Federal Bar Association
Labor and Employment Law Section
Spring 2014

The Labouring Oar

Message from the Chair

By Karleen Green

The year is moving quickly. Midyear Meeting is right around the corner. I look forward to representing our Section at that important event.

Our Board has been working hard to provide valuable resources to you, our members. Many of you are probably familiar with our Section's publications. Each month you should receive the *Circuit Updates*. This publication is intended to keep practitioners informed of significant decisions by the federal appellate courts. Ideally, we would like to have each circuit represented by the publication. Currently, we are looking for volunteers to report on recent decisions from the Second and D.C. Circuits. (I encourage practitioners in those circuits to consider contributing.) Several years ago, we began distributing our newsletter, the *Labouring Oar,* to provide updates on developments in the labor and employment area and information on various Section activities. The newsletter is a great way for Section members to become involved by submitting articles to help enrich the practice of labor and employment law. Finally, our section frequently contributes articles to *The Federal Lawyer*. I encourage you to contribute to one of these publications. This is a wonderful way for you to become involved.

Our Board continues to look for opportunities to work with other Sections, Divisions, and Chapters. We were fortunate to participate in the Last Chance CLE sponsored by the New Orleans Chapter in December 2013. We are planning to participate in the Sixth Annual FBA Hawaii Conference in December and have been invited to participate in a conference sponsored by the El Paso Chapter. In addition, we are working with the Federal Litigation Section, Maryland Chapter, and Minnesota Chapter on a few projects. Please look for details in future Section publications. If your Chapter is interested in partnering with our Section to host a CLE or similar event, please contact me.

In addition, our Board has been working on other programming. Save the Date! The 2015 Bi-Annual Conference will be held in New Orleans on March 12–13, 2015. More details about the conference will be available in late fall. Please plan to attend the conference and enjoy all that New Orleans has to offer after the program is completed. We anticipate announcing webinars in the next few months. These programs are an easy way for you to stay informed of issues relevant to our practice.

Please visit our page on the FBA website and let us know how we can better serve you. ■

L&E Section Members are Invited to Get Involved!

The L&E Section provides its members with many ways to become more involved as speakers for CLEs throughout the country, as authors of articles in magazines and newsletters, and participating on committees in your practice area.

- If you are interested in speaking at a CLE program, please contact Craig Cowart (ccowart@laborlawyers.com).
- If you are interested in publishing an article on an L&E topic in one of our publications (Circuit Updates, *Labouring Oar*, or the L&E Corner in *The Federal Lawyer*), please contact Donna Phillips Currault (dcurrault@gordonarata.com).
- If you are interested in working with the Committee on Employee Benefits, please contact Nancy Bloodgood (nbloodgood@fosterfoster.com). ■

A Look at What's Inside

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So Far, Medical Marijuana Laws Have Had Little Impact on the Workplace

By Mark Wilkinson and Jeff Nowak

Currently, twenty-one states and the District of Columbia have legislation decriminalizing the use of marijuana for medical purposes.[1] Six states have similar legislation pending.[2] Going one step further, the states of Colorado and Washington have legalized the recreational use of marijuana.[3] By contrast—and although the United States Department of Justice has issued a directive[4] de-prioritizing marijuana as an enforcement target in states with medical marijuana laws—marijuana remains an illegal schedule 1 narcotic under federal law.[5]

While the conflict between state and federal law may provide interesting fodder for a constitutional law debate, it has left many employers and employees understandably perplexed. For instance, what happens when an employee or applicant with a prescription for medical marijuana fails a drug test? Can the employer terminate that employee or refuse to hire the applicant? So far, the answer seems to be yes.

Although only a handful of medical marijuana cases have addressed the employment issues implicated by these new laws, the courts have acknowledged that state medical and recreational marijuana laws only protect marijuana users from criminal prosecution by their states or from the loss of other state-sponsored benefits. Those laws do not protect employees from the employment consequences of testing positive for marijuana use. Other courts have found that employers have no duty to make accommodations to their policies for employees who use medical marijuana and have rejected other disability-related claims involving medical marijuana use.

