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To What Extent Can Employers Attempt To Regulate Employees' Off-Duty/Private Conduct?

Employers have long had the right to adopt some policies which can affect an employee's off-duty conduct, such as a requirement for a drug or alcohol-free workplace, enforced through periodic random testing. More and more frequently, however, as a way to reduce health care costs, employers are adopting other policies which can have an effect on, and potentially infringe upon, an employee's off-duty conduct. Employee smoking and obesity are coming under increasing scrutiny. Depending on the policy and how it is crafted, it may pass legal muster, or it may land you in court. For example, although federal law doesn't protect workers who use tobacco, many states have statutes which prohibit employment decisions based on an employee's tobacco use.

In 2011, a Victoria, Texas hospital rolled out a unique hiring policy regarding obesity—the Citizens Medical Center now rejects job applicants for being too heavy. The policy specifically requires applicants to have a body mass index (BMI) of less than 35—for example approximately 210 pounds for someone 5' 5" or 245 pounds for someone 5' 10". At the time an applicant seeks employment with the hospital, a physician screens the applicant to assess their fitness for work, including their BMI. If the applicant's BMI is greater than 35, then they will not be considered for employment beyond the initial screening. However, if an employee becomes obese while employed, that employee will not be terminated

The Hospital's policy does not indicate that paying for health insurance of obese workers is too expensive or suggest that obese employees are unable to do their jobs. Instead, the policy mostly refers to physical appearance, placing obese applicants in the same category as those with visible tattoos or facial piercings.

Such policies potentially open an employer up to litigation as several courts have already ruled that obesity can be a disability under the Americans With Disability Act. Moreover, the recent Amendments To The Americans With Disabilities Act make it more likely that a court will find that obesity is a disability as long as the applicant can perform the essential functions of the job, or that an employer may have "regarded" an applicant as disabled. Additionally, the ADA prohibits any sort of pre-employment medical examination unless the employer has already made a conditional offer of employment to the applicant. Requiring all applicants to undergo a BMI evaluation before a conditional offer of employment has been made can violate this prohibition.

Before you consider adopting such employment policies, we suggest you consult legal counsel.

Jessica L. Kirker

"Non-Subscribing" Texas Healthcare Providers Gain Added Protections Against Employee Injury Claims

THE ISSUE . . .

Texas is the only state which does not require employers to carry workers' compensation insurance, but instead allows employers to choose to opt out of the workers' compensation system and be a "non-subscriber." If an employer opts out of the workers' compensation system, the employer is subject to suits at common law for injuries suffered by employees on the job. In addition, non-subscribers are generally not able to avail themselves of many common-law defenses to negligence claims brought by employees.[1] Under a recent decision from the Texas Supreme Court, *West Oaks Hospital, LP v. Williams*,[2] however, non-subscribing healthcare providers now have additional potential protection against such claims from an unlikely source—the medical malpractice tort reform provisions which are part of the Texas Medical Liability Act ("TMLA").

The TMLA, enacted in 2003, contained a number of reforms intended to limit medical malpractice liability, including damage caps and procedural provisions designed to weed out frivolous claims at the early stages of litigation. Under one provision of the reforms, a person who brings a "health care liability claim" against a health care provider must, within 120 days of filing suit, serve an expert report (including the expert's *curriculum vitae*) explaining, in the expert's opinion, why and how the plaintiff's injury was caused by the defendant's negligence. Other than for the plaintiff's ability to obtain medical, hospital, and other records relevant to the claim, no discovery can take place until the report is served, and failure to timely serve the report can result in dismissal of the suit and an award of attorney fees to the defendant. Additionally, even if a report is timely filed, the defendant can challenge the sufficient of the report. Finally, health care defendants have a right of interlocutory appeal from a trial court's denial of a motion to dismiss for failure to timely file a sufficient expert report. Although these provisions were aimed at limiting medical malpractice claims, in *West Oaks*, the Texas Supreme Court applied them to an injury claim brought against the hospital, a "non-subscriber," by an injured employee and dismissed the employee's claims against the hospital for failure to provide an expert report within 120 days.

