opposing counsel and I slid into the hot seats and it was our turn to argue, Judge Orr turned his gaze and full attention to us. For a moment, everyone in the room hushed. I decided to seize the day. It was my motion and I had carefully rehearsed my opening. In those days, law firms did not abbreviate their names. I launched in: "Your Honor, Andrew S. Hament with the law firm of Muller, Mintz, Kornreich, Casey, Crosland and Bramnick. P.A." Judge Orr looked at me quizzingly and then exclaimed, "Say what!!!???" The room roared with laughter.

Fortunately, my memory of the rest of that hearing is a blur.

Fast forward two years and I had a week-long jury trial before Judge Orr in the same case. My preparation was intense. I studied trial procedures until I was blue in the face, things like *voir dire*, the rules of evidence, jury instructions, and a myriad of other things you didn't learn in law school back then. A senior partner, Herbert Mintz, sat with me throughout the trial. But it was my case and my trial to win or lose.

I won! Opposing counsel was a well-known litigator with a large, connected Miami law firm. He immediately filed a motion for new trial.

A few weeks later, Judge Orr conducted a hearing on opposing counsel's motion for new trial. Opposing counsel arrived for the hearing in the judge's chambers with a small entourage of associates. He began his argument: "Judge, this case is very, very important to my firm."

As an employment law firm, we routinely practiced in federal court and before federal agencies. We were less frequently in state court. We stayed out of local politics and judicial campaigns. We were not "connected" as far as those things went. I figured I was screwed.

Judge Orr denied the motion for new trial. Opposing counsel huffed out of chambers closely trailed by his associates. I packed up my briefcase and was exiting the anteroom when I heard the judge call my name—my first name, "Andy." I looked back, and the judge was leaning against his judicial assistant's desk with an extremely serious look on his face. He said, "Do you know why I ruled for you, Andy?" I stammered something to the effect that I thought the case law clearly supported my client's position. Judge Orr continued to look at me sternly and

said: "Nope. I had to rule for you. It was your first jury trial."

I, of course, knew that was not the reason that Judge Orr ruled for me. He was poking fun at me. He ruled for me because the law required him to do so. He was a straight shooter. What overwhelmed me was that he had taken an interest in me. I had never discussed my trial experience (or lack thereof) with him. He checked me out. He knew my first name.

The walk back to One Biscayne Tower was heavenly.

***Andrew ("Andy") Hament** retired as a partner of FordHarrison LLP, where he specialized in employment and labor law. Following the experiences described in this article, Andy went on to handle employment-related cases for almost four decades, including a notable case before the U.S. Supreme Court.*

COMMISSION SEEKS APPLICANTS FOR SPECIAL MAGISTRATE ROSTER

The Florida Public Employees Relations Commission coordinates federally provided mediators and privately retained special magistrates to resolve impasses in labor negotiations. Special magistrates are selected by the Chair of the Commission for two-year terms. The current special magistrate roster runs through July 2021. Qualified individuals are encouraged to apply for vacancies on the roster. You can find more details about the appointment here or in Florida Administrative Code Rule 60CC-3.003. If you have any questions or would like additional information, contact Jennifer Okwabi, Impasse Resolution Coordinator, at 850-488-8641, ext. 1116.

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CASE NOTES

ELEVENTH CIRCUIT

By Melissa M. Castillo, Tampa

Employer's uneven application of workplace rules with minimal consequences to the employee is insufficient to prove that the proffered reason for termination was pretext for disability discrimination.
Hughes v. Wal-Mart Stores East, No. 19-14863, 2021 U.S. App. LEXIS 5473 (11th Cir. Feb.24, 2021).

