EMPLOYMENT LAW UPDATE NPO PAAC
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I. ADA -

A. Actual Disability

Barlia v. MWI Veterinary Supply, Inc., 2017 WL 345644 (E.D. Mich. 2017) (Rosen, J.). The plaintiff failed to show that she was "disabled" within the meaning of the ADA. The plaintiff alleged that she suffered from "adrenal insufficiency, hypothyroidism, mastocytosis and histamine release syndrome." As evidence, she cited her own deposition testimony and thirteen pages of medical records. The records, however, consisted only of a "terse description of the 'problems' that triggered each" of the plaintiff 's visit to her physician. Although some of the records show that the stated reason for her visit was "hypothyroidism" and that she "experienced symptoms consistent with thyroid and hormonal imbalance," there was no evidence that she was diagnosed with any condition. The medical conditions listed could have simply represented the plaintiff 's complaints or concerns.

B. Substantial Limitation

EEOC v T4S Secure Solutions USA, Inc. (E.D. Mich. 2017) (Friedman, J.). Judge Friedman denied Employer's motion to dismiss
EEOC's complaint, concluding that charging party's mixed connective tissue disorder and lupus, both of which are musculoskeletal, neurological and skin-related impairments substantially limit her walking, which is a major life activity under §12102(2)(A).

Morrow v. AI-Cares, LLC, ___ F.Supp.3d ___, 2017 WL 3215206 (E.D. Mich. 2017) (Murphy, J.). Judge Murphy granted employer's motion for summary judgment as to former employee's ADA claim, concluding that temporary knee injury which resulted in restrictions for nine days was not a substantially limiting disability.

Taulbee v. University of Physician Group, ___ F.Supp.3d ___, 2017 WL 3169241 (E.D. Mich. 2017) (Parker, J.). Judge Parker granted employer's motion for summary judgment, concluding that RN failed to create an issue of fact as to whether her fibromy-
 algia substantially limited a major life activity or whether her supervisors were aware that he condition was disabling.

Bowers v. Brennan, ___ F.Supp.3d ___, 2017 WL 678079 (W.D. Mich. 2017) (Quist, J.). Judge Quist granted Postal Service's motion to dismiss supervisor's ADA claim, concluding that supervisor did not allege facts to support his contention that he is disabled or that the Postal Service regarded him as disabled, even though he was rated as "disabled" by Department of Veteran Affairs.

C. Regarded as Disabled (Perceived)

Beauvais v. City of Inkster, ___ F.Supp.3d ___, 2017 WL 5192249 (E.D. Mich. 2017) (Drain, J.). Judge Drain granted summary judgment with respect to ADA claim of former police officer, concluding that City of Inkster's decision to require officer to undergo a fitnessfor-duty evaluation because she requested leave based on work-related issues was not sufficient to show that the City regarded her as disabled within the meaning of the ADA.

Monroe v. Consumers Energy, ___ F.Supp.3d ___, 2017 WL 4699043 (E.D. Mich. 2017) (Cohn, J.). The plaintiff was employed by Consumers Energy Company ("Consumers"). Approximately thirteen years after the plaintiff began working for Consumers, her supervisor began to notice that the plaintiff was losing focus, becoming increasingly secretive, and not interacting with her co-workers as she had in the past, causing her work performance to significantly suffer. Later that year, the plaintiff filed a complaint with Consumers alleging that her co-workers were tracking and surveilling her. She complained that her co-workers were intercepting her personal text messages from her personal cellular phone, placing listening devices in her office, placing cameras in her home, and placing GPS tracking devices in her car. Consumers conducted an investigation a few months later, but did not find any merit to the allegations. Given the sudden poor performance and wild unfounded complaints, Consumers arranged for the plaintiff to undergo an independent medical examination to determine if she was able to perform the essential functions of her job. A few days later, the plaintiff was found crying at her desk. Consumers then placed the plaintiff on paid sick leave, required her to submit to an IME and attend counseling sessions. Summary judgment was granted in favor of Consumers. The court held that the plaintiff did not present sufficient evidence to show that Consumers regarded her as having a disability and that the mandatory leave was an adverse action. The fact that Consumers sent her for an IME was not sufficient evidence that Consumers regarded her as having a disability. The court concluded that the nature of the allegations of the plaintiff's complaint against her co-workers, coupled with her performance issues, "would have caused any reasonable employer to inquire as to whether she was still capable of effectively doing her job." The fact that Consumers might have perceived her health problems as adversely affecting her job performance was not tantamount to regarding her as disabled. Likewise, requesting that she undergo an IME was not evidence of discrimination because it did not prove that Consumers perceived her as having an impairment that limited one or more major life activities. An employer has the right to determine the cause of an employee's aberrant behavior.

