



FBA Memphis/MidSouth Chapter Newsletter



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Chapter Website: www.fedbar.org/Chapters/Memphis-Mid-South-Chapter

Upcoming FBA Events

Summer Seminar – Trial Practice

Friday, August 29, 2014

At the Clifford Davis/Odell Horton

Federal Building

Annual Federal Practice Seminar

Friday, October 17, 2014

At the University of Memphis,

Cecil C. Humphreys School of Law

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President's Message

By: Craig A. Cowart

This is shaping up to be a banner year for the Memphis/Mid-South Chapter. The first half of 2014 has been full of activities and programming for our Chapter, and I look forward to the exciting events we have planned as we move toward the end of the year.

One objective for our Chapter this year is to combine more social and networking opportunities with outstanding programming. We kicked off our year in March with a program that met our objective. Following an opportunity to enjoy appetizers and drinks at Napa Café, those who attended our "Top-Notch Arguments: Advice from Supreme Court Advocates" program gained insight from lessons learned by attorneys who have prepared and presented arguments before the Supreme Court of the United States. We were honored to be joined by Judge Mark Ward of Shelby County Criminal Court and Connie Lewis Lensing, Senior Vice President of FedEx Express, as they shared their insights in a lively program moderated by Kevin Ritz, Assistant United States Attorney.

Another objective of our Chapter is to work collaboratively with other groups both inside and outside the Federal Bar Association to serve the interests and needs of federal practitioners and the federal judiciary. On April 18, 2014 we had the privilege of working with the Federal Litigation Section of the Federal Bar Association and the Federal Public Defender's office to sponsor a program commemorating the 50th anniversary of *Gideon v. Wainwright* and the Criminal Justice Act. The program was held in the Historic Courtroom at the University of Memphis Law School, and the centerpiece of the program was a "reader's theater," where attorneys and judges performed a reenactment of the *Gideon* case. The program was a great success and provided a great opportunity for learning and commemorating historic events in the history of the federal court system.

Other examples of our Chapter's collaboration can be found in our involvement with the University of Memphis School of Law. The Chapter was pleased to provide the first annual \$1,000 award to the law

student achieving the highest grade in the Federal Courts class and looks forward to continuing this support of promoting education concerning our federal court system. Our Chapter is also working with the University of Memphis School of Law to form a student division of the Federal Bar Association at the Law School and has plans to kick off the new division in the upcoming academic year. We are also pleased to continue our collaboration with the Federal Bar Association Immigration Law Seminar by providing a sponsorship for the annual event traditionally held here in Memphis during the month of May.

Our annual seminar in Jackson was held on May 15, 2014 and featured several prominent attorney presenters and many judges from the Western District of Tennessee. As always, the Jackson seminar was a great success. We look forward to continuing the tradition and thank Brandon Gibson for her many years of service in spearheading the Jackson Seminar.

The Chapter is excited to have many more plans in place for the remainder of the year. In August, we will host a seminar at the federal courthouse that will provide an opportunity for networking and CLE credit. On October 17, 2014, we will host our Annual Practice and Procedure Seminar at the University of Memphis School of Law. I encourage you to make plans to attend this program, as it will be an opportunity to hear outstanding speakers and hear from our judiciary in the annual Judge's panel. Finally, the Chapter plans to host an Ethics CLE Program in December in conjunction with the annual Chapter election.

I would like to thank the dedicated members of our Board who make the Chapter's activities possible. Their commitment of time and work make our programs possible. I would also like to thank our speakers and judges who always show tremendous support for our Chapter.

If you are not already an FBA Member, we would love for you to join our Chapter. You can join online at www.fedbar.org or obtain an application from any Board member. We look forward to seeing you at upcoming events!

**Memphis Mid-South Chapter
Recognized at
FBA 2013 Annual Conference**

The Memphis Mid-South Chapter received special recognition at the 2013 FBA Annual Conference in Puerto Rico on September 28, 2013. The Chapter received a Chapter Activity Presidential Achievement Award in recognition of its accomplished chapter activities in the areas of administration, membership outreach and programming. The Chapter also received a Meritorious Newsletter Award for 2013. Chapter Vice President Craig Cowart accepted the awards on behalf of the Chapter. The Chapter would like to extend its special gratitude to Greg Grisham for his work on the newsletter in 2013, Colleen Hitch-Wilson for her leadership in membership outreach, and Barry Frager, Brandon Gibson, Ben Scott, Frank Day, Michael McLaren and Bryce Ashby for their contributions to the Chapter's outstanding 2013 programming.



