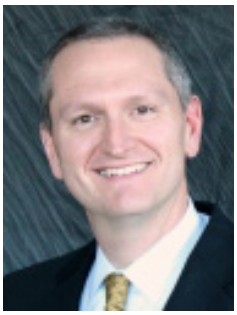
Federal Bar Association
Labor and Employment Law Section
July 2015

The Labouring Oar



Message from the Chair

By Craig Cowart

The Labor and Employment Law Section is having a great year, and we would love for you to be a part. The Section's Biennial Labor and Employment Law Conference took place in New Orleans during March, and it was an excellent program. The Conference featured excellent speakers, programs, and activities. If you have not attended one of our Section Conferences before, make our 2017 Biennial Conference a priority. You will not want to miss it.

Our Section is excited about the Annual Meeting and Convention to be held in Salt Lake City September 10-12. The Labor and Employment Law Section and the Veterans and Military Law Section will be joining forces to present a joint program entitled "Returning our Warriors to Work – Employment Law Issues." The presentation will address the issues that can arise in returning service members to the workplace. The presentation will provide in-depth discussion of the application of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the Family Medical Leave Act ("FMLA"), and the Americans with Disabilities Act Amendments Act ("ADAAA") when service members (and their family members) face leave and return-to-work issues on the job. This will be a "must see" presentation, and we look forward to seeing you there.

The Labor and Employment Law Section provides valuable and informative publications to Section members throughout the year. In addition to our quarterly newsletter, *The Labouring Oar*, the Section also publishes Circuit Updates with information about labor and employment law decisions from federal appellate courts. If you have an interest in contributing to our publications, please contact either Corie Tarara, Chair of our Committee on Publications and Public Relations, or me.

Keep your eyes open for the excellent programming our Section presents throughout the year. More webinars on labor and employment law topics are being planned. The Section's webinars provide a convenient, efficient way to remain current on a variety of topics while meeting CLE requirements. If you have any questions about our Section programming, please contact either Donna Currault, Chair of our Committee on Programming and CLE, or me.

The Labor and Employment Law Section is supported by dedicated, hard-working individuals who serve on the Section Board and Committees. The Section is successful because of their hard work. Thank you!

Please do not hesitate to contact any of our Board Members with any questions or feedback about our Section. We look forward to continuing to serve our Section Members and look forward to seeing you soon. ■

Craig A. Cowart
Chair, Labor and Employment Law Section

A Look at What's Inside

The Labouring Oar is published by the Federal Bar Association Labor and Employment Law Section, 1220 N. Fillmore St., Suite 444, Arlington, VA 22201, (571) 481-9100, (571) 481-9090 (fax). ISSN 1080-1316.

Statutory Analysis: Post-Delivery Leave for Employees with Healthy Pregnancies

Elizabeth ("Betsy") S. Chestney, Committee on Legislation and Congressional Relations

Many statutes protect pregnant workers and workers who have just given birth. The Family and Medical Leave Act (FMLA) requires employers to give up to 12 weeks unpaid leave per year for a qualifying reason, which includes the birth of a child. But the FMLA does not apply to employees who have been employed for fewer than 12 months, or to employees who work for employers with fewer than 50 employees.

The Americans with Disabilities Acts (ADA), which applies to employers with at least 15 employees and prohibits discrimination against employees on the basis of disability, requires that temporary disabilities be accommodated like other disabilities. After the ADA was amended in 2008, Congress clarified that "disability" includes temporary disabilities, removing the "transitory or minor" exception from the ADA's definition of actual disability. The ADA itself does not mention pregnancy at all. But the EEOC in its implementing regulations has made it clear that a woman who suffers disabling complications related to childbirth or pregnancy is entitled to unpaid leave as an accommodation when recovering from or receiving treatment for a pregnancy or childbirth-related disability, to the same extent that any other temporarily disabled employee would be entitled to such leave.

Title VII, of course, prohibits discrimination based on sex, and also applies to employers with at least 15 employees. In 1978, the statute was amended by the Pregnancy Discrimination Act to clarify that discrimination based on sex includes discrimination based on pregnancy. Consequently, it does not violate Title VII for an employer to terminate an employee who requires more leave after childbirth than the employer's leave policy provides, as long as non-pregnant employees would also be terminated once they exhausted the employer's available leave. (Note: it can be a violation of Title VII for an employer to provide bonding leave to female employees but not to male employees. The law requires equal treatment of the sexes.)

Where does that leave female employees who have had healthy pregnancies and typical deliveries? Does the law require employers to provide them with leave? And if so, how much? Most obstetricians recommend that women who experience healthy pregnancies and who deliver healthy babies take four to six weeks off of work. Is there any law that protects these workers' right to return to the jobs they had prior to giving birth, or are employers in these situations free to enforce policies permitting no or short periods of leave, so long as childbearing employees are treated no less favorably than non-childbearing employees?

Filling the statutory gap

Because the existing statutes—the FMLA, the ADA, and Title VII—do not explicitly address how employers of fewer than 50 employees (or employers of employees in their first 12 months) should handle leave when employees require time off to recover from healthy pregnancies and childbirth, agencies step in to fill in the gaps. In particular, the EEOC promulgates regulations implementing both the ADA and Title VII. But even these regulations fill in only some of the blanks. According to the regulations, written policies that address the commencement, duration, extension, or accrual of leave "shall be a be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied other disabilities." 29 CFR § 1604.10(b) (emphasis added). Moreover, when temporarily disabled employees are terminated because they have run out of available leave under an employer's policies, the termination is illegal if it has a disparate impact on employees of one sex that is not justified by business necessity. See 29 CFR § 1604.10(c).

Even with this regulatory guidance, however, it is not clear what employers are required to do for employees who experience healthy pregnancies that culminate in complication-free childbirth. No statutory provision or regulation ever comes out and states explicitly that every employee who experiences childbirth should be considered temporarily disabled.

Non-discrimination versus accommodation

Employers attempting to comply with the law but operating in the absence of explicit guidance find themselves dealing with the tension between two governing principals—that is between non-discrimination and accommodation. There are different ways the law could address the issue of post-childbirth leave for employees. The law could extend the approach of the FMLA to smaller employers, or to employees in their first year of employment, and make a policy-based judgment on the appropriate amount of leave smaller employers should be required to provide in these situation. For instance, the FMLA could be amended to require smaller employers to provide up to four weeks of leave in the same situations where larger employers are required to provide up to twelve. The law would also indicate that this FMLA-type leave could not be treated any less favorably than any other leave employees are entitled to take.