In this ADA case, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of Walmart. The former employee alleged that Walmart terminated her in retaliation for making several requests pertaining to her medical conditions. Specifically, the employee informed her pharmacy supervisor that she would be unable to deliver injections in compliance with Walmart's policies due to her disabilities, made a request for additional hours so that she could retain the benefits afforded to her as a full-time employee, and made an ADA request for a stool after her supervisor decided to remove the existing stool in the pharmacy. The employee reported that the stool was helpful to her in managing the pain from her medical conditions. In response to Walmart's four-month delay in ordering the new stool for the employee, she filed a complaint of discrimination with Walmart's Global Ethics Hotline against her supervisor. The employee later filed a charge of discrimination and retaliation with the EEOC in January of 2016. Walmart suspended the employee in July of 2016 and later terminated her in September of 2016 because she declined to fill out a conflict of interest form that was required of all pharmacy employees and because of ongoing disputes over the dress code. The court determined the employee could not establish a causal connection based on temporal proximity, as nearly six months had passed between her EEOC complaint and her suspension. In doing so, the court reaffirmed that a period of three to four months between the protected activity and adverse employment action is too attenuated to establish temporal proximity. Further, the court determined the employee was unable to point to any retaliation that did not hinge on the application of a workplace rule that applies to all, noting that, despite her claims that "each rule was unfairly or wrongly applied to her, the uneven application and minimal consequences pled [did] not rise above the 'petty slights and minor annoyances that often take place at work.'" (quoting *Burlington N. & Santa Fe Ry. Co. v. White*). Thus, the court determined that "[a] pattern of the enforcement of universally applicable rules [was] insufficient to show that Walmart's proffered reasoning for [the plaintiff's] firing—her insubordination—was pretextual" and that she failed to establish a prima facie case of retaliation under the ADA.

The court also affirmed the district court's grant of summary judgment in favor of Walmart as to plaintiff's defamation claim. In doing so, the court reasoned that the supervisor's comments that the employee was "unfit" and "no longer in a frame of mind to safely fill prescriptions that day" were statements of opinion, and thus, not defamatory.

Where the prospective candidate for a position at a correctional training center alleged Title VII race discrimination after the employer rescinded his job offer based on his prior probation for fleeing and eluding a police officer but promoted an alleged comparator who had previously been on probation, the Eleventh Circuit rejected plaintiff's arguments that the selected candidate was a valid comparator, rejected plaintiff's "cat's paw" theory of liability, and also rejected plaintiff's "convincing mosaic of circumstantial evidence" theory of liability.
Holley v. Ga. Dep't of Corr., No. 20-12297, 2021 U.S. App. LEXIS 4090 (11th Cir. Feb. 12, 2021).

In this Title VII race discrimination case, the Eleventh Circuit affirmed summary judgment in favor of the Georgia Department of Corrections (DOC). The plaintiff was an African American male whose job offer for an instructor position at a correctional training center was rescinded after his criminal history report revealed that he was previously charged with fleeing and eluding an officer and subsequently sentenced to five months' probation. After receiving the criminal history report from the human resources manager, the warden rescinded the job offer because the plaintiff did not qualify for employment under the DOC's leadership directive that precluded applicants with any type of probation from being hired. The DOC subsequently promoted a different candidate, a white woman and an established part-time employee at the DOC, to fill the position, though it was later discovered that she had also been on probation. The court determined that the plaintiff and selected candidate were not similarly situated comparators because the records that the warden had relied on showed, albeit incorrectly, that the selected candidate had not been on probation. The court also determined that the plaintiff failed to establish liability under a cat's paw theory, finding the human resources manager could not have provided a biased recommendation to the warden because that was not her role in the hiring process and because she only gave to the warden the employee's criminal his-

tory report that she had no hand in creating. Thus, the warden's rescission of the plaintiff's job offer was based solely on the plaintiff's criminal history and was entirely separate from any action by the human resources manager. Finally, the court determined that the plaintiff failed to create a triable issue concerning a convincing mosaic of race discrimination, finding that the plaintiff failed to present evidence that the DOC acted arbitrarily or that the DOC's proffered nondiscriminatory reasons for rescinding his job offer were pretextual.

Professor alleged the university did not renew her employment based on her age in violation of the ADEA, but she could not establish that the university's legitimate, non-discriminatory reason for termination—the dean's personal observation that the professor was "the worst" teacher he had seen at the law school for a person of her experience, coupled with students' teacher performance evaluations—was pretext for age discrimination or that there was a convincing mosaic of circumstantial evidence warranting such an inference.