D. Ability to Perform Essential Job Functions with or without Accommodations

Mosby-Meachem v. Memphis Light Gas & Water Division, ___ F.3d ___, 2018 WL 988895

(6th Cir. 2018). In-house attorney was denied request to work from home for ten weeks while she was on bed rest due to complications from pregnancy. Following trial, jury found in attorney's favor on her ADA claim and awarded compensatory damages. Court of Appeals affirmed District Court orders denying employer's motions for new trial, for judgment as a matter of law and awarding equitable relief. Although the Court of Appeals acknowledged that several pieces of evidence introduced at trial supported the conclusion that in-person attendance was an essential function of the attorney's job, the Court concluded that given the deference that must be accorded a jury verdict, plaintiff produced sufficient evidence that she could perform all of the essential functions of her job remotely for ten weeks. The Court distinguished *EEOC v. Ford* and *William v. ATT Mobility Services LLC.*

Singleton v. Public Health Trust of Miami-Dade County, ___ Fed. Appx. ___, 2018 WL 679389 (11th Cir. 2018). Attending Physician, despite receiving reasonable accommodations, failed to show that he could meet the minimum productivity requirements—measured by the number of patients treated each day—which was an essential function of his job.

Gamble v. JP Morgan Chase & Co., 689 Fed. Appx. 397 (6th Cir. 2017). Employee who could not perform essential functions of his job as stockbroker was not otherwise qualified for his position, as required to establish prima facie case of disability discrimination under ADA; regular attendance was essential function of employee's position, but he was unable to return to work throughout his disability leave, at time that he was terminated, or during pendency of his litigation against employer, and he admitted to being completely disabled, unreleased to work by his physician, and unable to regularly attend his job.

Green v. BakeMark USA, LLC, 683 Fed. Appx. 486 (6th Cir. 2017). The plaintiff's medical restriction, prohibiting him from working more than eight hours a day and five days a week, made him unqualified for the job which required fifty hours a week minimum. A part-time work schedule was therefore an unreasonable accommodation and he was not qualified for the position.

Bush v. Compass Group USA, Inc., 683 Fed. Appx. 440 (6th Cir. 2017). Former employee was unable to perform essential functions of chef manager position of lifting and carrying items up to 50 pounds, and thus former employer was not liable for disability discrimination under ADA or Kentucky Civil Rights Act (KCRA), **even though job description stated that chef manager must be able to lift and carry items weighing up to 10 pounds; job description did not reflect actual functioning of position,** former employee stated his actual job duties involved regular lifting and carrying of items weighing up to 50 pounds, and former employee repeatedly admitted during deposition that he was physically incapable of continuing as chef manager, with or without reasonable accommodations.

Bridgewater v. Michigan Gaming Control Board, ___ F.Supp.3d ___, 2017 WL 4517902 (E.D. Mich. 2017) (Lawson, J.) (appeal docketed November 13, 2017). Genuine issue of material fact existed as to whether regular attendance was essential function of gaming engineering specialist position, and thus whether employee, who suffered from

dermatological disease that caused severe disruption of his sleep, was qualified for position, precluding summary judgment on claim for disability discrimination under ADA against state official at Michigan Gaming Control Board.

Welch v. Level 3 Communications, LLC, ___ F.Supp.3d ___, 2017 WL 2306443, 2017 AD Cases 178, 007 (E.D. Mich. 2017) (Tarnow, J.) (appeal docketed June 27, 2017). Judge Tarnow granted employer's motion for summary judgment, concluding that even if the plaintiff was disabled or regarded as disabled, she was no longer able to perform the essential functions of her job at the time that her employment was terminated.

Arndt v. Ford Motor Co., 247 F.Supp.3d 832 (E.D. Mich. 2017) (Borman, J.). Employee who suffered from post-traumatic stress disorder (PTSD) failed to demonstrate that he was qualified for his position as a manufacturing supervisor at an automobile assembly plant with or without a reasonable accommodation, and, thus, he could not establish a prima facie case of discrimination against his employer under ADA and Michigan Persons with Disabilities Civil Rights Act (PWDCRA), where employee's treating psychologist never opined that employee's service dog could enable him to perform specific job functions he was incapable of performing due to his PTSD, and employer's expert opined that there was no evidence that employee's symptoms could be adequately controlled by presence of his service dog.

E. Non-Discrimination

Guzman v. Brown County, ___ F.3d ___, 2018 WL 1177592 (7th Cir. 2018). Court of Appeals affirmed summary judgment for the County with respect to ADA claim of Telecommunications Operator at its 911 Call Center who was diagnosed with sleep apnea and was eventually terminated after repeatedly showing up late for work. The Court indicated that it did not need to decide whether the Operator was a qualified individual with a disability because even if she was, she failed to identify any evidence establishing that an adverse employment action occurred as a result of her alleged disability rather than as a result of her repeated late arrivals.

Koegh v. Concentra Corp., ___ F.Supp.3d ___, 2017 WL 4618411 (E.D. Mich. 2017) (Steeh, J.). Judge Steeh granted employer's motion for summary judgment with respect to ADA claim of staff physician suffering from herniated discs at L4 and L5 and resulting surgeries whose employment was terminated because of thoroughly documented behavioral and tardiness issues.

Kieffer v. Planeet Fitness of Adrian, ___ F.Supp.3d ___, 2017 WL 3581315 (E.D. Mich. 2017) (Levy, J.). Judge Levy granted motion to dismiss ADA claim of Army veteran suffering from PTSD and other injuries who was hired as fitness instructor and was unable to show that his disabilities were the but for cause of his termination.