Another non-discrimination based approach is just to say that childbirth, by definition, is disabling—at least for some period of time. Thus, the disparate treatment rules that prohibit treating those with disabilities less favorably than those without apply to employees in the wake of childbirth as well. In other words, any exceptions that are made to leave policies for other employees for other reasons have to be factored into a decision to refrain from making an exception for pregnant employees, and that such employees can be treated no less favorably than the others.

The final approach is to say pregnancy and the weeks that follow childbirth qualify as disabilities that must be accommodated. Whatever an employer's policy on leave is, exceptions must be created for pregnancy when creating such an exception would be a reasonable accommodation that did not constitute an undue hardship on the employer. The employer would have an obligation to analyze the circumstance of each employee's pregnancy, including whether the employee's position would permit the employer to extend leave to the employee that she would not otherwise be entitled to as a

reasonable accommodation, or whether it would be an undue hardship.

The problem with the last approach, of course, is that it leaves employers in a gray area, unsure of whether they are permitted to draw lines, in danger of being accused of treating similarly-situated employees differently for impermissible reasons, and confused about how to draw up compliant policies that provide meaningful guidance to employees on what their leave rights are after giving birth.

Congressional action

During the 2013-14 Congress, the Senate and the House introduced the "Pregnant Workers Fairness Act." The bill never made it out of committee. The bill's stated purpose was to "to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition." Among other things, the bill, if made law, would have rendered it illegal to "not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless [the employer could] demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." In addition, if the law had passed, it would have imposed an obligation on the EEOC to promulgate regulations to "identify some reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions that shall be provided to a job applicant or employee affected by such known limitations unless the covered entity can demonstrate that doing so would impose an undue hardship." The bill also imported the definitions of "reasonable accommodation" and "undue hardship" from the ADA. It further provided that it did preempt state laws that provide greater protection for pregnant employees.

Essentially, this proposed approach would instruct employers to treat all pregnancies and childbirths as disabilities, and to treat pregnant employees (whether suffering from complications or experiencing healthy pregnancies and childbirth) as if they had any other qualifying disability under the ADA. It would not provide the clear-cut guidance that an FMLA-type law would provide, but it would at least make clear to employers that the correct approach for them to follow is the familiar approach of ADA accommodation, including the interactive process and the reasonable accommodation/undue hardship analysis.

This spring, the same senator, a Democrat, who previously introduced the Pregnant Workers Fairness Act, introduced an amendment to the budget resolution in Congress that would create a deficit-neutral fund to assist pregnant workers in securing accommodations. The amendment, which passed 100-0, but will likely have no impact at all, potentially signals the senator's intent to reintroduce the Pregnant Workers Fairness Act. Given that the bill did not make it out of committee in a Democratic Congress, it is not likely to fair much better in this session.

In the interim, smaller employers will have to rely on the EEOC's regulations and interpretative guidance, and their state legislatures for guidance on what—if any—leave they are required to provide to employees who have healthy pregnancies and complication-free deliveries. ■

EEOC Issues Proposed Regulations for Workplace Wellness Programs

Tara Craft Adams

On April 20, 2015, the Equal Employment Opportunity Commission (EEOC) issued a notice of proposed rulemaking regarding how the Americans with Disabilities Act (ADA) applies to employer wellness programs that are part of a group health plan. At this time, the regulations are only proposed, but provide an indication as to the EEOC's future approach to wellness program regulation.

The term "wellness program" refers to programs and activities typically offered through employer-provided health plans as a means to help employees improve health and reduce health care costs. Under Health Insurance Portability and Accessibility Act (HIPAA) regulations, wellness programs are generally divided into two categories. Participatory wellness programs, such as an employee completing a health risk assessment, do not require an individual to satisfy any goal relating to a health factor. Health-contingent wellness programs, on the other hand, focus on activities (such as a walking program) or the achievement of certain health outcomes (for example, lowering cholesterol). The Affordable Care Act (ACA) permits health plans to incorporate wellness incentives — both penalties and rewards — of up to 30 percent of the cost of employee-only coverage, an increase over the previous limit of 20 percent. If the wellness activity aims to help someone quit or reduce smoking, the incentive can be up to 50 percent.

The EEOC is responsible for enforcement of the ADA, which restricts the type of medical information that employers may request from employees and applicants. However, the ADA contains a safe-harbor provision that exempts bona fide employee benefit plans from its limitations on health-related inquiries and medical examinations. Even if a wellness program does not qualify for the safe harbor, an employer may still use health questionnaires and biometric screening as part of a wellness program as long as participation is "voluntary." According to previous EEOC guidance, a wellness program is voluntary as long as it:

- does not require employees to participate;
- does not deny access to health coverage or generally limit coverage under its health plans for non-participation; and
- does not take any other adverse action or retaliate

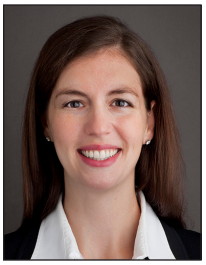
against, interfere with, coerce, intimidate, or threaten employees (such as by threatening to discipline an employee who does not participate or who fails to achieve certain health outcomes).

However, there has been no guidance regarding when a penalty or incentive would render a wellness program involuntary. Until now, the EEOC has chosen to litigate, rather than regulate, the voluntariness of workplace wellness programs. Because of the lack of clarity as to what was "voluntary" in the regulations, and in the absence of formal guidance on the topic, the EEOC instituted litigation against employers related to the voluntariness of their wellness programs. In the latter half of 2014, the EEOC filed three different lawsuits against employers alleging that their wellness programs were not voluntary. One such case that is being closely watched was filed in the U.S. District Court for the District of Minnesota against Honeywell, Inc. (Civil No. 14-4517, filed Oct. 27, 2014).