Tsavaris v. Savannah Law Sch., No. 20-11150, 2021 U.S. App. LEXIS 5579 (11th Cir. Feb. 25, 2021).

In this ADEA case, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the employer, Savannah Law School (SLS). The employee was a former tenure-track professor at SLS whose employment was not renewed after her fourth year of teaching at the school. SLS declined to reappoint the professor based on her poor teaching evaluations as well as the dean's personal observation that the professor was "the worst [he] had ever seen at the school" and that given the professor's prior teaching experience, the dean expected better. The professor sued SLS alleging age discrimination as she was the oldest professor at the law school. The Eleventh Circuit agreed that the professor's poor teaching ability was a legitimate, non-discriminatory reason for termination. Further, the Eleventh Circuit affirmed the district court's determination that the professor was unable to prove SLS's legitimate, non-discriminatory reason for termination was pretextual. In reaching its determination, the court reasoned that the dean considered professors' experience levels, but not their ages, in evaluating their performance, finding the dean's conduct was permissible under the ADEA and consistent with SLS's proffered explanation. The professor also failed to establish that SLS treated her less favorably than the comparator, a fellow SLS professor who was renewed despite receiving similarly poor teaching evaluations. The court noted that the fellow professor had not been teaching as long as the plaintiff and also noted there was no indication that the dean witnessed a comparable teaching performance by the comparator. The court also rejected the professor's argument that pretext follows from the fact that she was the oldest professor at SLS and the only professor that SLS has ever chosen not to renew, stating that the "logic of [the professor's] pretext argument seems to be that suspicious circumstances surrounding an employment decision undermine the employer's proffered explanation for the decision" and finding it contradicted the principle that "[s]imply introducing evidence of discriminatory animus unconnected to the employer's proffered reasons is insufficient" to establish pretext. Further, the court found that the plaintiff's subjective disagreement with SLS's assessment of her performance was insufficient to establish pretext. Finally, even though the dean was rumored to have resolved not to renew plaintiff's employment four months before he observed her teaching ("strong evidence" of pretext, according to the court), the court nevertheless found that the plaintiff failed to present a mosaic of circumstantial evidence "sufficient for a jury to make the further inference that Tsavaris' age, rather than some other factor, was the reason for her termination."

Where the employee alleged race discrimination after she was terminated for absenteeism and suspected falsification of time records, she could not prove comparators were similarly situated in all material respects because the decision maker never suspected the comparators of falsifying their time records.

Luke v. Univ. Health Servs., No. 19-13788, 2021 U.S. App. LEXIS 2421 (11th Cir. Jan. 28, 2021).

In this Title VII race discrimination case, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the employer. The employee worked for the employer as a patient care assistant/phlebotomist and had a long history of tardiness and absenteeism. She was terminated after her supervisor suspected that she falsified her time records and after she continued to arrive late to work despite receiving a final warning. Specifically, it was discovered that the employee arrived to work 12 minutes later than the time noted on one of her time adjustment sheets. The employer could not substantiate falsification but terminated the employee for her history of poor attendance, which included being tardy 100 times over a period of nearly 3 years and having 32 documented instances of being tardy in the 12 months preceding her termination. The court concluded that the employee failed to establish a prima facie case of discrimination, noting that, although the named comparators worked in roles similar to the employee's and also had a history of poor attendance, they were not suspected of falsifying their time records. The court also determined that the employer's explanations for terminating the employee—her attendance, tardiness, and missed

CASE NOTES

punches (i.e., failure to clock in)—were not inconsistent, and thus, not pretextual. Finally, the court rejected the employee's "work rule defense," finding she was terminated for her attendance history rather than for falsifying her time records, as her supervisor was unable to determine whether she actually falsified her time records.

Where the employee filed an ADA claim alleging disability discrimination based on her anemia, she could not prove her anemia substantially limited any major life activity or that her employer regarded her as disabled.