Taylor v. Comcast Cable Communications, Mgmt., LLC, ___ F.Supp.3d ___, 2017 WL 3394755 (E.D. Mich. 2017) (Cohn, J.). Judge Cohn granted Comcast's motion for summary judgment of customer account executive who claimed that his employment was terminated for a

mental disability, when the evidence showed that she misused her medical leave for a planned vacation in violation of Comcast's code of conduct.

F. Reasonable Accommodation

Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017). The employer was not required to provide the employee with an additional two- to three-month leave of absence following the expiration of his FMLA leave. The court rejected the EEOC's argument that "a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is (1) of a definite, time limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns." The court held that, "If as the EEOC argues, employers are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical leave statute—in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term "reasonable accommodation." NOT THE LAW IN MICH/6TH CIR BUT GREAT CASE FOR EMPLOYERS

Ortiz-Martinez v. Fresenius Health Partners, 853 F.3d 599 (1st Cir. 2017). To survive summary judgment on a failure-to-accommodate claim under the ADA, a plaintiff must prove that: (1) he or she is disabled within the meaning of the ADA, (2) he or she was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) his or her employer, despite knowledge of his or her disability, did not reasonably accommodate it. **Former employee's refusal to engage in interactive process with former employer regarding employee's request for accommodation precluded employer's liability under the ADA for failing to provide a reasonable accommodation**; while employee expressed a desire to be reinstated, this did not demonstrate that she meaningfully engaged with the interactive process in good faith, as such expression did not assist employer in probing contours of her physical limitations in order to fashion an appropriate accommodation, and employer's requests for more information from employee and her physician were reasonable, as employer continually attempted to engage in the interactive process in good faith, while employee refused to meaningfully engage after submitting an initial letter from her doctors.

DeWitt v. Southwestern Bell Telephone Co., 845 F.3d 1299 (10th Cir. 2017). The U.S. Court of Appeals for the Tenth Circuit rejected DeWitt's requested accommodation of retroactive leniency for misconduct and held it was not reasonable within the meaning of the ADA. DeWitt was an insulin dependent diabetic who worked as a customer service representative. Southwestern Bell allowed her to take breaks as needed to eat or drink to maintain proper blood sugar levels and also granted her intermittent leave for diabetes-related health issues. DeWitt was terminated for hanging up on two customers (a violation of her employer's code of business conduct) and her "last chance" agreement for other performance issues. DeWitt attributed her conduct to having suffered a severe drop in her blood sugar, which caused her to experience disorientation, confusion, and lethargy, and claimed that Southwestern Bell failed to accommodate her by not excusing the dropped calls that were caused by her disability. The Tenth Circuit disagreed and held that the ADA does not require employers to accommodate a disability by excusing past misconduct, even

when that misconduct is caused by a disability. **The court cited the EEOC's ADA Enforcement Guidance which states that reasonable accommodations are "always prospective."**

Arndt v. Ford Motor Co., ___ Fed. Appx. ___, 2017 WL 6375584, 33 AD Cases 1397 (6th Cir. 2017). Court of Appeals affirmed Judge Borman's order granting summary judgment to Ford with respect to reasonable accommodation claim of Army veteran who suffered from PTSD and requested to bring his service dog with him to work as a reasonable accommodation for his disability. Plaintiff's physician claimed that "the presence of his trained service dog enables him to maintain his high level of functioning by sensing tension and calming him before the tension becomes problematic." The Court of Appeals concluded that **plaintiff made two requests for accommodation—one of which was withdrawn and the second of which remained pending at the time that plaintiff resigned—neither of which was denied by Ford. The Court also concluded that no reasonable juror could conclude that Ford failed to engage in the interactive process or that Ford was responsible for a breakdown in that process before a reasonable accommodation could be identified.**

Roberts v. Permanente Medical Group, Inc., 690 Fed. Appx. 535 (9th Cir. 2017). The District Court properly granted summary judgment with respect to employee's ADA reasonable accommodation claim where **requested accommodation—being restricted from visual or verbal contact with her direct supervisor—was effectively a request for a new supervisor.** Such a request was per se unreasonable, as was her request for reassignment in contravention of her collective bargaining agreement.

Bridgewater v. Michigan Gaming Control Board, 2017 WL 4517902 (E.D. Mich. 2017) (Lawson, J.), appeal pending (November 13, 2017). The plaintiff suffered from a skin condition that caused him severe disruption of his sleep, as well as pain and discomfort throughout the day. The condition periodically and unpredictably flared up. From 2001 to 2015, the employer allowed the plaintiff to work a flexible schedule to accommodate his skin condition. During this time, his performance appraisals stated that he was performing his job satisfactorily or better. In early 2015, the employer informed the plaintiff that his flexible work schedule would no longer be allowed. A subsequent request by the plaintiff to return to a flexible work schedule was denied. The plaintiff was instead given the option of using any available leave credits or requesting intermittent FMLA leave. The plaintiff filed a lawsuit, alleging that the employer failed to accommodate his disability by refusing to allow him a flexible work schedule. The employer filed a motion for summary judgment. The court rejected the employer's motion. **The court held that this was a rare case in which a jury could conclude that regular attendance was not an essential job function because the employee had been allowed a flexible work schedule for years and received satisfactory performance ratings. Moreover, the job description did not include regular working hours or suggest that the job required teamwork or a high level of face-to-face interaction.** Further, the proposed accommodation would not result in the plaintiff working any fewer hours than the inflexible schedule imposed by the employer. Under both, the plaintiff would work 40 hours per week.