THE FACTS . . .

In *West Oaks*, Williams worked as a psychiatric technician and professional caregiver and was injured on the job while supervising a severely schizophrenic patient. Williams had been attempting to calm the patient and took the patient to an enclosed outdoor smoking area, in violation of the unit-restriction policy. According to the Court's opinion, the door to the enclosure locked behind them and the unsupervised area contained no cameras, audio supervision, mirrors, or other monitoring apparatus. While in the enclosed smoking area, a physical altercation occurred between Williams and the patient, resulting in the patient's death and injuries to Williams.

The patient's estate sued West Oaks, and Williams, asserting health care liability claims under the TMLA. Williams subsequently asserted cross claims of negligence against West Oaks. Williams alleged West Oaks was negligent for failure to properly train him or warn him about the inherent danger of working with such patients; failing to adequately supervise its employees; failing to provide adequate protocol to avoid and/or decrease the severity of altercations between its employees and patients; failing to provide its employees, including Williams, with adequate emergency notification devices to alert other employees of altercations in which assistance is needed; failing to warn Williams of the dangers that the hospital knew or should have known were associated with working with such patients; and failing to provide a safe workplace. West

[1] See Tex. Labor Code §406.033(a).

[2] ___ S.W.3d ___, 2012 WL 2476807, 55 Tex. Sup. Ct. J. 1033 (Tex., June 29, 2012).

"Non-Subscribing" Texas Healthcare Providers Gain Added Protections Against Employee Injury Claims, cont'd

Oaks sought to dismiss Williams' cross-claims, arguing Williams' allegations constituted health care liability claims under the TMLA and Williams had not timely provided an expert report as required by the TMLA. Williams contended he was asserting an ordinary negligence claim against an employer not covered by workers' compensation and was not subject to the TMLA's requirements.

THE DECISION . . .

The trial court denied the hospital's motion to dismiss; and, in the hospital's interlocutory appeal, the Court of Appeals affirmed the denial. The Court of Appeals reasoned that the hospital's duty to Williams arose out of an employer-employee relationship, not a physician-patient relationship, and that claims arising out of safety provided by a healthcare institution must deal with safety that is "directly related to and inseparable from healthcare" in order to be considered a claim subject to the TMLA. The hospital then petitioned the Texas Supreme Court for review, and, by a 6-3 decision, the Supreme Court reversed.

The Court held Williams' claims were subject to the TMLA. The Court reached this decision after noting the Legislature's use of the term "claimant" rather than "patient" in the TMLA's health care liability claim definition. Williams had argued that the Legislature's substitution of "patient" with "claimant" was meant only to include derivative claims by the relatives and representatives of deceased patients, not employees of health care provider defendants. The Court disagreed—Williams was a claimant within the plain language of the TMLA. It rejected Williams' contention that he was not a "claimant" within the meaning of the TMLA, finding nothing in the language of the statute which supported a narrow definition.

The Court also rejected Williams' argument that he was not a "claimant" because his claims were not health care liability claims, since they did not involve the exercise of professional medical judgment. However, Williams' claims involved allegations of inadequate employee training and safety measures and were considered to be within the scope of the TMLA because these claims could be considered to be "health care" as defined in the TMLA. The Court's opinion noted that "training and staffing policies and supervision and protection of [patients] . . . are integral components of a [health care facility's] rendition of health care services . . . ." Further, the Court concluded that Williams' claims against West Oaks were health care liability claims based on his allegations of alleged departures from accepted standards of health care and safety. In support of its reasoning, the Court looked to a prior opinion, *Diversicare Gen. Ptr., Inc. v. Rubio*,[3] in which the Court held that a claim alleges a departure from accepted standards of health care if the act or omission complained of is an inseparable or integral part of the rendition of health care. The Court stated, "(c)laims based on departures from accepted standards of health care therefore involve a nexus between the standard departed from and the alleged injury. Such a nexus exists in this case."