Attendees at the Supreme Court Advocates CLE at Napa Café enjoy insights from Kevin Ritz, Connie Lewis Lensing, and Judge Mark Ward.

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Judicial Profile

Honorable S. Thomas Anderson

By Shea Sisk Wellford

As a young man taking a hiatus from college in order to work on Lamar Alexander's bid to become the next Governor of the State of Tennessee, Thomas Anderson noticed that Alexander and many members of his staff were attorneys. Alexander advised Anderson to go to law school, telling Anderson that a law degree opened a lot of doors in life. Until then, Judge Anderson had not considered a legal career. Little did he know that Alexander would play another pivotal role in his professional life in the years ahead.

After the election, Judge Anderson's parents encouraged him to focus on his education. He graduated from the University of Memphis Cecil C. Humphreys School of Law in 1980 after receiving a degree in Political Science and History from The University of Tennessee at Martin. He returned to his hometown of Lexington, Tennessee to practice law with Davis Smith & Anderson, where he learned to be a trial attorney. In 1983, he moved to Nashville when he was appointed Assistant Commissioner of the Tennessee Department of Transportation. In 1985, he was appointed Claims Commissioner of the Tennessee Department of Treasury, a post he held until he returned to private practice.

In 1987, Judge Anderson founded The Anderson Law Firm, which had offices in Lexington and Jackson, Tennessee. His firm defended numerous Section 1983 cases, and had a heavy federal court caseload. Judge Anderson remained in private practice until he was selected to be a United States Magistrate Judge in 2003, and began his official duties in 2004.

Over the years, Judge Anderson and Senator Alexander kept in touch. Three decades after serving as a junior member of Alexander's staff, Judge Anderson received a call from the



Senator asking Anderson if he could submit Anderson's name to fill the vacancy created when Judge James D. Todd of the Western District of Tennessee went on senior status. Judge Anderson's reply: "Well absolutely – feel free." After he was nominated in September 2007 by President George W. Bush, Judge Anderson awaited his confirmation. By May 2008, he knew that time was running out to be confirmed. While driving from Memphis to Jackson, Judge Anderson received word that the confirmation was going to take place within the next thirty minutes; he watched the unanimous vote on C-Span.

Judge Anderson was raised in a family "full of love and a strong work ethic." His mother worked two full time jobs most of her life, while also cooking two to three meals a day and taking care of the home. His father owned a sporting goods store located across the street from their home. The store would close for the evening between 9 and 10 o'clock, but would re-open at any hour with the push of a buzzer.

Continued on page 5.

Judicial Profile

Honorable S. Thomas Anderson (continued)

When Judge Anderson and his brothers were old enough, they would answer the buzzer for a fisherman needing bait in the wee hours of the morning. According to Judge Anderson, “everyone had to contribute to the family.”

In his role as United States District Court Judge, Anderson and his Court “family” – the probation office, pretrial services, the Clerk’s office, chambers’ staff and the Marshall service -- work equally hard to contribute, in Judge Anderson’s words, “to making Memphis a better place to live.” One of the biggest challenges that Judge Anderson faces on a regular basis is that of sentencing in criminal cases. As he puts it, “None are easy to decide. Every defendant has a story, and every victim has a story. You have to hear what everyone has to say, and everyone needs to be treated equally.”

True to his upbringing, Judge Anderson uses the time during his daily commute between Lexington and Memphis to prepare for the next day’s work. When he does not have his clerks on the phone, he uses the time to decompress and reflect on his rulings.

Growing up, Anderson spent a lot of time outdoors, and could walk to a lake near his house to fish. Although being a judge requires him to spend most of time indoors, he still finds time to duck hunt and fish, as well as attend Grizzlies and Titans game with his 12-year old son, who recently attended a reception at the White House with his father. The highlight of the reception for his son was meeting the President, who asked him about school, his grades, and sports.

When asked about advice he has for attorneys appearing in his Court, he has one word: preparation. “It all comes down to preparation,” said Anderson. “The vast majority of attorneys are well-prepared and know the rules and procedure. Know your judge because we are all a little different, and don’t try to bluff your way through.”