G. Retaliation

Barlia v. MWI Veterinary Supply, Inc., ___ Fed. Appx. ___, 2018 WL 327448 (6th Cir. 2018). Court of Appeals concluded that Judge Rosen properly granted summary judgment to veterinarysupply company with respect to outside sales representative's ADA retaliation claim. Representative failed to establish a prima facie of retaliation because she did not offer evidence tending to show a causal connection between her protected activity and the adverse employment action. Because roughly three months passed between the representative's request for accommodation and her being placed on a PIP, and another month before her discharge, the evidence of temporal proximity was insufficient to create a genuine dispute on the issue of causation.

Frazier v. Secretary, Dept. of Health and Human Services, ___ Fed. Appx. ___, 2017 WL 4334037, 33 AD Cases 1156 (11th Cir. 2017). Department of Health and Human Services' (HHS) proffered legitimate reasons for firing employee, specifically, her disrespect for authority and failure to follow instructions, were not pretext for retaliatory termination in violation of the Rehabilitation Act based on employee's requesting accommodation for her disability, type 2 diabetes mellitus; although HHS terminated employee just a few weeks after she complained about her team leader's allegedly harassing her because she had requested accommodations, and even if co-workers who reported her disrespect for authority or failures to follow instructions falsified or exaggerated those incidents, decision- maker who fired her sincerely believed that incidents had occurred.

H. Medical Exams and Inquiries

Williams v. FedEx Corporate Services, 849 F.3d 889 (10th Cir. 2017). The district court erred in failing to consider whether it was an unlawful medical inquiry for the employer to request that an employee returning from Short Term Disability leave for withdrawal from a prescription narcotic divulge the prescription medications he was legally taking.

Miller v. Michigan State Police, 2017 WL 3043972 (Mich. App. 2017). A police officer's disability discrimination claim was properly dismissed because, while the employer might have required him to obtain a mental evaluation because it regarded him as having a mental disability, it ordered the evaluation because it believed he was a safety threat and was no longer fit for duty. "Thus, to the extent that MSP perceived Miller as posing a threat to the safety of its employees because of his mental condition, the PWDCRA did not require that MSP refrain from taking adverse action against him."

II. DISCRIMINATION

A. Sex/Sexual Orientation

Hively v Ivy Tech Community College of Indiana, 853 F3d 339 (CA 7 (Ind), 2017). Overruling past precedent, the court held that discrimination on the basis of one's sexual orientation is unlawful sex discrimination in violation of Title VII. "Any discomfort, disapproval, or job

decision based on the fact that the complainant— woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex."

Christiansen v Omnicom Group, Incorporated, 852 F3d 195 (CA 2 (NY), 2017). The court refused to reverse existing Circuit precedent holding that discrimination on the basis of sexual orientation is unlawful sex discrimination under Title VII. The court, however, held that the district court erred by dismissing the plaintiff 's gender stereotyping claim. The plaintiff 's gender stereotyping claim was cognizable under the seminal Price Waterhouse case even though the majority of his allegations related to sexual orientation discrimination as opposed to gender stereotyping.

B. Pregnancy

Kubik v Central Michigan University Board of Trustees, --- FedAppx ---- (CA 6, 2017). On appeal, the plaintiff, a tenure-track professor who was not appointed to a new term, challenged the district court's grant of summary judgment in favor of the defendant Central Michigan University ("CMU") and five individually named CMU employees on her claims of pregnancy discrimination, hostile work environment, and retaliation in violation of Title VII and state law. In its decision to affirm the district court's judgment, the court ruled that in the context of pregnancy-discrimination claims, a plaintiff has the burden to show that "(1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision." In this case, the district court applied the standard-issue McDonnell Douglas test, ruling that the plaintiff could not show that she was a member of a protected class at the time the challenged adverse decisions were made. The district court reasoned that the plaintiff 's pregnancy and the defendant-university's decision not to reappoint her were too attenuated for the plaintiff to rely on her pregnancy to establish protected class membership.

The Sixth Circuit affirmed the district court's judgment after finding the gap between the end of the plaintiff 's pregnancy and the first vote against her reappointment was only five (5) months. While the court recognized that a five-month gap was not a per se bar to relief, it also held that the plaintiff was required to produce additional evidence to show "a nexus between [the] pregnancy and the adverse employment decision." "A nexus requires some connection ... between the pregnancy and the adverse action. Therefore, where an adverse action occurs soon after pregnancy, courts can infer a nexus from the temporal proximity." However, "where the timeline is less probative, plaintiffs must offer other evidence." The plaintiff did not present sufficient evidence to show the required nexus between her pregnancy and the departmental votes against her reappointment.

Ramirez v Bolster & Jeffries Health Care Group, LLC, --- FSupp3d ----, 2017 WL 4227944 (WD KY, 2017). Summary judgment motion by the defendant-employer denied, in part, because there was conflicting evidence as to (1) whether the plaintiff, a certified nursing assistant working for the defendant-employer's nursing home facility, ever refused to lift residents during her pregnancy which provided the basis for the defendant- employer's transfer

decision and (2) whether the plaintiff's pregnancy actually motivated the defendant employer's decision to transfer her.

