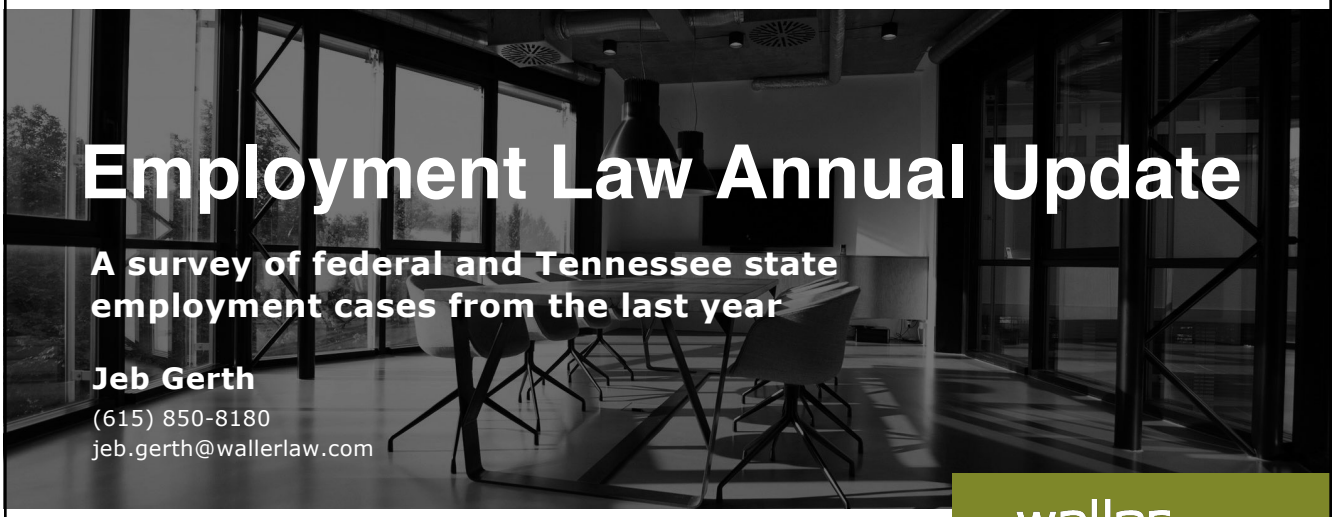

Employment Law Annual Update

A survey of federal and Tennessee state employment cases from the last year

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FMLA – Interference

[MSJ Decision]

Blank v. Nationwide Corp., 2021 WL 3469187 (6th Cir. Aug. 6, 2021)

Can you engage an employee while he/she is on FMLA without interfering with the leave?

Background:

- Plaintiff was an Associate Director for Nationwide
- Overhears two of his managers discussing jury duty
- Offers his unsolicited opinion on how to get out of jury duty (it involved use of the N-word)
- Managers complain; company investigates
- Thereafter, the work relationship between plaintiff and the two managers devolves
- Amid various complaints back and forth, plaintiff is given a final written notice and demoted to an "individual contributor role"
- The day plaintiff is informed of demotion, he also applies for FMLA (fibromyalgia and depression)
- Plaintiff calls in an ethics complaint
- Plaintiff takes 12 weeks of leave, returns in "individual contributor role," the following year is terminated in a RIF
- Files a lawsuit alleging (1) reverse discrimination, (2) disability discrimination, (3) age discrimination, (4) HWE, (5) **FMLA interference**

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FMLA – Interference

Blank v. Nationwide Corp., 2021 WL 3469187 (6th Cir. Aug. 6, 2021)

Analysis:

- Interference includes "discouraging an employee from taking FMLA leave," which includes "asking an employee to work while they are on protected leave."
- "*De minimis*" requests do not amount to interference
- The only two calls initiated by Nationwide were:
  1. Conference call to inform plaintiff of his demotion
  2. Call to discuss plaintiff's ethics complaint

Holding:

- These calls were *de minimis*: no FMLA interference

[MSJ Decision]

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Federal Arbitration Act (FAA)

Southard v. Newcomb Oil Co., LLC, 7 F.4th 451 (6th Cir. Aug. 4, 2021)

How "bare bones" can a purported arbitration agreement be?