Martin v. Teleperformance Inc., No. 20-10462, 2021 U.S. App. LEXIS 5193 (11th Cir. Feb. 23, 2021).

In this ADA case, the Eleventh Circuit affirmed the lower court's grant of summary judgment in favor of the employer, Teleperformance (TPUSA). The employee was a customer service representative at TPUSA's call center for about four months before TPUSA terminated her employment. The employee alleged that TPUSA terminated her because of her anemia, stating that she could "become impaired when the weather gets a little too cold." The Eleventh Circuit determined that the employee did not point to any major life activity substantially impaired by her anemia, noting that the employee's own testimony confirmed that her anemia did not impact her work "in any way." As such, the employee failed to establish she was "actually" disabled. And, because the employee did not establish that her impairment substantially limited a major life activity, she also necessarily failed to show a record of a qualifying impairment under the ADA. The court also determined that TPUSA did not regard the employee as disabled. In reaching this determination, the court reasoned that the employee never requested an accommodation for her anemia and that she only communicated to TPUSA that she had the medical condition after she was terminated. The court also declined to consider the employee's separate privacy claim, as her amended complaint consisted of a one-count discriminatory termination claim under the ADA that did not "clearly present" her privacy issue to the district court in a way that afforded it "an opportunity to recognize and rule on it."

Where a former deputy sheriff was reinstated after appealing her termination but placed in a lower-paying dispatch role, the jury concluded that she failed to establish that her transfer to dispatch was an adverse employment action, and the admission of testimony from her former supervisor concerning her earlier disciplinary history was not erroneous.

Cogar v. Citrus Cty. Sheriff's Office, No. 20-11003, 2021 U.S. App. LEXIS 4096 (11th Cir. Feb. 12, 2021).

In this Title VII and FCRA gender discrimination case, the Eleventh Circuit affirmed the jury verdict rendered against a former deputy sheriff and in favor of the Citrus County Sheriff's Office. The deputy sheriff had been terminated by then-Sheriff Dawsy after the car she was riding in was pulled over by law enforcement for making an illegal turn. She appealed her termination and was reinstated as a bailiff at a courthouse. A year later, the deputy sheriff was terminated by Sheriff Dawsy for a second time following her arrest for domestic battery. Again, she appealed her termination and was reinstated as a dispatcher under the new sheriff, Sheriff Pendergast. As a dispatcher, she was no longer a law enforcement officer and earned less money. The deputy sheriff argued on appeal that the district court committed reversible error by permitting the responding officer from her traffic incident and the former sheriff to testify about the traffic incident and subsequent termination. The deputy argued that such testimony was unduly prejudicial because the new sheriff was the ultimate decision maker. The court disagreed, finding that even if the admission was erroneous, it was harmless because it was the deputy sheriff's failure to establish that her transfer to dispatch was an adverse employment action that was fatal to her case rather than the testimony of the former sheriff and the responding officer.

The court also determined that the district court did not abuse its discretion in instructing the jury that the deputy sheriff was "placed" rather than "transfer[red]" to the dispatcher position, finding her argument that a "placement" decision is not an adverse employment action was meritless and noting the jury understood her argument was that her dispatch placement was a demotion.

M. CASTILLO

Melissa M. Castillo *is an associate in the Tampa office of FordHarrison, where she focuses her practice on the representation of management in matters related to labor and employment law.*