C. Religious Discrimination/Accommodation

Pierce v General Motors LLC, --- Fed Appx ----, 2017 WL 5952738 (CA 6, Dec. 1, 2017). Summary judgment properly granted in favor of defendant employer where evidence showed that the plaintiff, a Seventh- Day Adventist, was suspended after threatening a supervisor—not on the basis of religious animus. The plaintiff worked as a walk picker for the defendant-employer's Willow Run warehouse, located in Michigan. Walk pickers were responsible for retrieving parts from the warehouse's inventory in order to fill orders from dealers and other customers. While the walk picker's schedule required that they work normal 8-hour shifts Monday through Friday, their union's collective bargaining agreement allowed management to require that they work up to six (6) mandatory Saturdays each year.

When the first mandatory Saturday was designated in 2013, the plaintiff notified a general warehouse supervisor that he was unable to work because Seventh-Day Adventists generally do not work on Saturdays. The general warehouse supervisor, however, directed the plaintiff to contact his direct supervisor to request the accommodation. Instead of speaking to his direct supervisor, the plaintiff simply took the day off. When the plaintiff did not report to work on the first mandatory Saturday, the direct supervisor noticed the plaintiff of a mandatory meeting that had been scheduled to determine whether there were sufficient grounds to take disciplinary action. Two days after the mandatory meeting was scheduled, the plaintiff approached his direct supervisor "huff[ing] and puff[ing]" with "balled up fists," stating that he could not promise "who's going to come out of the room" if the meeting was actually held. The supervisor reported the incident to warehouse management.

When conducted an investigation into the report, the plaintiff admitted that he spoke to the supervisor regarding the meeting with balled up fists, but adamantly denied making the reported threat. After warehouse management credited the direct supervisor's account of the incident, the plaintiff was suspended. On appeal, the plaintiff argued that the defendant's proffered reason for his suspension had no basis in fact. However, the court affirmed the district court's rejection of the plaintiff's position on the grounds that, at the time of the suspension, management honestly believed he threatened his supervisor. Accordingly, the plaintiff was required to present sufficient evidence permitting an inference of discriminatory motive, which he was unable to do.

Fallon v Mercy Catholic Medical Center of Southeastern Pennsylvania, 877 F3d 487 (CA 3, 2017). The court affirmed the dismissal of the plaintiff's religious discrimination action against the defendant-hospital following his termination for failure to comply with the hospital's vaccination policy. The factual record showed that the defendant-hospital had an established policy requiring all employees to receive the flu vaccine each year, unless they qualified for a medical or religious exemption. The plaintiff opposed the mandatory vaccination policy because he believed that the vaccine might do more harm than good. In

his accommodation request, the plaintiff indicated that if he consented to the defendant hospital's mandatory policy, he would "violate his conscience as to what is right and what is wrong." He requested that he be allowed to "follow his conscience and refuse the influenza vaccine." The plaintiff was later terminated for his failure to comply with the mandatory vaccination policy following the defendant-hospital's determination that his rationale for refusing the mandatory vaccine did not qualify him for the religious exemption.

On appeal, the court affirmed the district court's determination that the plaintiff's beliefs supporting his refusal to receive the flu vaccination were not protected religious beliefs under Title VII. **The court reasoned that the basis of the plaintiff's "refusal of the flu vaccine—his concern that the flu vaccine may do more harm than good—[was] a medical belief, not a religious one." The plaintiff's beliefs, while strongly held, were not manifested in formal and external signs and other similar manifestations associated with the traditional religions.** His anti-vaccination beliefs likewise did not occupy a place in his life similar to that occupied by a more traditional faith. Consequently, his objection to obtaining the vaccine was not protected by Title VII. **The court, however, did acknowledge that anti-vaccination beliefs can be part of a broader religious faith, and in those limited circumstances, those beliefs would likely be protected under Title VII.**

D. Retaliation

Carvalho-Grevious v Delaware State University, 851 F3d 249 (CA 3, 2017). A plaintiff alleging retaliation under Title VII is not required to establish "but-for" causation at the prima facie stage. The plaintiff is only required to establish that the protected activity was the likely reason for the adverse employment action.

Frazier v Richland Public Health, 685 FedAppx 443 (CA 6, 2017). The plaintiff filed an internal complaint alleging that a manager physically assaulted her after she reported that a group of female worked had complained that another male manager had a camera facing the women's restroom. The district court held that this internal report was not protected activity because it was not related to protected Title VII activity. The court of appeals reverse, holding that it was protected activity because it was related to a sex-based complaint by the female workers.

Alexander v Kellogg USA, Inc, 674 FedAppx 496 (CA 6, 2017). The plaintiff alleged that he was discharged in retaliation for exercising his FMLA rights. His claim was properly dismissed where it was shown that he was terminated for unexcused absences after his FMLA leave request was properly denied. The fact that his leave was properly denied prevented him from establishing the first element of his prima facie case that he was carrying out an activity protected by the FMLA.