Background:

- Plaintiff worked as a convenience store attendant at one of defendant's gas stations
- Files a putative FLSA action (on a class basis) in state court, also asserts state law wage claims
- Defendant removes; plaintiff amends the complaint to drop the FLSA claim
- Defendant move to dismiss or stay pending arbitration, citing language in employee handbook and plaintiff's employment application referencing "alternative dispute resolution"
- District court denies motion to dismiss/stay, finding no arbitration agreement, remands to state court

[MTD/Remand Decision]

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Federal Arbitration Act (FAA)

Southard v. Newcomb Oil Co., LLC, 7 F.4th 451 (6th Cir. Aug. 4, 2021)

Analysis:

- "Liberal federal policy favoring arbitration agreements"
- FAA does not define arbitration; courts evaluate "how closely [an agreement] resembles classic arbitration"
- Features of classic arbitration:
  1. A final, binding remedy by a third party
  2. An independent adjudicator
  3. Substantive standards
  4. An opportunity for each side to present its case
- Here, in a handbook and employment application, there are:
  1. Reference to ADR
  2. Reference to mediation

[MTD/Remand Decision]

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Federal Arbitration Act (FAA)

Southard v. Newcomb Oil Co., LLC, 7 F.4th 451 (6th Cir. Aug. 4, 2021)

Holding:

- References to ADR generally are not enough to form an arbitration agreement.
- Open question as to whether handbook provisions and employment application formed an agreement.

[MTD/Remand Decision]

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FLSA – Jurisdiction for Nationwide Collective Actions


[MSJ Decision]

Canaday v. Anthem Cos., 9 F.4th 392 (6th Cir. Aug. 17, 2021)

Where is a corporate defendant subject to personal jurisdiction for a multistate (or nationwide) collective action?

Background:

- Canaday was a nurse claim reviewer for Anthem in TN
- Anthem is based in Indiana
- Paid on a salary basis
- Filed a collective action in TN on behalf of similarly situated employees across multiple states
- Nurses from other states opted in
- District court dismissed out-of-state opt-ins based on personal jurisdiction

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FLSA – Jurisdiction for Nationwide Collective Actions


[MSJ Decision]

Canaday v. Anthem Cos., 9 F.4th 392 (6th Cir. Aug. 17, 2021)

Analysis:

- Two types of personal jurisdiction:
  1. general jurisdiction: state of incorporation or headquarters
  2. specific jurisdiction: claims arise out of/relate to defendant's form state activities
- *Bristol-Myers Squibb*, SCOTUS, defective drug case under CA law: similarity between resident and non-resident plaintiffs' claims are not a sufficient basis to establish specific jurisdiction
- "In an FLSA collective action, as in the mass action under California law, each opt-in plaintiff because a real party in interest, who must meet her burden for obtaining relief and satisfy the other requirements of party status."
- Some statutes provide for nationwide service on defendants and personal jurisdiction in any federal district court; the FLSA does not.
- Personal jurisdiction is analyzed at the claim level, not the suit level.
- Collective actions are different than class actions (the former is representative, the latter is not).

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Age Discrimination – Comments about retirement

[MSJ Decision]

Sims-Madison v. Dana Commercial Mfg., No. 21-5706(6th Cir. Mar. 28, 2022)

Are multiple comments about an employee's retirement sufficient to raise a fact question regarding age-based animus?

Background:

- Sims-Madison was a 15-year material handler; member of the union
- Disciplinary issue throughout her employment; things escalated in 2017
- Employee complaints of disrespectful speech, "hurling expletives"
- Additional employee complaints in 2018
- Dana issues 5-day suspension "within intent to discharge"
- Sims-Madison says she is going to retire in 5 months
- Dana reduces suspension to 1-day, "considering her 15 years and her intent to retire"
- *Additional* employee complaints, followed by *more* complaints
- As Dana considers next steps, Sims-Madison says she would consider immediate retirement if the company would pay PTO and another CBA contractual benefit
- Dana makes the offer but Sims-Madison never responds(!)
- Dana terminates Sims-Madison's employment; she sues, alleging age and race discrimination under the KCRA

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Age Discrimination – Comments about retirement

[MSJ Decision]

Sims-Madison v. Dana Commercial Mfg., No. 21-5706(6th Cir. Mar. 28, 2022)

Analysis:

- Sims-Madison assumed to have established *prima facie* case; Dana established legitimate, non-discriminatory reason
- Pretext analysis:
  1. *No basis in fact:* honest belief rule (neutralizes Sims-Madison's denials)
  2. *Actual motivation of termination:* regarding age, at least 10 references to retirement
     * retirement comments generally not evidence of age animus on their own
     * Can go "from **innocuous to actionable**"
  3. *Insufficient to motivate discharge:* Sims-Madison cannot identify any helpful comparators

Holding:

- Affirmed. No factual dispute supporting pretext.

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Title VII – Retaliation (Pleading Standard)

Kinney v. McDonough, 2022 WL 223633 (6th Cir. Jan. 26, 2022)

What must a plaintiff allege to successfully plead a Title VII retaliation claim?