In the Honeywell wellness program, employees and their spouses are asked to get blood drawn to test their cholesterol, glucose and nicotine use, and also have their body mass index and blood pressure measured. An employee who refuses is subject to a $500 surcharge on health insurance premiums and could lose up to $1,500 in Honeywell contributions to a health savings account. A worker and spouse are also each subject to a $1,000 tobacco surcharge if they refuse to do the screening. That means a couple could face a combined $4,000 in financial penalties. The position of the EEOC is that medical testing of this nature has to be voluntary under the ADA, and requiring the testing or penalizing employees who choose not to undergo the testing is prohibited. A second issue the EEOC litigated is whether an employer may condition incentives for a family member on that family member's participation in a wellness program. The EEOC alleged that Honeywell's wellness program violates GINA's prohibition on providing incentives to an employee to obtain that employee's family medical history. According to the EEOC, by penalizing an employee if the employee's spouse does not participate in the program's biometric screening, which could yield information related to conditions such as hypertension and diabetes, Honeywell's program provides a financial inducement to obtain family medical history. The EEOC's request for a preliminary injunction against Honeywell's program was denied by the court. Presumably, the EEOC is continuing investigation into the Honeywell program, and it is possible that litigation could continue on the merits of the case.

The newly proposed regulations provide some much-needed guidance as to the level of incentives or penalties that can make a program involuntary. Under the proposed regulations, an employee is not "required to participate" in a wellness program and such participation is considered voluntary if the total incentive available under all wellness programs does not exceed 30 percent of the cost of employee-only coverage. The 30 percent cap already applies under HIPAA and the ACA to programs that mandate some physical activity or the achievement of specific health outcomes. But the EEOC's proposal extends that cap to "participatory" wellness programs that ask only for an employee's participation in, say, filling out a health questionnaire or undergoing biometric screening, consequently aggregating participation in all wellness programs for purposes of the 30 percent threshold. Hopefully, the confliction of the aggregation issue will be addressed in any final rule issued by the agency.

While employers do not have to comply with the proposed rule, many of the requirements explicitly set forth in the proposed rule are already requirements. For example, employers should make sure they do not require employees to participate in a wellness program; do not deny health insurance to employees who do not participate; and do not take any adverse employment action or retaliate against employees who choose not to participate in wellness programs or who do not achieve certain outcomes. ■



Tara Craft Adams is an attorney with Seaton, Peters & Revnew in Minneapolis, Minnesota, practicing in the areas of labor and employment law litigation and counseling. She advises employers on a broad range of labor and employment matters, including policy development, employment agreement agreements, and discipline and discharge issues. Ms. Adams represents employers throughout litigation and has experience defending employers in state and federal courts. She is also a member of the FBA Communications Committee for the District of Minnesota. Ms. Adams may be reached at tadams@seatonlaw.com.

6th Biennial Labor & Employment Law Conference held in New Orleans

The Labor & Employment Section held its 6th Biennial Labor & Employment Conference on March 12-13, 2015 in New Orleans, Louisiana. Approximately 75 members from across the nation attended the program and heard leading judges, regulators, and practitioners discuss sophisticated topics in the labor and employment arena. Fifth Circuit Court of Appeals Justice Stephen Higginson delivered an engaging and informative presentation on Ethics in the Appellate Process, and U.S. Magistrate Judge Charmiane Claxton's "View from the Bench" was particularly compelling given her past experience as a labor and employment practitioner as well as the former Vice President of Human Resources for Memphis Light, Gas & Water and Deputy Director of the Human Resources Division for the City of Memphis. Our members greatly appreciated the Regulatory Updates from NLRB Regional Director Kathleen McKinney and EEOC Supervisor Trial Attorney (Acting) Gregory Juge, and the comprehensive materials provided by Al Latham in his Essential EEO Update. The attendees were also engaged by the implicit bias point-counterpoint discussion from Brooks Eason and Robert Valli, the whistleblower discussion from Stephen Kohn, and the post-*Windsor* issues discussion from Karleen J. Green and Janis Vanmeerveld. The program concluded with Sid Lewis and Debra Fischman discussing difficult issues involving ADA and FMLA leave, which engaged the audience in an interactive Q&A that resulted in a high level discussion of these challenges.

The L&E Section awarded NLRB Regional Director Kathleen McKinney with the Section's Outstanding Speaker Award in recognition of her generosity in sharing her time and knowledge with our members at CLE programs. Special thanks goes to our Event Sponsors:

Gold: Fisher & Phillips, LLP; Stone Pigman, Walther Wittman, LLC; Sher Garner Cahill Richter Klein & Hilbert, LLC and Haystack ID
Silver: Jones, Walker LLP and Chaffe McCall, LLP
Bronze: Gordon, Arata, McCollam, Duplantis & Eagan, LLC; Baker, Donelson, Bearman, Caldwell & Berkowitz, PC; Adams & Reese, LLP; Phelps, Dunbar, LLP; Iris and the New Orleans Chapter of the FBA.

Pictured L - R: Presenting the outstanding speaker award to Ms. McKinney: Craig Cowart, Karleen Green, M. Kathleen McKinney (NLRB Regional Director, New Orleans Regional Office) and Donna Currault

Many of this year's attendees characterized our program as "fantastic" and "excellent," and we received several suggestions for interesting topics to address at our next program. We hope that you can join us for our 7th Biennial Conference in 2017! ■

Gregory Juge giving his speech to the audience

The Text of Liability: An Examination of Employer Liability for Employee's Use of Cell Phones for Work Purposes While Driving

Lindsey Wagner, Managing Attorney at Cathleen Scott & Associates, PA West Palm Beach office

Employers may wish to think twice before scheduling a telephone conference with an employee during the employee's daily commute. With fatal work-related motor vehicle accidents on the rise, the Occupational Safety and Health Administration (OSHA) partnered with the Department of Transportation (DOT) and the National Safety Council (NSC) to roll out a "Distracted Driving Initiative." Under the guidelines of the Occupational Safety and Health Act of 1970 (OSH Act) section 5(a)(1), the "general duty clause" requires employers to provide a workplace free of serious recognized hazards. Seizing on the general duty clause requirement, OSHA's initiative seeks to provide education to employers on preventing of occupationally-related distracted driving and issue citations and penalties to employers who require texting and driving or organize work so texting is a practical necessity. While federal employees have been prohibited from this practice since 2009 under President's Obama's Executive Order prohibiting texting and driving, and over 40 states now have laws prohibiting texting and driving, OSHA's initiative targets private employers, and for good reason. Each year, fatal work injuries related to driving continue to rise – with OSHA recognizing that two out of every five fatal work injuries in 2010 are attributable to motor vehicle crashes.