For example, in *Casias v. Wal-Mart Stores*, the Sixth Circuit Court of Appeals upheld the discharge of a former Wal-Mart employee who tested positive for marijuana use. [6] Casias had an inoperable cancer that caused him terrible pain. Pharmaceutical pain relievers either provided little relief or undesirable side effects, so Casias' oncologist prescribed him medical marijuana and he had a permit to use it. Casias eventually failed a drug test at Wal-Mart, and after the company fired him, he sued claiming wrongful discharge. The court of appeals affirmed summary judgment in favor of Wal-Mart because the court determined that Michigan's medical marijuana law only gave medical marijuana users a limited protection from criminal prosecution by the state and limited protections from other adverse state actions in certain situations.

The Washington Supreme Court reached a similar result in *Roe v. Teletech Customer Care Management*.[7] In that case, Roe suffered from severe migraine headaches that caused her chronic pain, nausea, blurred vision, and sensitivity to light. Her doctor prescribed her medical marijuana. She applied for and received an offer to work as a telephone customer service representative at Teletech, subject to a background check and drug screen. Roe failed her drug test and Teletech rescinded its conditional employment offer. Roe sue for wrongful discharge. The case made its way to Washington's top court, which held that the state's medical marijuana law did not provide any private employment privileges nor did it imply a cause of action for unlawful discharge. It only decriminalized medical marijuana use in the State of Washington.

The Americans with Disabilities Act prohibits employers from discriminating against persons with disabilities and in some situations, requires employers to provide reasonable accommodations to allow disabled employees to perform their jobs. However, the ADA specifically excludes persons currently using illegal drugs from the definition of a qualified person with a disability[8] and the statute defines an illegal drug as those made unlawful by the federal Controlled Substances Act (which currently includes marijuana).[9] So, not surprisingly, in cases that included claims brought under the Americans with Disabilities Act, the Supreme Courts of Montana and Oregon have both held that an employer has no obligation "to accommodate an employee's use of medical marijuana."[10]

Similarly, in *Ross v. RagingWire Telecommunications*, the California Supreme Court examined its state's medical marijuana laws and the effect on the workplace. Ross, a U.S. Air Force veteran, used prescription medical marijuana to treat his back pain and back spasms.[11] Ross failed a drug test, lost his job, and sued for wrongful termination and disability discrimination. The court acknowledged Ross' back condition qualified him as a person with a disability under the California Fair Employment and Housing Act, which has anti-discrimination protections similar to the Americans with Disabilities Act. But even so, because marijuana remains illegal under federal law, the court held that the California statute "does not require employers to accommodate the use of illegal drugs."[12] The court also rejected Ross' wrongful termination claim because California's medical marijuana statute had no articulated public policy that would require employers to accommodate medical marijuana users.

In addition to failure-to-accommodate theories under the ADA, courts have also rejected regarded-as-disabled disability claims. In *Bailey v. Real Time Staffing Services*, the plaintiff had HIV but never told anybody at work about it other than to say he had a "medical condition."[13] After having undergone a random drug test, Bailey submitted a doctor's note to his employer that said he is on medication that "may cause a positive drug screen." He later submitted another doctor's note that specified marijuana as the drug for which he might falsely test positive. Neither note mentioned his HIV status. The company eventually fired Bailey for failing his drug screen, and he sued for disability discrimination under the ADA. Bailey argued that the company fired him for a manifestation of his HIV status—meaning the positive drug screen was a manifestation of his disability (HIV positive status) and the medication (marijuana) used to treat it. Under a manifestation theory of disability discrimination, a plaintiff can prove causation by showing that the defendant fired him for conduct caused by the disability, such as a narcoleptic employee who fell asleep at work, assuming this does not render him unqualified for the work. The Sixth Circuit Court of Appeals rejected Bailey's theory and characterized his argument as "trying to fit a square peg into a round hole" because he was not fired for his conduct in the ordinary sense. He was fired for the failed drug test and the ADA allows employers to test for illegal drugs. Similarly, in *Curry v. MillerCoors Inc.*,[14] the

United States Court for the District of Colorado dismissed a medical marijuana user's state disability discrimination claim after he had been fired for a positive drug screen because his termination was not "because of" his disability (hepatitis C, osteoarthritis, and pain). The court determined the employer was free to administer drug screens to employees using medical marijuana and terminate those who test positive, even if they would have never used marijuana absent their disabilities.