Not only did the Court hold that Williams was a claimant under the TMLA, but his negligence claim also fell within the TMLA's provisions regarding health care. One of the issues discussed extensively in the opinion was whether Williams' workplace safety-related claims were part of "health care" as that term is defined and applied under the TMLA. Williams argued that the lack of a patient-physician or patient-health-care-provider relationship between him and West Oaks meant that his claims were not within the Legislature's definition of health care liability claims and that a patient-physician or patient-health-care-provider relationship was necessary to have his claim be considered a health care liability claim. His arguments were not persuasive and the Court opined that a negligence claim brought by an employee against a non-subscribing healthcare provider can

[5]185 S.W.3d 842 (Tex. 2005).

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fall under the health care prong of the definition even absent a physician-patient relationship so long as a physician-patient relationship is "involved."

The Court rejected Williams' argument that West Oaks' alleged safety and security breaches did not require expert medical testimony and were interchangeable with safety and security issues arising in non-medical settings such as corrections facilities. The Court reasoned that Williams' claims required evidence on proper training, supervision, and protocols to prevent, control, and defuse aggressive behavior and altercations in a mental hospital between psychiatric patients and employed professional counselors who treat and supervise them. In this instance, the provision of emergency notification devices, warning of dangers associated with psychiatric patients, providing a safe workplace and properly training the caregiver at a psychiatric facility are integral to the patient's care and confinement. In the Court's opinion, acts or treatment that are integral to a "patient's medical care, treatment, or confinement" constitute "health care" pursuant to the TMLA.

Thus, Williams should have timely provided an expert report and his failure to do so required dismissal. The Court reversed the appellate court and ordered the case to be remanded to the trial court for that court's consideration of the hospital's request to recover its attorney fees from Williams.

UNRESOLVED ISSUES . . .

Does this decision create a conflict between the Workers' Compensation Act and the TMLA, and are there implications for health care provider employers who have workers' compensation coverage? The Court's majority did not think so, noting the different remedies available under the Workers' Compensation Act and that the statute bars negligence claims by the employee against the employer. In a worker's compensation proceeding in Texas, the parties are the employee and the worker's compensation insurance carrier; the employer is not a proper party. However, a deceased employee's surviving spouse or heirs can seek exemplary damages against an employer if the employee's death was caused by an intentional act or omission or gross negligence of the employer.[4] Query: whether *West Oaks* will apply to such survivor claims if made against a health care provider?

Another unresolved potential issue is whether an employee's claims, such as Williams' claims, made against a non-subscribing health care provider might trigger insurance coverage under the provider's professional liability policy (in addition to whatever coverage might exist under the provider's employment practices or general liability coverages). As the Court has now deemed such claims to be health care liability claims, medical malpractice insurance carriers may find themselves with coverage for otherwise unanticipated employee claims.

Finally, it is not clear whether the TMLA could be read broadly enough by Texas courts to include other employment related claims against a healthcare facility or medical provider. The nature of Williams' allegations, *e.g.*, that his injuries resulted because the hospital's acts and omissions fell below the appropriate standards for a psychiatric hospital, involved "integral components of a [health care facility's] rendition of health care services." Query: whether *West Oaks* will apply to an employee's claim which does not involve such allegations, such as where an employee is injured, *e.g.*, slipping on ice in the parking lot, falling to the floor because a chair collapsed, *etc.*—causation having nothing whatsoever to do with the rendition of health care services.

Albert Betts, Jr.

[4] *See* Tex. Lab. Code §408.001(b).