[MTD Decision]

Background:

- Kinney was an LPN with the VA in Michigan
- Filed multiple EEO complaints
- Administrative processes ultimately culminated in a federal lawsuit
- Among her claims was a Title VII retaliation claim
- All of Kinney's claims dismissed based on various deficiencies in pleading
- Retaliation claim dismissed based on failure to sufficiently plead causation

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Title VII – Retaliation (Pleading Standard)

Kinney v. McDonough, 2022 WL 223633 (6th Cir. Jan. 26, 2022)

[MTD Decision]

Analysis:

- Starting point: a complaint need not establish a *prima facie* case
- That said, Kinney's retaliation claim "did not sufficiently allege that the adverse employment actions were in response to her EEOC complaint, so she cannot show a causal connection."

Holding:

- Affirmed. Kinney's retaliation claim was insufficiently pled.
- Dissent: The majority's standard is too high. Kinney pled "this action is for discrimination on account of age, race, *and reprisal*." That is sufficient to plead causation.

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Title VII – Religious Discrimination/Accommodation


[MTD Decision]

O'Connor v. Lampo Group, LLC, 2021 WL 4480482 (M.D. Tenn. Sept. 29, 2021)

Background:

- O'Connor worked for Lampo Group ("Ramsey Solutions") as an administrative assistant, reporting to Dave Ramsey
- In June 2020, O'Connor emails HR that she is 12 weeks pregnant; "I understand that being unmarried and expecting is frowned on here"
- Company Conduct policy: *"The image of Ramsey Solutions is held out to be Christian. Should a team member engage in behavior not consistent with traditional Judeo-Christian values or teaching, it would damage the image and the value of our good will and our brand. If this should occur, the team member would be subject to review, probation, or termination."*
- Company "Righteous Living" policy
- O'Connor ultimately terminated for violating the Company Conduct policy

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Title VII – Religious Discrimination/Accommodation


[MTD Decision]

O'Connor v. Lampo Group, LLC, 2021 WL 4480482 (M.D. Tenn. Sept. 29, 2021)

Analysis:

- O'Connor alleges discrimination for having different religious beliefs and for failure to accommodate her religious beliefs
- Regarding accommodation: *"O'Connor must show a religious belief that conflicts with the requirement to eschew premarital sex."*
- A conflict between her religious beliefs and Ramsey's religious beliefs (rather than the work rule) is insufficient
- Regarding discrimination: O'Connor must allege facts that she was terminated for her religious beliefs. She has not.

Holding:

- O'Connor's Title VII religion claims are defectively pled.

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ADA – Fitness for Duty Exams


[MSJ Decision]

Kreszowski v. FCA US, LLC, et al., 2022 WL 782664 (6th Cir. Mar. 15, 2022)

Is a fitness for duty exam evidence of a perception of disability?

Background:

- Kreszowski was a union worker in FCA's manufacturing facility
- On Sept. 30, 2016, Kreszowski hit the "abort" button on a machine because he thought a coworker was being unsafe
- Kreszowski given a day off to make an OSHA complaint (OSHA issued no citation)
- Local Response Team (LRT) meets with Kreszowski; attempts to work through his issues
- Kreszowski makes comments to LRT that are concerning
- Kreszowski given a fitness for duty exam (2016); returned to work
- Kreszowski given a second fitness for duty exam (2017)
- Kreszowski goes through multiple doctors; ultimately absent from Oct. 27, 2017 to March 18, 2019
- FCA sends Kreszowski a 5-day letter
- March 26, 2019, Kreszowski terminated
- Kreszowski sues, alleging unlawful termination, disability discrimination, and retaliation

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ADA – Fitness for Duty Exams


[MSJ Decision]

Kreszowski v. FCA US, LLC, et al., 2022 WL 782664 (6th Cir. Mar. 15, 2022)

Analysis:

- Kreszowski pursued a "regarded as" theory of disability
- Argued that the fitness for duty examinations were evidence that FCA regarded him as disabled
- "*Because employers must be able to determine the cause of an employee's aberrant behavior, requesting an employee to undergo a fitness for duty examination is not tantamount to regarding that employee as disabled.*"
- Medical examinations must be job-related and consistent with business necessity

Holding:

- Affirmed. No evidence suggests that FCA regarded Kreszowski as disabled.

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Tennessee Public Participation Act (TPPA) (Anti-SLAPP law)

Doe v. Roe, 638 S.W.3d 614 (Tenn. Ct. App. May 2, 2022)

What counts as an exercise of a protected right under Tennessee's 2019 Anti-SLAPP law?