Although Colorado received heavy media attention for its constitutional amendment that permits recreational use of marijuana as of January 1, 2014, the effect on the workplace should be minimal. The amendment includes language that specifically allows "employers to have policies restricting the use of marijuana by employees."[15] And the Colorado Court of Appeals has already rejected a fired medical marijuana user's challenge to his dismissal under Colorado's lawful activities statute—which makes it illegal for employers to take action against employees who use lawful products outside the workplace—because marijuana is still illegal under federal law.[16] A similar challenge under Colorado's marijuana law for recreational use should not produce a different result.

While some employers in states that have decriminalized marijuana could choose to overlook medical or recreational marijuana use (or modify existing policies), employers that must comply with U.S. Department of Transportation regulations, federal contractors, or those employers that receive federal funds cannot. Employers holding federal contracts or receiving federal funds must comply with the Drug-Free Workplace Act and maintain a drug-free workplace.[17] Employers subject to DOT guidelines must conduct random drug testing, as well as incident testing based on reasonable suspicion, for employees in safety-sensitive positions. Further, the DOT has issued a medical marijuana notice to clarify for employers that marijuana use "remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations."[18] The DOT wanted "to make it perfectly clear that the DOJ guidelines [deprioritizing marijuana prosecutions in states that have medical marijuana laws] will have no bearing on the Department of Transportation's regulated drug testing program."

Therefore, despite some employers' fears that relaxed marijuana laws would bring tremendous change to the workplace, those laws have seemingly done little to alter the status quo thus far. Employers can still terminate employees and refuse to hire applicants who use marijuana, even if that use is lawful under state law. ■

Mark Wilkinson and Jeff Nowak are partners at Franczek Radelet in Chicago. They both practice management-side labor and employment law and handle just about any question or claim involving the workplace. They also represent employers in all aspects of litigation when disputes become unavoidable.

Endnotes

[1]*See* National Conference of State Legislatures, State Medical Marijuana Laws (collecting legislative citations), available at www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[2]Kentucky Senate Bill No. SB 43; Minnesota House Bill HF Nos. 2099 & 1818 and Senate Bill No. HF 1641; New York Senate Bills SB Nos. 1682 & 4406 and Assembly Bill No. AB 6537; Ohio House Bill No. HB 153; Pennsylvania Senate Bill No. SB 1182; Tennessee House Bill No. HB 1385.

[3]Colorado Constitutional Amendment No. 64 (2012); Washington Initiative Measure No. 502 (2011).

[4]U.S. Department of Justice, *Memorandum from Deputy Attorney General James M. Cole to All United States Attorneys, Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at www.justice. gov/iso/opa/resources/3052013829132756857467.pdf.

[5]21 U.S.C. §§ 812(c) & 841(a)(1).

[6]695 F.3d 428 (6th Cir. 2012).

[7]257 P.3d 586 (Wash. 2011).

[8]42 U.S.C. § 12114(a).

[9]42 U.S.C. § 12111(6).

[10]*Emerald Steel Fabricators Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010); *Johnson v. Columbia Falls Aluminum Co. LLC*, 213 P.3d 789 (Mont. 2009).

[11]174 P.3d 200 (Cal. 2008).

[12]Ross, 174 P.3d at 204.

[13]2013 WL 5811647, 28 AD Cases (BNA) 1338 (6th Cir. Oct. 28, 2013).