Tidbits

Has "political correctness" overtaken proof of discrimination?
Dawson v. U.S. Postal Service, Appeal No. 0120114186 (EEOC Off. Fed. Opns. Feb. 8, 2012)—EEOC reverses USPS' dismissal of employee's complaint of racial harassment where employee complained some co-workers wore clothing containing the Confederate flag; no other evidence of allegedly harassing behavior, *e.g.*, no threats, epithets, adverse actions, *etc.*, just a "lack of concern for my feelings associated with this matter."

Punitive damages are recoverable on a "*Sabine Pilot*" claim, *i.e.*, a claim an employee was discharged because the employee refused an order from the employer to commit a criminal act. *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655 (Tex. 2012).

EEOC purports to expand Title VII protection to cover "trans-gender identity."
Macy v. Holder, Appeal No. 0120120821 (EEOC Off. Fed. Opns. April 20, 2012)—In an administrative appeal, the EEOC holds an unsuccessful applicant for a position with the Bureau of Alcohol, Tobacco and Firearms, who was a "transgender woman," could pursue a discrimination claim against ATF under Title VII not only for sex discrimination, but also on the basis of her "gender identity, change of sex, and/or transgender status." Macy, who was a male Phoenix police detective when "he" applied for an ATF crime laboratory position, alleged ATF discriminated against "her" by withdrawing its job offer after learning "she was in the process of transitioning from male to female." ATF had accepted Macy's sex discrimination claim under Title VII, but held Macy could not pursue a "gender identity" claim under the statute. On administrative appeal to the EEOC, the EEOC disagreed and ordered ATF to reinstate and consider the gender identity/sex change/transgender status allegations.

Texas modifies elements of *prima facie* case of age discrimination in "replacement" cases.
Mission Consolidated ISD v. Garcia, ___ S.W.3d ___, 2012 WL 2476911, 115 FEP Cases (BNA) ¶610, 55 Tex. Sup. Ct. J. 1065, (Tex. June 29, 2012). Under the normal *McDonnell-Douglas* allocation of the order and burden of proof in discrimination cases, the plaintiff has the burden of producing elements of a prima facie case of discrimination. If the plaintiff does so, a rebuttable presumption of discrimination arises, which requires the employer to articulate a legitimate nondiscriminatory reason. If the employer does so, the rebuttable presumption "evaporates from the case," and the plaintiff retains the ultimate burden of proving discrimination. Absent proof of a prima facie case, however, the rebuttable presumption never arises and the employer is entitled to summary judgment.

In age discrimination cases, normally in order to establish a *prima facie* case a plaintiff must show that: (1) he was in the protected class; (2) he was qualified for the position; (3) he was discharged; and (4) he was either (a) replaced by someone younger; or (b) otherwise discharged because of age. The "otherwise discharged because of age" proof option for the fourth element was primarily designed to allow a plaintiff to make out a case of discrimination even in cases where the plaintiff had not been replaced, *i.e.*, in reduction-in-force cases. In *Garcia*, the Texas Supreme Court modified the elements of a *prima facie* age discrimination case where the plaintiff *was* replaced. Specifically, the Court held that in order to make out a *prima facie* case, the plaintiff *must* present proof she was replaced by someone younger. In *Garcia*, it was undisputed the plaintiff had been replaced by someone who was *older*. Therefore, as a matter of law, Garcia was not entitled to the presumption of discrimination which otherwise arises from the *prima facie* case.

The Court's majority acknowledged that there could be rare instances where a person was the victim of age discrimination, even though replaced by an older worker, such as where the plaintiff was intentionally discharged because of his age by one supervisor, but the replacement was hired by a different, non-discriminatory, supervisor who played no role in discharging the plaintiff. In such rare, hypothetical instances, the majority held the plaintiff would have to present *direct evidence* of discrimination by the discharging supervisor because no circumstantial inference of discrimination could arise from replacement by an older worker.