In fact, OSHA is not the only federal organization seeking to prohibit texting and driving in the workforce – both the Federal Motor Carrier Safety Administration (FMCA) and the Pipeline and Hazardous Materials Safety Administration have passed regulations prohibiting commercial truck drivers and bus drivers from texting while driving, with FMCA issuing a full-ban on hand-cell cell phones.

Prohibiting employees' use of cell phones for work purposes while driving may also serve another benefit beyond just safe driving – limitations on litigation. With the rise of employees using cell phones while driving, especially for work purposes, so too has litigation ensued regarding an employer's liability for motor vehicle accidents involving employees engaged in work-related activities. The issue is further compounded when for example, an employee is engaged in a car accident, files a workers' compensation claim (arguing it occurred in the scope of employment), and the other driver brings a claim against the employer under the theory of respondeat superior, or negligence against the employer, for knowing the employee was using the device while driving. Julie A. Totten and Melissa C. Hammock, *Personal Electronic Devices in the Workplace*, 30 ABA Journal of Labor & Employment Law 27 (2014).

Using these theories, litigants have been successful imposing liability on employers for damages caused by their employees and associated with the employees' cell phone usage in work-related activities. In *Tiburzi v. Holmes Transp., Inc*., a couple was awarded more than $18 million in damages against a truck driver and his employer (under the theory of respondeat superior*)* due to an accident that occurred while the truck driver was reaching for his cell phone. *Tiburzi v. Holmes Transp., Inc.,* No. 4:08CV1151DDN, 2009 WL 2592732, at *1 (E.D. Mo. Aug. 20, 2009).

However, other courts have concluded otherwise, even when the employee is driving an employer-owned vehicle, as long as the employee was not on a business-related call. In *Hoskins v. King*, the United States District Court for the District of South Carolina refused to hold an employer liable under a theory of respondeat superior where an employee struck and killed a bicyclist while driving a car leased by the employee's employer. *Hoskins v. King,* 676 F. Supp. 2d 441 (D.S.C. 2009). While the employee was driving a company car, the evidence revealed that at the time of the fatal collision the employee was either speaking to her friend on a non-work related matter on her mobile phone which was issued by the employer, adjusting the stereo, talking to her two dogs in the passenger seat, or some combination of all three. As such, the court rejected the estate's request to obtain evidence concerning the employer's policies regarding the use of company automobiles and cell phones, as it would not aid in the determination of whether the employee who was driving company automobile while talking on company cell phone was acting within scope of her employment when the accident occurred. Because the employee was not going about employer's business at the time of the accident, nor at any time close to the accident, the court rejected liability against the employer.

Similarly, in *Archer Forestry, LLC v. Dolatowski*, a Georgia court declined to extend liability to an employer under the theory of respondeat superior where an employee was involved in an accident in a company car on route home from a doctor's appointment. *Archer Forestry, LLC v. Dolatowski*, No. A14A2210, 2015 WL 1380446, at *2 (Ga. Ct. App. Mar. 27, 2015), No. A14A2210, 2015 WL 1380446, at *2 (Ga. Ct. App. Mar. 27, 2015). Here, the employee was involved in an accident while on his cell phone, but on non-work related matters. The court was not persuaded by the argument that liability should extend to the employer because the employee was on a work-related call 25 minutes prior to the accident; instead, concluding that because the call was not during the time of the collision, there is no liability.

Courts have extended the same reasoning to accidents where a company vehicle is not involved. For example, in *Miller v. Am. Greetings Corp*., the California Court of Appeals held that an employees' work-related cell phone call eight (8) minutes before an employee's driving accident injuring a pedestrian did not create employer liability under a theory of respondeat superior. *Miller v. Am. Greetings Corp*., 161 Cal. App. 4th 1055, 1058, 74 Cal. Rptr. 3d 776, 778 (2008). Additionally, the employee was driving his own car and en-route to a non-work related meeting. Likewise, in *Whitehead v. Variable Annuity Life Ins. Co.*, the court declined to extend liability to an employer under a respondeat superior theory for an accident involving an employee on his commute home

from work. *Whitehead v. Variable Annuity Life Ins. Co*., 801 P.2d 934, 937 (Utah 1989). The court was not persuaded by the argument that liability should extend to the employer under a "dual purpose exception" when the employee was traveling from work to home and where he intended to make additional business-related calls. Specifically, the court concluded that because the "predominant motivation and purpose of the activity is in serving the social aspect, or other personal diversion of the employee, even though there may be some transaction of business or performance of duty merely incidental or adjunctive thereto, the person should not be deemed to be in the course of his employment."

The Georgia Court of Appeals had a comparable conclusion in *Farzaneh v. Merit Const. Co*., which involved an automobile accident by an employee during his commute to work in his personal vehicle. *Farzaneh v. Merit Const. Co.*, 309 Ga. App. 637, 637, 710 S.E.2d 839, 841 (2011). In that case, even though the employee had a work-phone in the car, it was not in use during the time of the accident, and therefore, there was no liability to impute on the employer.

In another Georgia Court of Appeals case, the court concluded no employer liability for an employee automobile accident while the employee was in the company truck, but not on a company phone-call. *CGL Facility Mgmt., LLC v. Wiley,* 328 Ga. App. 727, 730, 760 S.E.2d 251, 255 (2014), reconsideration denied (July 31, 2014), cert. denied (Oct. 20, 2014). Though the court recognized that "when an employee is involved in a collision while operating a vehicle owned by his employer, a presumption arises that he is acting within the scope of his employment," the court concluded that the employer rebutted the presumption by providing evidence which was "clear, positive and uncontradicted and that shows the servant was not in the scope of his employment."

However, not all cases have turned in favor of the company and employee. A jury in the case of *Bustos vs. Leiva and Dyke Industries* awarded an over $20 million verdict in favor of the Plaintiffs in a case where an employee of Dyke Industries rear ended a vehicle, causing serious injuries to the backseat passenger Plaintiff. *Bustos v. Leiva et al*, 02 FJVR 4-40, (Dade County, Florida Circuit Court), 2001. In *Bustos*, the employee denied cell phone use, but cell phone records revealed he used the phone forty-six minutes before he called the police to report the incident. The employee was in a company truck and on duty at the time of the incident. *Id*.