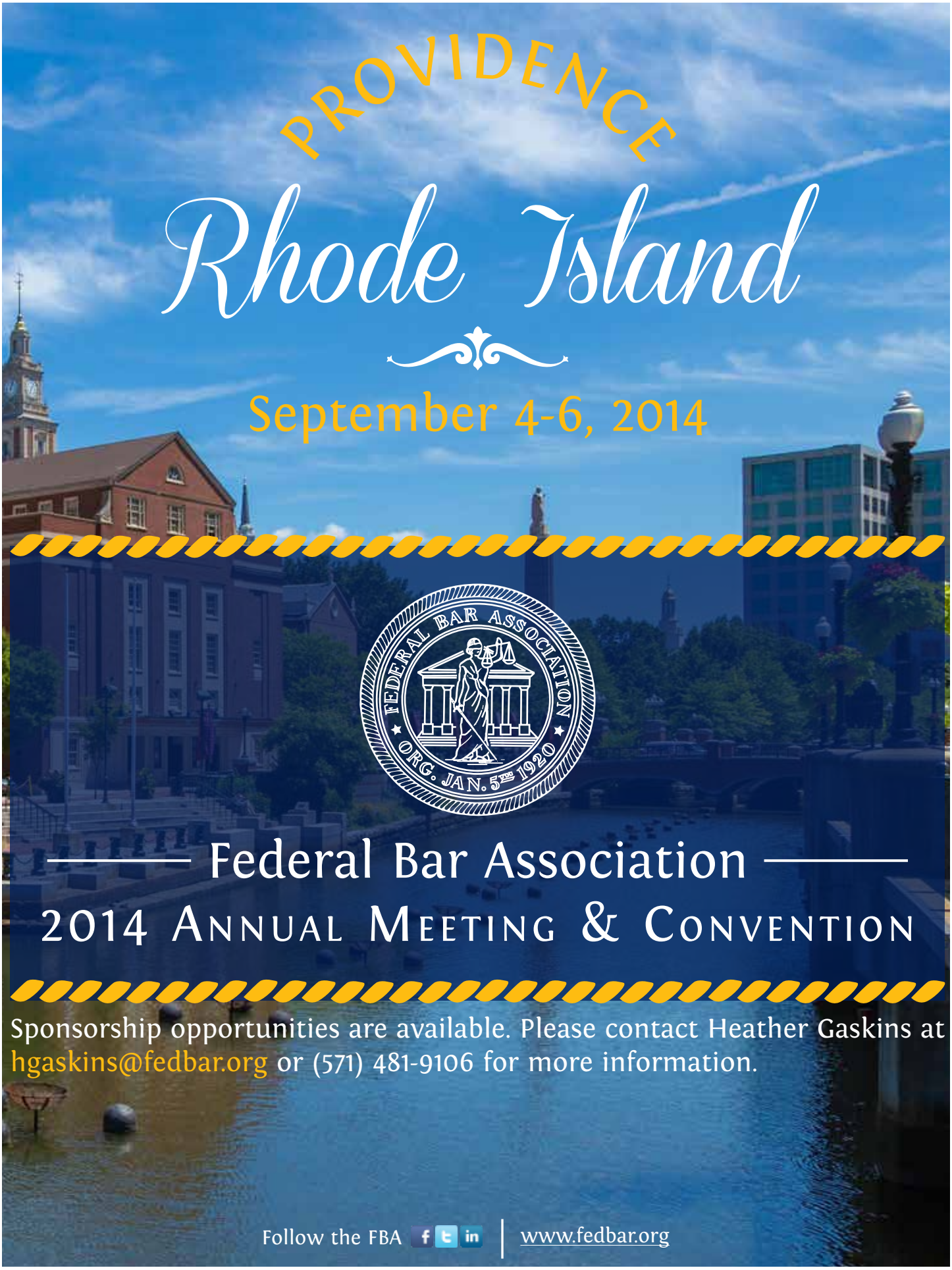
[14]2013 WL 4494307, 28 AD Cases (BNA) 774 (D. Colo. Aug. 21, 2013).

[15]Colo. Const. art. XVIII § 16.

[16]*Coats v. Dish Network LLC*, 303 P.3d 147 (Colo. Ct. App. 2013), *cert. granted*, No. 13SC394 (Colo. Jan. 27, 2014).

[17]41 U.S.C. §§ 8101(a), 8102 & 8103.