Illinois Bans Employer Requests for Social Networking Passwords.
On August 1, 2012, the Governor of Illinois signed a piece of legislation making Illinois the second state in the nation—after Maryland—to ban employers from requesting social networking passwords. Under the new law, which becomes

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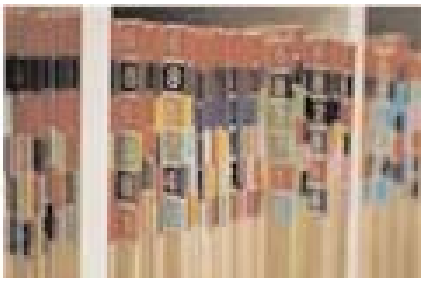
EEOC Holds Employer Violated ADA Confidentiality Provision when it Produced Employee Medical Records in Response to State Court Subpoena

A recent United States Equal Employment Opportunity Commission ("EEOC") administrative decision may force employers to think twice before producing confidential employee medical information. In *Bennett v. United States Postal Service*, the EEOC Office of Federal Operations held that the U.S. Postal Service ("USPS") had violated the Rehabilitation Act when it released a former postal employee's medical information to a private party in response to a state court subpoena.



Ronald Bennett, a former USPS maintenance employee, filed suit against his subsequent employer, Union Carbide, for discrimination, and Union Carbide secured issuance of a Texas state court subpoena signed by the Deputy Clerk for Bennett's medical information. Upon learning that the USPS had complied with the subpoena, Bennett filed an internal administrative charge of discrimination with the USPS alleging that by releasing his confidential medical records, it had violated the confidentiality provisions of the Americans With Disabilities Act ("ADA").[1] The USPS initially rejected Bennett's claim, reasoning that because Bennett alleged only that his "privacy rights" had been violated, the EEO process was not the proper forum for his complaint. But on appeal, the EEOC Office of Federal Operations reversed and held that the USPS made an improper disclosure of its employee's confidential medical information in violation of the Rehabilitation Act.

In reaching its decision, the EEOC considered Title 1 of the ADA, which is typically found to impose the same legal duties as the Rehabilitation Act. *See* 42 U.S.C. §§ 12112(d)(3)(B), 4(c); 29 C.F.R. § 1630.14. The ADA requires all information regarding the medical condition or history of any employee or applicant—not just those with disabilities—be treated as confidential medical records. Although not all medically-related information falls within the confidentiality provision, as a general rule, documentation or information concerning an individual's medical diagnosis must be treated as confidential. The EEOC noted that the ADA only allows for release of an applicant or employee's medical information in limited circumstances, such as to supervisors or managers obtaining information regarding necessary restrictions on the employee's duties.

Finding that none of the ADA exceptions applied, the EEOC next considered the applicability of the Privacy Act, which allows for disclosure of an individual's records "pursuant to the order of a court of competent jurisdiction." The EEOC concluded that subpoenas are not court orders unless specifically approved by a court, so the Privacy Act exception did not apply to a state court subpoena—even if signed and issued by the Deputy Clerk. Moreover, the fact that the USPS Human Resources Associate thought she was required by legal compulsion to release the records was deemed immaterial.

Finally, the EEOC considered the ADA's provision allowing compliance with the requirements of another federal statute or rule, even if the statute or rule conflicts with the requirements of the ADA. But because the state court subpoena in this case was not issued pursuant to any federal rule or law, the EEOC rejected this provision. Thus, the EEOC found that Bennett had a *per se* claim of discrimination against the USPS for the improper release of his confidential medical information and could seek damages, including compensa-

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[1]Federal employee/federal sector EEO complaints are governed by a separate section of Title VII, which contains an entirely different administrative process than private sector discrimination charges. Under §717 of Title VII, the Charging Party must file an internal EEO complaint with the employing agency. That agency then makes an internal investigation and decision regarding the claim. If unhappy with the agency's decision, the Charging Party can appeal that decision to the EEOC's Office of Federal Operations, which administratively decides the appeal. Only after exhausting this administrative process may a federal sector employee file suit. Additionally, the time frames within which a federal sector employee must file his initial charge and appeal are different from, and much shorter than, the time frames for filing a private sector charge with the EEOC.