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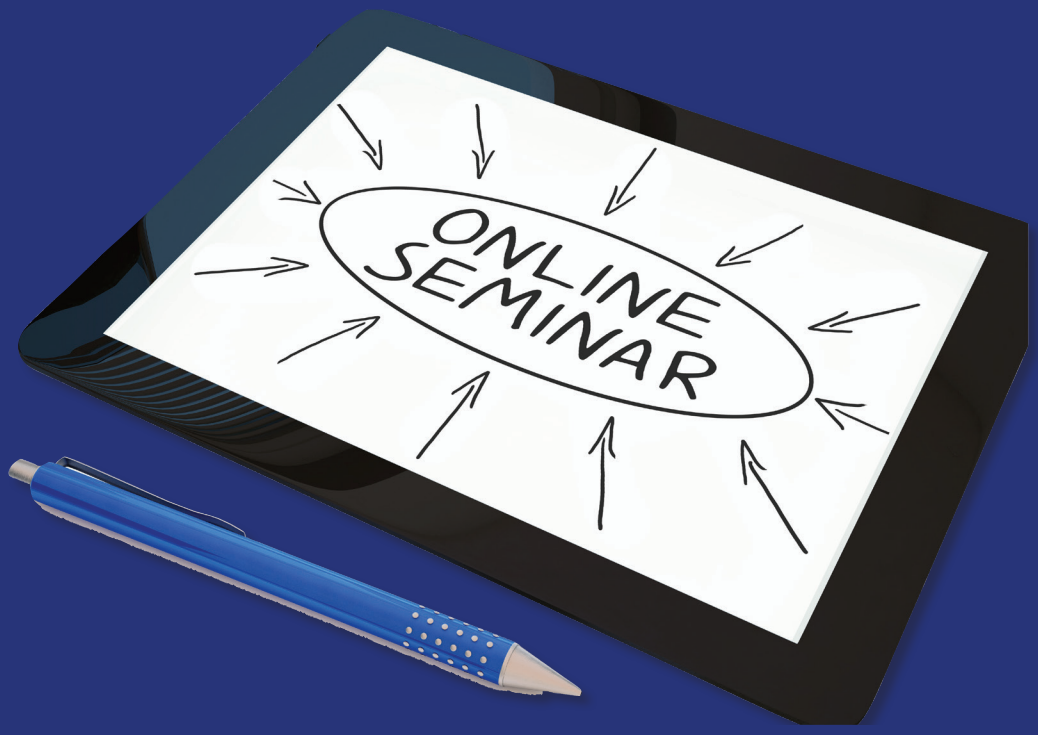

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ADVANCED LABOR TOPICS - May 21, 2021

Agenda

8:20 a.m. - 8:30 a.m.
Welcome and Logistics

8:30 a.m.- 9:20 a.m.
Occupational Safety and Health Administration Updates
James Sullivan, OSHRC Chair, Washington, D.C.

9:20 a.m. - 10:10 a.m.
New FLSA Regulatory Scheme and Case Law Update for Tipped Employees
Alicia H. Koepke, Trenam Kemker, Tampa

10:10 a.m. - 10:20 a.m.
Break

10:20 a.m. - 11:10 a.m.
Better Lawyering Through Technology
Benjamin Yormack, Yormack Employment & Disability Law, Bonita Springs
Suzanne Boy, Boy Agnew Potanovic, PLLC, Ft. Myers

11:10 a.m. - 12:00 p.m.
FLSA and Work from Home and Independent Contractor Analysis
David Spalter, Jill S. Schwartz & Associates, P.A., Winter Park

12:00 p.m. - 1:00 p.m.
Lunch

1:00 p.m. - 1:50 p.m.
Ethics Issues in the COVID Litigation Era
Lansing C. Scriven, Lanse Scriven Law, Tampa

1:50 p.m. - 2:40 p.m.
New Supreme Court Term: L&E Issues on the Court's Horizon
Robert J. Sniffen, Sniffen & Spellman P.A., Tallahassee

2:40 p.m. - 2:50 p.m.
Break

2:50 p.m. - 3:40 p.m.
Litigation and Regulatory Developments After *Bostock v. Clayton County*
Gail E. Farb, Williams Parker, Sarasota

3:40 p.m. - 4:30 p.m.
NLRB/NLRA Update
Dave Cohen, Tampa

4:30 p.m.- 4:35 p.m.
Closing Remarks and Adjourn

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General: 8.0 hours
Ethics: 1.0 hour
Technology: 1.0 hour

Certification Credit

Civil Trial: 1.0 hour
Labor and Employment Law: 8.0 hours

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