University of Memphis 2L Tyler S. Davis receives Memphis Mid-South Chapter Academic Excellence in Federal Courts Award

The Memphis-Mid South Chapter of the Federal Bar Association recently awarded the Chapter's first Academic Excellence in Federal Courts Award to Tyler S. Davis, a second year law student at the University of Memphis Cecil C. Humphreys School of Law. As part of its ongoing relationship with the University of Memphis Cecil C. Humphreys School of Law (the Law School hosts the Chapter's Annual Federal Practice Seminar each fall), the Chapter recently instituted this award with the University. The Award, which includes a \$1,000 monetary gift funded by the Chapter, is given to the law student who obtains the highest grade in the Federal Courts class. The Award provides a helpful financial resource to a deserving law student, increases collaboration between the Chapter and the law school, and promotes the Chapter's mission of strengthening the federal legal system by encouraging federal legal practice. According to the law school, the offer of the Chapter's award increased enrollment for the class from 11 students in Fall 2012 to 24 students in Fall 2013.

The Chapter presented the Award at the March 20th CLE at the Napa Café. The dean of the Law School, Peter Letsou, as well as Associate Dean for Academic Affairs David Romantz and Director of Development Holly Hazlett attended and spoke during the presentation. Members of the Board also attended the Law School's Spring Scholarship Luncheon at the law school and had the opportunity to congratulate Tyler Davis.

The Chapter looks forward to awarding next year's award during the 2014-2015 academic year.



Chapter President Craig Cowart and Board Member Adam Cohen congratulate Tyler Davis on his receipt of the Chapter's Outstanding Achievement Award in Federal Courts.

Jackson Federal Practice Seminar Held on May 15, 2014

The Memphis/Mid-South Chapter of the Federal Bar Association hosted a Federal Practice seminar in Jackson on May 15, 2014. Approximately sixty attendees met in the federal courthouse to discuss a variety of federal litigation issues. Presenters included Michael Hill (Flippin, Collins & Hill in Milan), Geoffrey Lindley (Rainey, Kizer, Reviere & Bell in Jackson), and Vijay Padmanabhan (Vanderbilt University School of Law). Attendees enjoyed lunch with the judges and a panel discussion with District, Bankruptcy, and Magistrate Judges.



Seated from left to right, Judge Lipman, Chief Judge Breen, Judge Fowlkes, and Bankruptcy Judge Croom address attendees at the Jackson seminar held May 15, 2014.

SIXTH CIRCUIT CASE UPDATE

Criminal Law

Notable Recent Criminal Law Decisions of the U.S. Court of Appeals for the Sixth Circuit

United States v. Blewett, -- F.3d --, 2013 WL 6231727 (6th Cir. 2013)

The en banc Sixth Circuit (by a 10-7 vote) joined all other courts of appeals in holding that the Fair Sentencing Act does not retroactively apply to crack cocaine defendants sentenced before its passage. The court held that 18 U.S.C. 3582(c)(2) does not provide a vehicle for circumventing that interpretation, and neither does the Equal Protection Clause nor the Eighth Amendment.

United States v. Mikulich, 732 F.3d 692 (6th Cir. 2013)

The district court, pursuant to *Sell v. United States*, 539 U.S. 166 (2003), ordered that defendant be forcibly medicated with psychotropic drugs, so he could stand trial on charges arising from his attempt to bomb the federal building in Detroit. The Sixth Circuit affirmed, holding that the government had an interest in trying the case that was important enough to override defendant's liberty interests. The court distinguished *United States v. Grigsby*, 712 F.3d 964 (6th Cir. 2013), where a divided panel reversed a forcible medication order, and characterized as dicta *Grigsby's* suggestion that a defendant's possible insanity defense undermines the government's interest in taking the case to trial.

United States v. Duval, 742 F.3d 246 (6th Cir. 2014)

Defendant Gerald Duval was permitted to grow up to 12 marijuana plants on his farm for personal use under Michigan's Medical Marijuana Act (MMMA). His adult son Jeremy was registered as both a "patient" and "caregiver" under the MMMA, allowing him to grow up to 72 plants. Officers from a state/local drug task force visited the Duvals' farm in 2010 and offered advice on how to comply with the MMMA. In 2011, a sheriff's deputy (who had not participated in that 2010 visit) got search warrants for the Duvals' property that did not refer to the 2010 visit or address the Duvals' MMMA status. The Duvals were eventually convicted of federal drug crimes and challenged the warrants on appeal, arguing that "their status under the MMMA is a material fact that would have undermined a finding of probable cause." The court affirmed, noting that the evidence in the warrant indicated the Duvals were in violation of the MMMA.