Linkletter v Western & Southern Financial Group, Inc, 851 F3d 632 (CA 6, 2017). The plaintiff's job offer was rescinded after the employer became aware that the plaintiff had signed an online petition supporting a women's shelter. The court held that the employer's actions constituted retaliation in violation of the Fair Housing Act because its actions

interfered with the plaintiff's right to "aid or encourage" another's enjoyment of the rights provided by the FHA.

E. Cat's Paw

Schram v Dow Corning Corp, 2018 WL 317870 (ED Mich, 2018). The plaintiff filed an FMLA retaliation lawsuit, alleging that her termination resulted from unlawful discrimination. The employer filed a motion for summary judgment, arguing that the supervisor alleged to have been the source of the discriminatory animus was not the person who decided to terminate the plaintiff's employment. The court denied the employer's motion, holding that the employer could not defeat the cat's paw theory of liability on summary judgment because there was no evidence that the decision-makers conducted an investigation independent of the supervisor's claim that the plaintiff's performance had declined.

Marshall v The Rawlings Company LLC, 854 F3d 368 (CA 6, 2017). Cat's paw liability applies to FMLA retaliation claims. The employer was not entitled to summary judgment on plaintiff's FMLA retaliation claim. There were genuine issues of material fact regarding whether lower-level supervisors were biased against the plaintiff for taking FMLA leave for her mental health, and whether that bias had infected the ultimate decision maker's decision relating to the plaintiff The court rejected the employer's argument that the "cat's paw" theory of liability does not apply to FMLA retaliation cases. The court held that the same rationale which makes the theory applicable to other types of employment claims applies to FMLA retaliation claims. Moreover, the court reconciled the honest belief rule with the cat's paw theory, holding that the "honesty or sincerity" of a decision-maker's belief is irrelevant if that belief is based on the influence of a biased lower-level supervisor.

Brown v Excelda Manufacturing Company, Inc, 2017 WL 2351738 (ED Mich, 2017). The plaintiff filed an action alleging that the employer unlawfully retaliated against her for taking FMLA leave. Her claim was based on the cat's paw theory of liability. She alleged that her supervisor completed a Coaching and Corrective Action Notice recommending that the plaintiff be issued a written warning. The court granted summary judgment for the employer, holding that the plaintiff failed to produce evidence that the supervisor intended to have the plaintiff fired. Moreover, the plaintiff failed to present authority to rebut previous case law holding that a written warning is not an adverse employment action.

III. FAMILY AND MEDICAL LEAVE

Payton v. Aerotek, Inc., No. 15-12222, 2017 BL 100830 (E.D. Mich. Mar. 29, 2017) (Hood). Plaintiff acquired her position as a temporary employee at TSI, a title insurance agency, through Aerotek, supplemental staffing company. Before requesting and receiving FMLA leave for her pregnancy, Plaintiff demonstrated multiple performance problems, including quality issues and failure to meet production goals. Plaintiff was placed on an "improvement plan" one month before beginning her leave. While on leave, TSI conducted a review of its long-standing temporary employees. After evaluating about 100 employees, TSI found Plaintiff undeserving of a permanent position and terminated her. Plaintiff then alleged that both TSI and Aerotek violated the FMLA—TSI by retaliating against her and

Aerotek by interfering with her job. Plaintiff's poor performance served as a legitimate reason for her termination. Aerotek took no adverse action against Plaintiff, and it cannot be liable for the actions of TSI. Because Plaintiff was unable to demonstrate pretext, summary judgment was granted in favor of both defendants. The court did not address whether TSI and Aerotek were joint employers, as Plaintiff claimed.

Acker v. Gen. Motors, LLC, 853 F.3d 784 (5th Cir. 2017). Plaintiff alleged FMLA interference and retaliation, as well as ADA violations, after he was disciplined for attendance. Following five unexcused absences, employees are subject to discipline. After accumulating two unexcused absences, Plaintiff requested and was granted intermittent FMLA leave for anemia-related health problems in November 2014. Over the next two months, Plaintiff acquired five additional unexcused absences and three absences approved as FMLA leave. Defendant, therefore, subjected Plaintiff to its disciplinary policy, placing him on a 30-day unpaid suspension and allowing him to correct his absences as opposed to the policy-recommended action of termination. On appeal, Plaintiff contends that his non-compliant calls to Defendant should constitute "reasonable notice" of his absence; however, the Court acknowledged the case law's strong support for the requirement of employees to abide by the FMLA policies instituted by their employer, as well as the explicit inclusion of such a condition in the revised FMLA regulations. The Court then held that Plaintiff's symptoms, without factual support, did not qualify as "unusual circumstances," excusing his failure to call in. The district court's grant of summary judgment was affirmed.

IV. FAIR LABOR STANDARDS ACT (FLSA)

A. Opinion Letters

In January 2018, the Department of Labor announced it would reinstate the practice of issuing Wage and Hour Opinion Letters. They have begun issuing some new ones and have republished those rescinded by the Obama administration.

B. FLSA Settlements

DOL is out there.

1. In September 2017, TGI Fridays agreed to pay **$19.1 million** to settle a suit brought by nearly 29,000 tipped workers for **improperly taking a tip credit, unpaid overtime, and unlawful wage deductions for customer walkouts**.