In *Roberts v. Smith Barney*, the parties reached a settlement as part of a wrongful death claim against Smith Barney and third party defendant, its stockbroker employee, who struck and killed a 24-year-old motorcyclist. *Roberts v. Smith Barney, Inc.,* No. CIV. A. 97-2727, 1999 WL 33236939, at *1 (E.D. Pa. Jan. 29, 1999). At the time of the incident, the employee was using his personal phone, but was making "cold calls" to contact clients, which was permitted and expected by the employer. The matter was settled for over $500,000.00. *Roberts v. Smith Barney, Inc.,* No. CIV. A. 97-2727, 1999 WL 33236939, at *1 (E.D. Pa. Jan. 29, 1999); Order Regarding Settlement, DE 26, Roberts v. Smith Barney, Inc. No. CIV. A. 97-2727 (Entered 02/12/1999).

Finally, with regard to employer liability, in *Ford v. International Pape* , the parties settled a personal injury suit involving an employee who rear ended a vehicle and caused injuries. *Ford v. International Paper*, GA Superior Court, Dec. 14, 2007. In this case, there was a question of fact as to whether the employee was using her company supplied cell phone at the time of the accident—the employee testified she was not, and had only used it two miles prior, but witnesses testified otherwise. *Ford v. International Paper*, GA Superior Court, Dec. 14, 2007.

In one of the most recent case of distracted driving, the Court of Appeals of Oregon was confronted with a claim of negligence involving an automobile accident by an employee, who was traveling between employer's business locations, and had used his company phone in connection with employment-related matters during his drive, but not during the collision. *Leonard v. Moran Foods, Inc*., 269 Or. App. 112, 114, 343 P.3d 693, 695 (2015). The court was faced with the question as to whether the employer was negligent by failing to train its employee on the anti-cell phone use while driving policy. The court recognized that there was no evidence to support that the employee was using his phone at the time of the collision and, therefore, the question was whether the employee was distracted by his cell phone in "some other way." While the court agreed the employee may have been distracted by something prior to the collision, it concluded there was no evidence to support the allegation that the employee was distracted by his cell phone. The court declined to extend liability by way of a negligence claim against the employer for failure to properly train its employees on safe cell phone usage.[1]

In conclusion, courts across the nation are continuing to draw lines when it comes to employer liability for employees' distracted driving in connection with mobile phones based on the determination of whether the phone was used for business purposes. The fact that the employee intended to use the phone later, or used it prior to a collision, is not always determinative for liability. Rather, the question traditionally turns on whether an employee is using a phone at the time of the incident. An employer who adopts safe driving practice policies relating to prohibition of cell phone usage while driving may bolster arguments against liability. In the future, and as employees become more mobile, it is important for employers to be mindful of safe driving practices for employees to avoid liability for work-related automobile accidents. ■

Attorney Lindsey Wagner is Managing Attorney at Cathleen Scott & Associates, P.A. West Palm Beach office. Ms. Wagner joined the firm in 2011, and practices all aspects of employment and labor law, handling matters of litigation, arbitration, and administrative hearings. She currently serves as Chairperson of the

Liability continued on page 11

2014's Most Important Non-Employment Law Cases for Employment Lawyers? Revisiting *Tolan v. Cotton* and *Burrage v. U.S.*

Brock J. Specht

Last year the U.S. Supreme Court decided two non-employment law cases with the potential to significantly impact the labor and employment law practice. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), involved a rare *per curiam* summary reversal of an entry of summary judgment, in which the Justices criticized their colleagues at the Circuit Court and District Court level for improperly weighing evidence and resolving factual disputes. *Burrage v. United States*, 134 S. Ct. 881 (2014), is a criminal case involving the application of "but-for" causation under the Controlled Substances Act. The cases touch on issues of potential significance to employment lawyers, and this article examines how, and to what extent, the lower courts have applied these holdings in the context of employment law.

I. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014)

A. The SCOTUS Decision

For most employment lawyers, summary judgment is the focus of litigation strategy. Both the plaintiff and defense bar spend a substantial amount of time and energy in discovery with an eye toward creating a favorable record for summary judgment, and the bench has most of its substantive contact with the majority of employment cases at the summary judgment stage.

The standards applied by the courts in deciding motions for summary judgment are well settled, and most attorneys can recite from memory the mantras set down by the Supreme Court nearly 30 years ago in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). While summary judgment motions are often hotly contested, the underlying procedural rules rarely are.

Against this background, many observers, including apparently Justice Samuel Alito, were puzzled by the Court's decision in *Tolan v. Cotton,* 134 S. Ct. 1861 (2014). The underlying dispute in *Tolan* involved a claim of excessive force brought against a Texas police officer who shot and seriously wounded an unarmed man during the early morning hours of New Year's Eve, 2008. The District Court granted summary judgment in favor of the officer on qualified-immunity grounds, and Fifth Circuit affirmed. Plaintiff Tolan petitioned the Supreme Court for certiorari, arguing that the lower courts incorrectly applied the second prong of the two-part test for determining qualified immunity in excessive-force cases. *See Tolan v. Cotton*, No. 13-551, 2013 WL 5864010 (U.S. Oct. 29, 2013) (Petition for Writ of Certiorari).

In a *per curiam* decision, the Court granted Tolan's petition and summarily vacated the Fifth Circuit's decision. As the basis for its holding, the Court did not weigh in on the qualified-immunity question presented by Tolan, but instead stated that "the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan*, 134 S. Ct. at 1863 (quoting *Liberty Lobby*, 477 U.S. at 255). Instead of following that principle, the lower courts "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Id.* at 1867-68. Accordingly, the Court remanded the case for further proceedings. *Id.*

Justice Alito, joined by Justice Scalia, concurred in the judgment of the Court. *Id.* at 1868-69 (Alito, J., concurring). He suggested, however, that the procedural issues related to summary judgment, on which the Court based its decision, were "utterly routine" and that the Court was engaged in simple "error correction"—not typically part of the Supreme Court's workload. *Id.* Perhaps fueled by Justice Alito's concurrence, some commentators, including the Managing Editors of the Stanford Law Review,[1] interpreted the Court's decision as having broader implications for summary-judgment practice.