United States v. Fisher, 745 F.3d 200 (6th Cir. 2014)

Officers (in 2010, before *United States v. Jones*, 132 S. Ct. 945 (2012)) attached a GPS tracking unit to defendant's car without getting a warrant. They used a combination of physical surveillance and the GPS to follow the defendant and eventually stop him while he was transporting cocaine. Due to the GPS unit's short battery life, the officers used the "live tracking" feature of the unit only sparingly. The court held that even though the installation and use of a GPS tracker is a search under *Jones*, the evidence here was admissible under the good-faith exception. At the time of the search, the Sixth Circuit had approved of the warrantless use of beepers and cell phones to track a subject. See *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004). The court noted the possibility that GPS trackers could be used in a more invasive way that would make prior precedent inapposite, but the use of the GPS in this case did not cross that line.

United States v. Dimora/Gabor, -- F.3d --, 2014 WL 1687766 (6th Cir. 2014)

Dimora was one of three Cuyahoga County (OH) commissioners, and Gabor worked for the county's weights-and-measures office. After a 37-day trial, a jury convicted them on various charges stemming from numerous bribery and fraud schemes – for example, "[e]xpensive trips to Las Vegas in exchange for county patronage, thousands of dollars in cash in exchange for government jobs, [and] extensive home improvements to the tune of \$30,000 in exchange for public construction contracts."

The court affirmed. Among the holdings: (1) the jury instructions properly distinguished between gifts given in friendship and bribes given in exchange for official acts; (2) the erroneous exclusion of Dimora's end-of-year ethics reports (showing he reported some gifts from alleged bribers) was harmless; and (3) the court properly excluded Dimora's proposed 404(b) evidence ("all it would have shown is that, in situations unrelated to the charges, Dimora did favors for people who did not pay him bribes").

SIXTH CIRCUIT CASE UPDATE

Civil Law

EEOC v. Ford Motor Co., No. 12-2484, ___ F.3d ___, 2014 U.S. App. LEXIS 7502 (6th Cir. Apr. 22, 2014)

The Sixth Circuit has previously stated that “regular attendance at the work place is undoubtedly essential.” See *EEOC v. Ford Motor Co.*, No. 12-2484, 2014 U.S. App. LEXIS 7502, at *6 (6th Cir. Apr. 22, 2014) (citing *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 418 (6th Cir.2004); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir.1998)). Most would consider this an obvious truth. However, the Court recently questioned the necessity of physically being at work, likely shocking employers everywhere.

In *EEOC v. Ford Motor Company*, the Sixth Circuit confronted the issue of whether an employee suffering from a debilitating disability could utilize a telecommuting arrangement as a reasonable accommodation for that disability. See *id.* at *1. Ford Motor Company (“Ford”) terminated Jane Harris (“Harris”) from her position as a resale steel buyer after she asked to telecommute several days a week in an attempt to control the symptoms of irritable bowel syndrome. See *id.* at *2. Harris’s job as a resale steel buyer required her to serve as an intermediary between steel suppliers and Ford’s parts producers. See *id.* at *2. The job also involved considerable face-to-face interaction with suppliers and other Ford employees. See *id.* at 3. Thus, when Harris began taking leave and her job performance declined, Ford terminated Harris’s employment despite the fact that Ford allowed telecommuting under certain circumstances. See *id.* at *4-10. The EEOC argued that Ford discriminated against Harris on the basis of her disability, but the district court granted summary judgment in favor of Ford. See *id.* at *2.

On appeal, the Sixth Circuit reversed and remanded, focusing on whether Harris was “otherwise qualified” for the resale steel buyer position. See *id.* at *14. The Sixth Circuit found that the EEOC offered enough evidence to create genuine factual disputes as to whether physical attendance was an essential function of the resale buyer position and as to whether Harris could effectively work from home with a reasonable accommodation for her disability, namely a telecommuting arrangement. See *id.* at *16, *35. Ford was unable to prove that either (1) the physical-presence requirement was an essential function of Harris’s job or (2) the telecommuting arrangement

would create an undue hardship. See *id.* In its analysis, the Court stated:

“[T]echnology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer’s physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.”

See *id.* at *17. Further, the Court deemed the cost of establishing telecommunication capabilities at an employee’s home to be *de minimus*. See *id.* at *35.

EEOC v. Ford Motor Company is a prime example of courts’ efforts to keep up with the times and tweak well-established legal principles in wake of new technology and modern realities. As the Sixth Circuit acknowledged, “it is no longer the case that jobs suitable for telecommuting are ‘extraordinary’ or ‘unusual,’” and employers should keep abreast of these changes as well. See *id.* at *36-37.