U.S. Supreme Court Holds First Amendment Trumps Anti-Discrimination Laws

"The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." – Chief Justice John Roberts Jr., delivering the unanimous opinion of the U.S. Supreme Court.

Earlier this year, the U.S. Supreme Court was presented with the issue of whether the freedom of religious organizations is implicated by employment discrimination laws. On January 11, 2012, the Court issued a unanimous ruling in a church school employment discrimination matter, giving religious organizations wide latitude in the hiring and firing of employees who perform religious duties, including certain school teachers.

In its opinion, the Court recognized, for the first time, a legal doctrine known as the "ministerial exception," which lower courts have used to exempt religious organizations from anti-discrimination laws and other statutes that regulate how employers treat their workers. The Court ruled that the ministerial exception trumps anti-discrimination laws and stated that religious groups must be free to choose and dismiss their leaders without government interference, as provided by the First Amendment of the U.S. Constitution.

The case, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, involved the termination of Cheryl Perich, a teacher at a Lutheran school in Michigan who took medical leave after she was diagnosed with narcolepsy. After several months of leave, Perich informed the school that she was ready to return to teaching. However, the school expressed concerns about her disability and asked her to resign. When Perich threatened to file suit against the school, rather than resolving the issue through the church's internal dispute resolution system, the school terminated her employment.

Perich and the EEOC filed suit against the school claiming the school had illegally retaliated against Perich for asserting her rights under the Americans With Disabilities Act ("ADA") and firing her for discriminatory reasons. The school cited the "ministerial exception" to employment discrimination laws, maintaining that its actions were protected by the First Amendment's Establishment Clause (which prohibits government from making any "law respecting an establishment of religion") and the Free Exercise Clause (which prohibits the government from making any law "prohibiting the free exercise" of religion). According to the school, it terminated Perich for violating religious doctrine by pursuing litigation rather than trying to resolve her dispute within the church.

After holding that there is a "ministerial exception" to federal employment discrimination laws, the Court applied a totality of the circumstances test to determine whether Perich was a "minister" within the meaning of the exception. The Hosanna-Tabor school offers "Christ-centered" education to students in kindergarten through eighth grade. The school classifies its teachers into two categories: "called" and "lay." To be considered "called," a teacher must complete certain academic requirements, including a course of theological study. Once called, a teacher receives the formal title "Minister of Religion, Commissioned." By contrast, "lay" teachers are not required to complete any religious training.

The evidence showed that the vast majority of Perich's job was to teach secular subjects at the school and that the few religious duties she had were also performed by lay teachers. However, in its analysis, the Court focused on Perich's religious training, her title, and the religious duties she performed. Because Perich was a "called" teacher who had completed religious training and the school considered her a minister, the Court held that the ministerial exception applied and Perich's claims were barred.

Although the Court did not adopt a precise test for determining how lower courts should determine who is considered a "minister," the concurring opinions provide some guidance. Justice Clarence Thomas,

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former Chairman of the EEOC, wrote that the courts should get out of the business of trying to decide who qualifies for the ministerial exception, leaving the determination to religious groups. "The question whether an employee is a minister is itself religious in nature, and the answer will vary widely," Justice Thomas wrote. Also concurring, Justice Samuel A. Alito, Jr., joined by Justice Elena Kagan, wrote that it would be a mistake to focus on ministers and the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."

The Supreme Court's holding in *Hosanna-Tabor* renders religious institutions essentially immune from discrimination and retaliation suits by employees who have had formal religious training and are charged with instructing their members or students about religious matters. It remains to be seen how the lower courts will formulate tests to determine the applicability of the ministerial exception to other positions.