2. In June 2017, Prudential Financial agreed to pay $**12.5 million** to financial representatives who claimed they were **improperly docked pay for work expenses and worked unpaid overtime.**

3. In September 2017, Petco Animal Supplies agreed to pay **$7.995 million** to settle wage and hour claims brought by a class of 900 assistant store managers for **unpaid overtime**.

4. In August 2017, the paper and packaging company Rock-Tenn Co. agreed to pay **$8.5 million** to settle wage and hour claims brought by a class of factory workers who alleged they were **deprived of proper breaks, wages, and overtime**.

5. In September 2017, AT&T agreed to pay $**2.75 million** to settle wage and hour claims brought by corporate **training managers who alleged they were misclassified as independent contractors** in violation of the FLSA.
6. In November 2017, Wyndham Vacation Resorts agreed to pay **$1.5 million, plus $500,000 in attorneys' fees t**o settle overtime claims brought by timeshare sales representatives who alleged the company had a policy of **requiring off-the-clock work without pay.**

7. In June 2017, Zenefits, a human resources subcontractor, agreed to pay **$3.4 million** to approximately 750 workers after the U.S. Department of Labor found that the company **unlawfully withheld overtime and caused the workers' compensation to slip below minimum wage**.

8. In July 2017, Wells Fargo agreed to pay **$3.5 million** to financial advisor trainees who failed out of the bank's training program**, after the bank required the trainees to pay back the $55,000 the bank claimed it cost to train them**.

9. In June 2017, Rite Aid agreed to pay **$5.5 million** to salaried store managers and assistant managers after the company **required them to handle the duties of cashiers, stock handlers, and other nonexempt workers in order to reduce the overtime it would have to pay those employees.**

10. In June 2017, Delta Airlines agreed to pay **$4.25 million** to nonexempt employees for improperly **excluding certain kinds of compensation when calculating their overtime pay**.

11. In August 2017, Office Depot agreed to pay **$2.9 million** to approximately 475 assistant store managers who claimed they were **shorted on wages and overtime** under the FLSA.

12. In August 2017, Rosa Mexicano agree to pay **$3.6 million** to service employees who alleged that the restaurant **failed to pay overtime and minimum wages** under the FLSA and state law.

C. New Exemption Rule

May be in the works. Probably a year out.

D. DOL Rescinded the Joint Employer Guidance issued in January 2016. When issued it broadened the definition of a Joint Employer

E. DOL Rescinded the Independent Contractor Guidance issued in July 2015, which had basically eliminated the Independent Contractor making everyone an employee.

F. Cases

Willful Violations - In *Hutchins v. Great Lakes Home Health Servs.*, 2017 U.S. Dist. LEXIS 121132 (E.D. Mich. Aug. 2, 2017), a Licensed Practical Nurse for a home health company brought a collective action on behalf of herself and similarly situated employees for alleged violations of the FLSA, against Defendants for failure to pay employees overtime compensation for hours worked in excess of forty hours per week. Originally, Defendants filed a motion to dismiss alleging that Plaintiff 's claims were time-barred because they were filed more than two years after the alleged violations of the FLSA. Plaintiff then filed an Amended Complaint alleging that the violations were willful, whereby willful violations of the FLSA have a three-year limitations period. Defendants then filed this motion to dismiss, contending Plaintiff 's allegations did not support a finding of willfulness. The court granted Defendants' motion, finding that Plaintiff had not outlined the employment policies and practices of Defendant nor even alleged inadequate record keeping. Doing so would have corroborated "an employee's claim that the employer acted willfully in failing to compensate for overtime under the FLSA."

Exemptions - In *Perry v. Randstad Gen. Partner (US) LLC*, 876 F.3d 191 (6th Cir. 2017), several former in-house staffing consultants and other in-house employees for Defendant staffing company filed a Complaint under the FLSA, asserting Defendant failed to pay them overtime. In the Eastern District of Michigan, Defendant successfully argued that Plaintiffs were administrative employees under the FLSA's administrative exemption and were granted summary judgment. On appeal, the Sixth Circuit reversed the summary judgment ruling in part, holding that some of Plaintiffs did not qualify as administrative employees. An employee is employed in an administrative capacity where: "(1) compensated at a rate of not less than $455 per week; (2) whose primary duty is 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; and (3) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." Plaintiff staffing consultants argued that their primary duties did not include the exercise of discretion and independent judgment. The court agreed, finding that a jury could find Plaintiffs' primary duties were non-exempt sales and routine recruiting tasks, as opposed to exempt matchmaking duties. Defendant also argued that it was not liable to Plaintiffs under the good-faith reliance defense because it reasonably relied upon, and acted in conformance with, a 2005 WHD Opinion Letter which stated staffing consultants were covered under the administrative exemption. However, the court found this defense was not applicable here, as the specified circumstances and facts stated in the WHD Letter did not exist here. Defendant's staffing consultants did not have the power to hire and fire, unlike those in the WHD Opinion Letter. Additionally, an employee's duties could vary significantly based on the clients serviced or what office they were located in, and **there was a question as to whether Defendant conducted a review of the individual employee duties across different locations.**