B. Application to Employment Cases

1. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015)

Jacobs v. N.C. Admin. Office of the Courts involved a disability discrimination claim brought by a county court clerk who suffered from social anxiety disorder. 780 F.3d 562, 565 (4th Cir. 2015). According to plaintiff Jacobs, after experiencing extreme stress and panic attacks while working at the customer service counter, she informed her supervisor of her history of social anxiety disorder, including the fact that she had previously received medical treatment, and requested a transfer to a filing and record-keeping position that did not require social interaction. Jacobs's supervisor discussed the situation with the head clerk, who took no immediate action but shortly after decided to terminate Jacobs for performance reasons. *Id.* at 565-68.

The district court granted summary judgment on Jacobs's disability discrimination and retaliation claims, concluding that there was no evidence that Jacobs was disabled or that the head clerk knew of Jacobs's request for an accommodation at the time she decided to terminate Jacobs. *Id.* at 568. Relying heavily on *Tolan*, the Fourth Circuit reversed the district court's decision, stating:

> [B]oth of the district court's key factual findings—that Jacobs was not disabled and that Tucker did not learn of Jacobs's accommodation request prior to terminating her—rest on factual inferences contrary to Jacobs's competent evidence. The district court thus improperly resolved factual issues at the summary judgment stage, in contravention of well-settled law. *Id.* at 569.

2. *Hawkins v. Smith*, 46 F. Supp. 3d 1175 (N.D. Okla. 2014)

Hawkins v. Smith is another disability case involving a request by a county employee to transfer to a different position. 46 F. Supp. 3d 1175 (N.D. Okla. 2014). Following a stroke, plaintiff Hawkins was required to use a walker due to poor balance. *Id.* at 1180. This interfered with Hawkins's ability to deliver checks to the county treasurer, which was one of her job duties. *Id.*

On summary judgment, the parties disputed whether Hawkins ever requested an accommodation, and whether such an accommodation was reasonable under the circumstances. The court began its analysis by reciting *Tolan*'s mandate that "reaching factual inferences that conflict with the non-movant's evidence is contrary to the 'fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.'" *Id.* at 1182 (quoting *Tolan*, 134 S. Ct. at 1868). The court then concluded that the facts, viewed in the light most favorable to Hawkins, established that she had requested an accommodation. *Id.* at 1184.

However, the court went on to conclude that her requested accommodation—transfer to a new position—was not reasonable. *Id.* at 1185. This conclusion did not require drawing any factual inferences against Hawkins because "the record is devoid of any evidence which would demonstrate that there was any vacant position to which she could have transferred." *Id.* Accordingly, the court granted summary judgment in favor of the defendant.

3. *Hansen v. Fincantieri Marine Grp.*, 763 F.3d 832 (7th Cir. 2014)

Hansen v. Fincantieri Marine Grp. involved an FMLA-interference claim. 763 F.3d 832 (7th Cir. 2014). The parties did not dispute that plaintiff Hansen suffered from a medical condition that entitled him to FMLA leave. However, Hansen's employer penalized Hansen for certain absences that it concluded were not based on medical necessity because the number of those absences exceeded the number of absences Hansen's physician estimated would be medically required. The district court agreed, granting summary judgment based on the conclusion that Hansen had introduced no evidence establishing that he was medically unable to work during the days in question. *Id.* at 833-34.

The Seventh Circuit noted that Hansen's physician's written certification was "unclear" regarding the extent of medically required leave. *Id.* at 843. The circuit court further stated that the physician's certification could raise multiple reasonable inferences, and that "the district court chose between competing inferences, drawing adverse inferences against Hansen, which was improper at the summary judgment stage." *Id.* (citing *Tolan*, 134 S. Ct. at 1863). The Seventh Circuit therefore vacated the grant of summary judgment and remanded the case for further proceedings. *Id.* at 845.

4. *Solomon v. Vilsack*, 763 F.3d 1 (D.C. Cir. 2014)

Solomon v. Vilsack, yet another disability case, involved an employee's request for a "maxiflex" schedule—a highly flexible work schedule—as an accommodation under the Rehabilitation Act. 763 F.3d 1, 4 (D.C. Cir. 2014). Although the evidence suggested that the plaintiff had been allowed to work on such a schedule on an informal basis for several months before the dispute arose, the district court granted summary judgment based on the conclusion that a flexible schedule was an unreasonable accommodation request as a matter of law.

In resisting summary judgement, the plaintiff argued that her requested accommodation was reasonable because she had previously been able to perform all of the essential tasks of her job without missing any deadlines while working a flexible schedule. The district court rejected this argument, concluding that it "may have merely been good luck" that allowed the plaintiff to meet her deadlines during that timeframe. *Id.* at 12. Relying on *Tolan*, the D.C. Circuit rejected this conclusion, stating that "[s]ummary judgment cannot rest on such speculation about evidence." *Id.* (citing *Tolan*, 134 S. Ct. at 1863, 1868).

C. Conclusions

As Justice Alito's concurrence points out, the Court in *Tolan* did not announce a new legal rule; it simply corrected an erroneous application of existing rules by the lower courts. Accordingly, *Tolan* does not appear to have introduced a sea change in summary-judgment practice. It provides a good reminder for practitioners, however, that the standards announced in *Celotex* and *Liberty Lobby* are not simply boilerplate quotations appended to the beginning of every summary-judgment brief. Arguments seeking summary judgment should focus on aspects of the nonmoving party's case for which there is a complete absence of evidence in the record, rather than advancing conclusions or inferences based on evidence that lends itself to multiple interpretations. In contrast, when opposing summary judgment, the nonmoving party should emphasize that the propositions advanced by the moving party require the court to make factual findings that are inconsistent with competent evidence in the record supporting the nonmoving party's case.

II. *Burrage v. United States*, 134 S. Ct. 881 (2014)

A. The SCOTUS Decision

The standard of causation has been a relatively hot topic in employment litigation in recent years. In 2009, the Supreme Court held that the "but-for" standard of causation applies to cases under the Age Discrimination in Employment Act. *Gross v. FBL Financial Svcs, Inc.*, 129 S. Ct. 2343 (2009). Then, in 2013, the Court applied the same "but-for" standard to cases of retaliation under Title VII. *Univ. of Tex. Southwestern Med. Center v. Nassar*, 133 S. Ct. 2517 (2013).[2] But neither *Gross* or *Nassar* explain what "but for" causation means nor under what circumstances it may be found to exist.