Rachael Chong Walters

EEOC Holds Employer Violated ADA Confidentiality Provision..., cont'd

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tion for out-of-pocket expenses, pain and suffering, mental anguish, and reasonable attorneys' fees incurred in prosecuting his charge.

The precedential effect of this administrative decision, if any, on private sector employment litigation remains to be seen. Substantial judicial precedent establishes that when a plaintiff, including a discrimination plaintiff, seeks damages for a physical or mental injury, *e.g.*, for "mental anguish," the plaintiff waives any confidentiality which would otherwise attach to their medical records; and the records are discoverable by the defendant-employer.[2] Indeed, under Texas law, a party who seeks damages for a physical or mental injury must authorize full disclosure of medical records reasonably related to either the injury or the damages asserted.[3] The EEOC's administrative decision did not consider these waiver arguments.

Nevertheless, it is likely plaintiffs' lawyers will attempt to use the decision as a basis for seeking to fight subpoenas and depositions on written questions for employer-retained medical records, thereby increasing litigation costs by forcing a resolution of the issue through a ruling on discovery motions.

Camille V. Fazel

[2]*See, e.g.*, *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (defendant entitled to records from a retaliation plaintiff's doctors, psychologists, psychiatrists, and counselors because plaintiff had placed her medical condition at issue by alleging emotional distress); *EEOC v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114 (W.D. N.Y. 2009) (motion to compel production of medical records granted); *EEOC v. Sheffield Financial, LLC*, 2007 WL 1726560 (M.D. N.C. June 13, 2007) (when Title VII plaintiff seeks damages for mental anguish, medical information and records are discoverable both as to causation and as to the extent of plaintiff's injuries; citations omitted; attorney fees awarded to defendant); *LeFave v. Symbios, Inc.*, 2000 WL 1644154 (D. Colo. Apr. 14, 2000) (plaintiff allegedly subjected to sexual harassment and religious discrimination sought damages for "pain and suffering, emotional trauma, and humiliation . . . [and] past emotional distress;" accordingly defendants held entitled to discovery of identities of plaintiff's health care providers and medical records for a period of five years before the events giving rise to plaintiff's claim and continuing to the time of the court's order).

[3]*Mutter v. Wood*, 744 S.W.2d 600, 601 (Tex. 1988).

U.S. Supreme Court Upholds Sales Position as Exempt

Good news for companies employing outside sales representatives—the Supreme Court confirms they are still exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"). Although this particular case focuses on pharmaceutical sales positions, it affects sales employees in other industries as well.

The FLSA generally requires employers to pay overtime wages to its employees, unless a specific statutory exemption or exclusion applies. 29 U.S.C. §207(a). "Outside salesmen" is one category of employees who are specifically excluded from the overtime provisions. On June 18, 2012, the U.S. Supreme Court decided that persons employed as sales personnel with pharmaceutical drug companies are subject to the same exemptions as "outside salesmen" in other industries.

The Department of Labor ("DOL") is delegated the authority to define the term "outside salesmen" and has defined the term as "any employee . . . whose primary duty is . . . making sales within the meaning of [29 U.S.C. § 203(k)]." Since 1940, the DOL has emphasized that an employee is an "outside salesman" when that employee "in some sense, has made sales."

Sales representatives for SmithKline Beecham Corporation, d/b/a GlaxoSmithKline, filed suit in 2009 against their employer, claiming they were not subject to the FLSA's exemption because the "sales" they made did not involve "an exchange" or other "disposition." Rather, because sales personnel in the pharmaceutical industry focus on obtaining a physician's nonbinding commitment to prescribe certain medications, there is no direct exchange of goods. The pharmaceutical sales personnel then earn incentive pay based on the overall sales those prescriptions garner as a result of physicians' prescriptions of them within the salesperson's assigned territories. This system has been in practice for decades, since the 1950's.