[18]U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance Notice (Oct. 22, 2009), available at www.dot.gov/sites/dot.dev/files/docs/ODAPC_medicalmarijuananotice_0.pdf.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Modified Work Schedules under the ADA

By Joyce E. Smithey and Betina Miranda

Modified work schedules are receiving increasing attention as a reasonable accommodation for employees with disabilities. On May 15, 2013, the Equal Employment Opportunity Commission (EEOC) issued four new "Question and Answer" guidance documents (available at www.eeoc.gov/laws/types/disability.cfm) which highlight specific types of reasonable accommodations for persons with cancer, diabetes, epilepsy, and intellectual disabilities. All four documents listed a modified work schedule as a suggested accommodation. But what exactly is a modified work schedule? And when is a modified schedule reasonable or unreasonable, regardless of the impairment at issue? The questions present complex, fact-intensive problems. Fortunately, recent case law across the country provides some practical guidance for employers and employees alike.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against a "qualified individual with a disability" because of a disability. 42 U.S.C. § 12112; 29 C.F.R. § 1630.4. The ADA also requires employers to grant a reasonable accommodation if it would enable an individual to perform the essential functions of the job, unless the employer demonstrates that the accommodation would impose undue hardship to its business. 42 U.S.C. § 12112; 29 C.F.R. § 1630.9. A reasonable accommodation is any change in the work environment or to work practices that allows the disabled individual to enjoy equal employment opportunity. For example, time off for medical appointments and ergonomic office equipment can be reasonable accommodations.

Under the ADA, a modified work schedule can be a reasonable accommodation. According to informal guidance from the EEOC, a modified work schedule can involve adjusting arrival or departure times, changing shift assignments, providing periodic breaks, altering when certain work functions are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. *See* EEOC Enforcement Guidance No. 915.002 (Oct. 17, 2002) (available at www.eeoc.gov/policy/docs/accommodation.html).

Assignment to a "less active" shift can be a reasonable accommodation. In *Christmas v. The Arc of the Piedmont, Inc.*, 2012 U.S. Dist. LEXIS 98385 (W.D.Va. July 16, 2012), the employee, Regina Christmas, suffered from Ehlers-Danlos Syndrome, a connective tissue disorder that limited her ability to walk, bend, lift, and stoop. Her employer, an assisted living facility, assigned her to work the overnight shift as an accommodation as the shift required significantly less physical activity. Ms. Christmas found that she was able to perform her job duties successfully in the overnight shift. However, after Ms. Christmas reported patient abuse to her supervisor, she was re-assigned to day shifts and ultimately terminated. Ruling on the employer's motion to dismiss, the court found that Ms. Christmas stated a plausible failure to accommodate claim. Assignment to the overnight shift would be a reasonable accommodation for her impairment under the facts that she alleged.

A "work when you want" schedule is not a reasonable accommodation. A request for a flexible schedule is not reasonable if the employee requests to work whenever he wants. In *Solomon v. Vilsacks*, 845 F. Supp. 2d 61 (D.D.C. 2012), the employee, Linda Solomon, began missing work after her pre-existing depression worsened. Her regular schedule was 7:30 am to 6 pm, four days a week. Within ten weeks, she used more than 110 hours of leave time by deviating from her normal schedule. Ms. Solomon claimed that she still did all her work and met her deadlines by arriving at work early some days and working late other days, as her condition permitted. She made a request for a "maxiflex" schedule, which Ms. Solomon described as allowing her to work as many or as few hours per day as she wanted, as long as she met her weekly requirement of 40 hours. The employer eventually denied her request. At summary judgment, the court determined that this request was unreasonable as a matter of law, pointing to the fact that Ms. Solomon's job involved meeting frequent deadlines, which she admitted at her deposition. Even if she had "fortuitously" met her deadlines in the past despite her erratic hours, this was not a predictor of future success. The employer was entitled to some predictability given the deadline-driven nature of the position.