Burrage v. United States may, to a certain extent, fill that gap. 134 S. Ct. 881 (2014). *Burrage* has nothing to do with age

discrimination or retaliation. It is a criminal case involving a defendant charged with selling heroin to a drug user who died after using the heroin in addition to a cocktail of other substances. *Id.* at 885. Under such circumstances, the drug dealer is subjected to a more-severe penalty if the substance he sold was the "but for" cause of the victim's death. *Id.* at 887-88.

The majority decision suggests that the "but for" standard of causation in this context is the same as the "but for" standard described in *Gross* and *Nassar*. *Id.* at 889 (citing *Gross* and *Nassar*). The Court also elaborated on examples of factual situations under which but-for causation would be present:

> [But-for causation exists] if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived. *Id.* at 888.

B. Application to Employment Cases

1. *EEOC v. Ford Motor Co.*, --- F.3d ----, 2015 WL 1600305 (6th Cir. April 10, 2015) (*en banc*)

In this highly-publicized decision, the *en banc* Sixth Circuit vacated a panel decision that had held that a reasonable accommodation under the ADA could include telecommuting, holding instead that "regular and predictable on-site job attendance" was an essential job function. *EEOC v. Ford Motor Co.*, --- F.3d ----, 2015 WL 1600305 (6th Cir. April 10, 2015) (*en banc*).

In a less-publicized aspect of the case, the court also affirmed entry of summary judgment on the EEOC's retaliation claim. Writing in dissent, Judge Karen Nelson Moore (joined by four of her colleagues) disagreed with this holding. She concluded that the EEOC had introduced sufficient evidence of retaliation to survive summary judgment. In support, Judge Moore pointed to two facts: (1) the close temporal proximity between the employee's complaint and her termination, and (2) the fact that the employee's acknowledged performance deficiencies long predated her termination. Drawing on *Burrage*'s analogy to a situation where "'poison is administered to a man debilitated by multiple diseases,'" Judge Moore argued that the "key question is whether the EEOC charge … was the poison that precipitated [the] firing to occur at the particular time it did." *Id.* at *26 (Moore, J., dissenting) (quoting *Burrage*, 134 S. Ct. 888).

2. *Roberts v. Alabama Dept. of Youth Svcs.*, No. 2:12cv335-MHT (WO), 2015 WL 590179 (M.D. Ala. Feb. 11, 2015)

In *Roberts v. Alabama Dept. of Youth Svcs.*, the Middle District of Alabama relied on *Burrage* in rejecting the argument that "but for" causation requires proof that the protected conduct was the sole cause of the challenged decision. No. 2:12cv335-MHT (WO), 2015 WL 590179 (M.D. Ala. Feb. 11, 2015).

Roberts sued his employer alleging, among other things, retaliation under Title VII. Roberts claimed that his supervisor retaliated against him after Roberts filed a charge of discrimination with the EEOC. Roberts's employment history established that, prior to filing his charge with the EEOC, Roberts had a number of "disciplinary and competence issues." *Roberts*, 2015 WL 590179, at *5. However, one of Roberts's co-workers testified that their supervisor told him that if Roberts complained to the EEOC then he "was going to fire" Roberts. *Id.* Approximately one month after Roberts complained to the EEOC, the supervisor recommended that he be terminated. *Id.*

Relying on *Burrage*, the District Court held that "the but-for cause of a challenged employer action need not be the sole cause of the action." *Id.* Accordingly, the District Court denied the employer's motion for summary judgment, finding "a genuine issue of material fact as to whether the EEOC charge was 'the straw that broke the camel's back.'" *Id.* at *6 (quoting *Burrage*, 134 S. Ct. at 888).

3. *Edwards v. Montgomery County Bd. of Ed.*, No. 2:13cv780-MHT, 2015 WL 758525 (M.D. Ala. Feb. 23, 2015)

In *Edwards v. Montgomery County Bd. of Ed.*, the same court that denied summary judgment in the *Roberts* case, discussed above, relied on *Burrage* in granting summary judgment where the evidence established that the employer had legitimate justifications for its actions that would have led to the same result even in the absence of protected activity. No. 2:13cv780-MHT, 2015 WL 758525 (M.D. Ala. Feb. 23, 2015).

Edwards sued her employer alleging, among other things, retaliation under Title VII. Edwards claimed that her employer retaliated against her after she reported that she had been sexually harassed by a co-worker. Shortly after Edwards made her complaint, her employer informed her that it intended to transfer her to a different position with less supervisory authority but the same salary. *Id.* at *3. Edwards resigned the next day. *Id.* at *4.

The employer moved for summary judgment, admitting that its decision to transfer Edwards was at least partially related to her complaints. But the employer also cited two legitimate reasons that were not related to Edwards's complaints and justified its decision to transfer Edwards. *Id.* The court held that Edwards had failed to rebut these legitimate justifications for her transfer, "any one of which would have alone more than adequately justified her transfer." *Id.* at *10. In doing so, the court relied on *Burrage* for the proposition that but-for causation is lacking where "the other factors alone" would have caused the same result. *Id.*

C. Conclusions

Although one court has stated in dicta that *Burrage* "sets forth an especially expansive view of but-for causation," *Tyler*

v. Comprehensive Health Mgmt., Inc., No. 11 C 9262, 2015 WL 122754, at *5 n.6 (N.D. Ill. Jan. 6, 2015), both plaintiffs and defendants will find helpful ammunition in the Court's decision. It will be useful for plaintiffs to emphasize that the "but for" cause need not be the "sole" cause of the challenged action nor even necessarily the most significant cause. This will be especially troublesome for defendants in cases where the employer's nondiscriminatory justification for the challenged action predated the protected conduct, a fact scenario lending itself to the "straw that broke the camel's back" analogy used by the Court to illustrate but-for causation. *Burrage*, 134 S. Ct. at 888. However, defendants will do well to focus on evidence that their nondiscriminatory reason(s) would have justified the same adverse action even without any alleged protected conduct, meaning that "other factors alone" would have led to the same result. *Id.* ■

Brock J. Specht is an attorney with Nichols Kaster, PLLP, in Minneapolis, Minnesota. He represents employees in a wide range of employment-related matters, including cases involving discrimination, harassment, retaliation, breach of contract, unpaid wages, and whistleblower claims.