The District Court awarded summary judgment to the pharmaceutical employer, agreeing that the sales positions were within the definition of an "outside salesman" and did not qualify the employees for overtime pay. The decision was subsequently affirmed by the Ninth Circuit, and the Supreme Court granted review.

In holding that pharmaceutical sales personnel were within the FLSA's exemption for employees who worked in the capacity as an outside salesman, the Court looked to how the DOL had interpreted the statutory meaning of sales, which is: "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 C.F.R. § 541.5400(a)(1)-(2). The DOL further defined sales as including "transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. §541.501(b).

The Court pointed out the DOL's use of "includes" in these definitions is meant to indicate the list following would be illustrative in nature and not an exhaustive list of what could be considered a "sale." Moreover, the Court held:

> [I]n the unique regulatory environment within which pharmaceutical companies operate [in obtaining nonbinding commitments from physicians to prescribe the employer's drugs], [a pharmaceutical sales representative] comfortably falls within the catchall category of 'other disposition.'"

The Court further opined that sales representatives earning an average salary of $70,000 per year and spending only 10-20 hours outside of normal business hours performing related work are "hardly the kind of employees that the FLSA was intended to protect."

Another interesting aspect of this opinion is that the DOL submitted *amicus* briefs in this case and in others before the Supreme Court, supporting its view that pharmaceutical sales representations were **not** exempt as "outside salesmen." The Court held that DOL's position was not entitled to deference because:

1. To defer to the DOL's interpretation would impose massive liability on an industry that has been

U.S. Supreme Court Upholds Sales Position as Exempt, cont'd

operating under the current arrangements since the 1950's, which would "result in precisely the kind of 'unfair surprise' against which [the] Court has long warned;"

2. By not taking any action to the contrary over the past 60 years, the DOL's inaction had resulted in acquiescence of the sales position as exempt;

3. The DOL's position had only been presented as *amicus* briefs to the Court and not as a formal regulation, subject to public commentary and review; and

4. The DOL's interpretation was inconsistent with the FLSA.

The Supreme Court's disposition of this issue may portend the DOL might propose changes to the definition of "outside sales" to conform to the position DOL took in its friend-of-the-court brief.

Jodee K. McCallum

At Least in California, No Duty to Ensure Employees Do Not Work During Meal Periods

In April of this year, a victory for employers came from an unexpected place. The California Supreme Court has held that, under the California Labor Code and one of the State's wage orders, employers must provide meal periods in which their employees are relieved of all duty, but are not required to ensure their employees do not work during those meal periods. *See Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012). A California employer now satisfies its obligation "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so."

Texas does not have a law requiring employers to provide meal periods, nor is there a federal requirement that would compel an employer to provide meal periods in Texas. If a Texas employer opts to provide a meal break, however, the employer generally must compensate the employee unless the break is "bona fide," meaning it lasts 30 minutes or more and that the employee is free to do as he wishes during the break.

Similar to California, Minnesota requires that employers provide to their employees sufficient time to eat a meal if those employees work at least eight (8) consecutive hours. Separate from this requirement is the issue of whether employees should be paid for their meal time. While there is no set definition for what constitutes a "bona fide" meal break, Minnesota does make it clear that breaks where the employee is not completely relieved from performing work-related duties for at least 20 minutes will not be considered "bona fide," and therefore should be counted as hours worked for purposes of calculating wages.

Stephanie S. Rojo

Tidbits, cont'd

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effective January 1, 2013, it will be illegal to either: (1) require an employee or applicant to provide a password or other account information allowing the employer access to a social networking account or profile, or (2) demand access in any manner to an employee or applicant's social networking account or profile. Despite these restrictions, the law continues to allow employers to institute and maintain lawful workplace policies governing the use of the employer's electronic equipment. It also does not restrict an employer's right to monitor an employee's use of that equipment and their company email. Illinois employers may also access information about current or prospective employees that is in the public domain or that is otherwise obtained in compliance with this new law.

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