Hugler v. Kazu Construction, LLC, 262 F. Supp. 3d 1032 (D. Haw. April 17, 2017), the Department of Labor alleged that a development company failed to pay employees

minimum wage and overtime compensation by banking hours in excess of forty per week. In addition, the Department of Labor alleged that the company failed to make and preserve accurate records of the hours its employees worked. In addressing the company's motion for summary judgment, the court examined whether the employees were entitled to the executive exemption. The court began its analysis regarding the exemption by noting that an employer who claims an exemption from the FLSA bears the burden of demonstrating that the exemption applies. That analysis focused mostly on whether the employees were paid on a salary basis or if they had their pay deducted or reduced in a manner that would void the exemption. The company asserted that the employees were paid a predetermined weekly amount or understood that they would receive guaranteed pay that was not subject to reduction, and therefore the salary basis requirement was satisfied. The employees countered that various documents indicated that the employees were not paid on a salary basis based on the verbiage used. **In rejecting the employee's argument, the court said the focus of the analysis is on how likely it was that the employees' pay would be reduced or whether there was evidence that it was actually reduced. The labels a company uses to describe pay is not determinative and neither is a company's subjective belief regarding employee classification.** The court held that there was sufficient evidence to conclude that certain employees were salaried because their pay had not been subject to reduction and granted summary judgment in part in the employer's favor with respect to them.

Ristovski v. Midfield Concession Enters., 2017 U.S. Dist. LEXIS 133597 (E.D. Mich. Aug. 22, 2017), three restaurant managers alleged that Defendant employer failed to pay them overtime wages for all time worked in excess of forty hours per week in violation of the FLSA and improperly classified them as exempt executive employees. Employees exempt from the FLSA's overtime provisions are those who are "1) Compensated on a salary basis at a rate of not less than $455 per week; 2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; 3) Who customarily and regularly directs the work of two or more other employees; and 4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of employees are given particular weight." Defendant filed a motion for summary judgment, which was denied by the court. The court found that it was a question of fact whether Plaintiffs had any such authority to hire and fire employees, as there was evidence that upper level managers employed by Defendant made the hiring and firing decisions.

Hours Worked/Record Keeping - *Maceachern v. Quicken Loans, Inc.*, 2017 U.S. App. LEXIS 20410 (6th Cir. Oct. 17, 2017), a former title clearance employee alleged that Defendants failed to properly compensate him for overtime under the FLSA. Defendants filed a motion for summary judgment, arguing that they had time-recording procedures in place for which Plaintiff would have been compensated for overtime work, but he failed to follow those procedures. The Eastern District of Michigan granted Defendants' motion for summary judgment, and the Sixth Circuit affirmed. The court held that "[b]ecause MacEachern did not follow the established procedure for reporting the overtime that he now asserts he is

owed, Defendants are not liable for non-payment." During his employment, Plaintiff was paid overtime for 12 of the 18 pay periods for which he was employed. He understood and had previously used the procedures in place to claim overtime pay. Defendants were not required to verify Plaintiff's hours through any type of investigation, as they had procedures in place for which Plaintiff could have claimed his overtime hours.

IV. E-Workplace Issues

Courts accepting E-Mails as notice of complaints.

Meky v. Jetson Specialty Mktg. Servs., Inc., No. 5:16cv1020, 2017 U.S. Dist. LEXIS 31007 (E.D. Pa. Mar. 6, 2017) (court declined to apply Farragher/Ellerth defense where there was an issue of fact over whether the plaintiff's prior emails to human resources detailed alleged harasser's physical contact "with young girls" as work and her increasing feeling of discomfort around him, sufficiently put company on notice of plaintiff's prior alleged sexual harassment complaints)

Knight v. Barry Callebaut USA Serv. Co., No. 15-6450, 2016 U.S. Dist. LEXIS 174807 (E.D. Pa. Dec. 19, 2016) (employee's disability discrimination claim proceeded where his email to managers informing them he was experiencing symptoms relating to Crohn's disease provided notice of disability)

Emami v. Bolden, No. 2:15cv34, 2017 U.S. Dist. LEXIS 34988 (E.D. Va. Mar. 10, 2017) (retaliation claim may proceed where employee complained of discrimination via email and was put on a performance improvement plan four days later)

Browett v. City of Reno, No. 3:16-cv-00181, 2017 U.S. Dist. LEXIS 23323 (D. Nev. Feb. 17, 2017) (denying summary judgment for employer on retaliation claim where employee's inflammatory email to HR regarding FMLA leave was intertwined with protected activity)

Lamar v. Ala. Dep't of Conservation & Nat. Res., No: 1:14cv571, 2017 U.S. Dist. LEXIS 17477 (M.D. Ala. Feb. 8, 2017) (denying summary judgment on retaliation claim the court found the stated reasons for discharge as pretextual where manager emailed that employee's complaints were "getting old")

V. Violence in the Workplace/Active Shooters

Unfortunately, every workplace needs to be prepared for such a situation. You should have a policy AND train your employees on what to do in such a situation.

It should walk the employees on who does what and orders of priority on everything from who calls 911, to how to exit, and tips for staying safe when you can't exit.

Three potential courses of action:

- Evacuate
- Hide out
- Self Defense