Background:

- Arises out of a Title IX complaint at MTSU
- Roe alleged Doe sexually assaulted her; reported to MTSU's Title IX Office
- Title IX complaint investigated, closed for lack of evidence
- Doe files a complaint in Davidson County Circuit Court alleging, defamation, false light, IIED
- Roe files a motion to dismiss, asserting the TPPA as a defense
- Trial court denied motion, finding that her Title IX complaint was not a matter of public concern implicating the TPPA
- Interlocutory appeal taken by Roe

[MSJ Decision]

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Tennessee Public Participation Act (TPPA) (Anti-SLAPP law)

Doe v. Roe, 638 S.W.3d 614 (Tenn. Ct. App. May 2, 2022)

Analysis:

- TCA § 20-17-104(a): "*if a legal action is filed in response to a party's exercise of the* ***right of free speech***, ***right to petition***, *or right of association, that party may petition the court to dismiss the legal action.*"
- SLAPP = "Strategic Lawsuits Against Public Participation"
- Anti-Slapp laws designed to counteract such cases intended to silence opponents, divert resources
- Free speech: must be in connection with a matter of "public concern"
- Petition: communication" that is constitutionally protected and intended to encourage consideration or review of an issue by a governmental body.

Holding:

- Title IX complaint is a matter of public concern – health and safety of an individual (not just the community at large) is a "public concern"
- Title IX complaint to a public school is a protected petition

[MSJ Decision]

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Tennessee Public Protection Act (TPPA)

[Post-Trial]

King v. Delfasco, LLC, 2021 WL 4304756 (Tenn. Ct. App. Sept. 22, 2021)

Does refusal to share a work password with your employer constitute refusal to engage in unlawful activity to be protected under the TPPA?

Background:

- Employee worked for company which did substantial business with the Department of Defense (DOD)
- DOD maintained a DOD Wide Area Workflow (WAWF) system used to, among other things, submit invoices
- Employee made errors on invoices, resulting in delayed payments (~$160K)
- After a week, employee's manager (the company's owner) demanded that she provide her WAWF password
- Employee calls WAWF administrator; is told it would be illegal to share password
- She refused; owner terminated her
- Other notable facts:
  - Employee had previously shared her WAWF password with others
  - Employee had her password on a post-it attached to her computer monitor

Tennessee Public Protection Act (TPPA)

[Post-Trial]

King v. Delfasco, LLC, 2021 WL 4304756 (Tenn. Ct. App. Sept. 22, 2021)

Analysis:

- Employee must "identify the law and policy [he or she] contends was contravened and must be able to substantiate these allegations to some degree."
- *But*, the employee doesn't have to prove that the requested conduct would have been "conclusively illegal," only that the employee "**reasonably believed the activity in question was illegal**"
- "Sharing access to a secure DOD website is a far cry from sharing one's Netflix password. To be clear, we do not condone the latter, but the difference in gravity is relevant to determining the reasonableness of [the employee's] belief."
- Call to the WAWF administrator is key

Holding:

- Employee reasonably believed it was illegal to share her WAWF password

Tennessee Human Rights Act (THRA) Continuing Violation Doctrine

McCain v. St. Thomas Med. Partners, 2021 WL 2156912 (Tenn. Ct. App. May 27, 2021)

Is an alleged constructive discharge part of a "continuing violation"?

Background:

- LPN claims that doctor engaged in sexual harassment in 2015 and early 2016
- LPN takes (unrelated) FMLA leave from June 26, 2016-Sept. 5, 2016
- Returns on Sept. 6, 2016, discovers she has been reassigned to work with a different doctor
- Claims assignment is "less prestigious"
- Same title, same pay, same benefits
- LPN has a panic attack; goes on medical leave
- Returns on **Sept. 12, 2016**, resigns, citing "duress" and "hostile environment"
- Files complaint on **Sept. 12, 2017** (one year later), alleging, among other thinks HWE, retaliation, constructive discharge under the THRA

[MSJ Decision]

Tennessee Human Rights Act (THRA) Continuing Violation Doctrine

McCain v. St. Thomas Med. Partners, 2021 WL 2156912 (Tenn. Ct. App. May 27, 2021)

Analysis:

- SOL under the THRA is one year
- A reassignment is a discrete act
- LPN's claim that discriminatory practices didn't "cease" until Sept. 12, 2016 is incorrect
- The reassignment occurred (at the latest) on Sept. 6, 2016
- LPN's resignation was not a "continuation" of that act "**but a consequence of it**"

Holding:

- LPN's claims are untimely (by 6 days)

[MSJ Decision]

Questions?

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