Endnotes

[1]*See* David Friedman, *The Supreme Court, and the Importance of Keeping the Lower Courts in Line,* The Stanford Daily (May 15, 2014), *available at* www.stanforddaily.com/2014/05/15/the-supreme-court-and-the-importance-of-keeping-the-lower-courts-in-line/.

[2]The *Nassar* Court distinguished cases of retaliation from "status based" discrimination cases, to which the lesser motivating-factor standard of causation applies. *Id.* at 2522-23.

Liability continued from page 7

Labor and Employment CLE Committee of the Palm Beach County Bar Association, Vice Chair of the Young Lawyer's Division of the Labor and Employment Committee for the American Bar Association, Co-Chair of the Membership Outreach Committee of the Florida Bar Labor and Employment Section, Co-Chair of the Social Media Committee for the Palm Beach County Chapter of the Florida Association of Women Lawyers (FAWL), and is a member of the National Employment Lawyers Association, serving as Treasurer and Secretary of the Association's Florida Chapter. Ms. Wagner earned her Bachelor of Arts degree in both Political Science and Journalism at Miami University and her Juris Doctor at Stetson University. Subsequently, she earned a Graduate Certificate in Health and Hospital law from Seton Hall School of Law.

Endnotes

[1]Though the court did uphold the decision to deny the employer's motion for directed verdict on the count of negligence for failure to train employees on safe driving practices in general – but not regarding a cell phone policy.

Labor and Employment Law Section Governing Board

CHAIR
Craig A. Cowart
Fisher & Phillips, LLP
Suite 312, Renaissance Center
1715 Aaron Brenner Drive
Memphis, TN 38120
(901) 526-0431
ccowart@laborlawyers.com

VICE CHAIR
Donna P. Currault
Gordon, Arata, McCollam, Duplantis & Eagan, LLC
201 St. Charles Ave. 40th Floor
New Orleans, Louisiana 70170-4000
Phone: (504) 582-1111
dcurrault@gordonarata.com

DEPUTY CHAIR
Danielle K. Brewer Jones
The Brewer Law Office, PLLC
1891 Pass Rd.
Biloxi, MS 39531
Phone: (228) 388-0053
dbrewer@brewerlegalservices.com

SECRETARY
Corie Tarara
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd.
Minneapolis, MN 55439
(952) 921-4615
ctarara@seatonlaw.com

TREASURER
Kathryn M. Knight
Stone, Pigman, Walther, Wittmann LLC
546 Carondelet St.
New Orleans, LA 70130
(504) 593-0915
kknight@stonepigman.com

IMMEDIATE PAST CHAIR
Karleen Green
Phelps Dunbar LLP
City Plaza, 445 North Boulevard, Suite 701
P.O. Box 4412
Baton Rouge, LA 70821
Phone: (225) 346-0285
Fax: (225) 381-9197
karleen.green@phelps.com

EDITOR, *The Labouring Oar*
Corie Tarara
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd.
Minneapolis, MN 55439
(952) 921-4615
ctarara@seatonlaw.com

STANDING COMMITTEES:
(All Chairs/Co-Chairs are members of the Governing Board)

Standing Committee on Membership and Chapter Relations
Chair: Danielle K. Brewer Jones
The Brewer Law Office, PLLC
1891 Pass Rd.
Biloxi, MS 39531
Phone: (228) 388-0053
dbrewer@brewerlegalservices.com

Standing Committee on Publications and Public Relations:
Chair: EDITOR, THE LABOURING OAR
Corie Tarara
Seaton, Peters & Revnew, P.A.
7300 Metro Blvd.
Minneapolis, MN 55439
(952) 921-4615
ctarara@seatonlaw.com

Standing Committee on Programming and Continuing Legal Education:
Chair: Donna P. Currault
Gordon, Arata, McCollam, Duplantis & Eagan, LLC
201 St. Charles Ave. 40th Floor
New Orleans, Louisiana 70170-4000
Phone: (504) 582-1111
dcurrault@gordonarata.com

Standing Committee on Finance and Expenditures:
Co-Chairs: Nancy Bloodgood Foster Law Firm, LLC
3875 Faber Place Drive, Suite 204
North Charleston, S.C. 29405
Phone: 843-744-7828
nbloodgood@fosterfoster.com
Kathryn M. Knight
Stone, Pigman, Walther, Wittmann LLC
546 Carondelet St.
New Orleans, LA 70130
(504) 593-0915
kknight@stonepigman.com

Standing Committee on Executive Agency Outreach
Chair: Wanda Pate Jones
Regional Director, Region 27
National Labor Relations Board
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294
(303) 844-3551
wanda.jones@nlrb.gov

Standing Committee on Legislation and Congressional Relations
Co-Chairs: Steven F. Griffith, Jr.
Baker Donelson Bearman Caldwell & Berkowitz, PC
201 St. Charles Ave., Suite 3600
New Orleans, Louisiana 70170
(504) 566-5225
sgriffith@bakerdonelson.com

Standing Committee on Awards
Karleen Green
Phelps Dunbar LLP
City Plaza, 445 North Boulevard, Suite 701
P.O. Box 4412
Baton Rouge, LA 70821
Phone: (225) 346-0285
Fax: (225) 381-9197
karleen.green@phelps.com

CHAPTER REPRESENTATIVES:
(All are members of the Governing Board and of Standing Committee on Membership and Chapter Relations)

Timothy Bliss
Vetter & White
CenterPlace
50 Park Row West, Suite 109
Providence, RI 02903
(401) 421-3060
TBliss@vetterandwhite.com

José Gonzalez-Nogueras
Jimenez Graffam & Lausell
Midtown Bldg. Ste 505
420 Ponce de Leon Ave.
San Juan, Puerchato Rico 00918-3405
Phone: (787) 767-1030
Fax: (787) 751-4068
jgonzalez@jgl.com

Jim Hammerschmmidt
Paley Rothman Et Al Chtd
4800 Hampden Ln 4th Floor
Bethesda, MD 20814
(301) 951-9338
jrh@paleyrothman.com

Whitney Sedwick Meister
Fennemore Craig PC
2394 E. Camelback Road
Suite 600
Phoenix, AZ 85016
(602)916-5412
wmeister@fclaw.com

Joel P. Schroeder
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-8860
joel.schroeder@FaegreBD.com

The Labouring Oar

Labor and Employment Section
Federal Bar Association
1220 North Fillmore Street
Suite 444
Arlington, VA 22201