Facilitating the employee's commute may be reasonable. Even if an employee does not need an accommodation to perform his job duties, he may need an accommodation to get to work. In *Livingston v. Fred Meyer Stores, Inc.*, 388 Fed. Appx. 738; 2010 U.S. App. LEXIS 15044 (9th Cir. July 21, 2010), the employee, Michelle Livingston, requested an earlier shift so that she would not have to drive home at the end of her shift in the dark. Ms. Livingston had a vision impairment which prevented her from driving and walking outside safely after dark. In fall and winter 2005, her supervisor had modified Ms. Livingston's schedule at her request to minimize driving after dark. However, in fall 2006, the employer refused to make the same accommodation. The court found that because the employer had not experienced any hardship during Ms. Livingston's modified schedule in 2005 (and, in fact, Ms. Livingston had increased sales during that time), her requested accommodation was reasonable and should have been granted.

A modified work schedule may include a part-time work schedule. However, changing a full-time position to a part-time position is not reasonable if the change would require the elimination of an essential job function. Factors that are important in determining whether a function is essential include: the employer's judgment; whether the functions are listed as essential in a job description; whether other employees in the same job position have been required to perform these duties; the number of other employees who are available to perform the function if the disabled employee is not; the amount of time spent performing the function; and whether the function is the purpose of the job. 29 C.F.R. § 1630.2(n); EEOC Opinion Letter dated Feb. 3, 2005, available at www.eeoc.gov/eeoc/foia/letters/2005/ada_reas_accomm.html.

Recent cases indicate that a reasonable part-time modification is likely to be temporary. In *White v. The Standard Insurance Company, Inc.*, 895 F. Supp. 2d 817 (E.D. Mich. 2012), the plaintiff employee, Darla Kay White, worked as a commercial insurance agent in the trucking lines department. She and the other agents worked full-time and had specific customers assigned to them. After an injury to her back and a related medical leave, Ms. White's doctor released her to return to work on a part-time basis with the belief that she would be able to resume full-time work in a couple months. The employer had never employed a part-time agent before, but it agreed to allow her to work part-time for a six-week period as a trial. During this period, Ms. White's supervisor and co-workers observed that the accounts that she was exclusively assigned to were suffering. At her deposition, Ms. White admitted that her not being available full-time was detrimental to her clients. After a few weeks of part-time work, Ms. White's doctor extended her part-time restriction by another month. Ultimately, the employer terminated her employment when she was unable to return to full-time work. At summary judgment, Ms. White argued that she should have been given a part-time schedule on an indefinite basis. The court determined that this was a request that an essential function of her position be eliminated or, at the very least, that she be allowed to perform only some of her responsibilities. The court ruled that this would not be a reasonable accommodation.

Another court came to a similar conclusion in *West v. New Mexico Taxation and Revenue Department*, 757 F. Supp. 2d 1065 (D.N.M. 2010). The employee, Ulrike West, was diagnosed with Relapsing Remitting Multiple Sclerosis. She requested several accommodations, including 20 hours of leave without pay per week and the permanent reclassification of her job from full-time to part-time status. Her employer granted the request for leave but declined to reclassify her position on a permanent basis; it was concerned that, once it abolished the full-time position, it would be difficult to obtain funding for it again in the future. The court found that Ms. West was reasonably accommodated with the grant of 20 hours of leave per week and that the employer was not required to permanently reclassify the position.

Likewise, in *Konspore v. Friends of Animals, Inc.*, 2012 U.S. Dist. LEXIS 38334 (D. Conn. Mar. 20, 2012), the plaintiff, Sharon Konspore, was the accountant and controller for a non-profit organization. She requested a permanent change from full-time to part-time status because of the symptoms of her chronic Lyme disease. Ms. Konspore argued at summary judgment that the job could be done in 20 hours per week. However, she testified at her deposition that she often worked more than 40 hours per week in order to "get the job done." The court found this determinative of the fact that full-time status was an essential function of her job.

As the above cases illustrate, determining a reasonable modified work schedule is not a simple question: it requires a thorough, detailed assessment of the individual circumstances. This assessment, however, is necessary, as modified work schedules continue to be requested by employees. ■

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FBA L&E Section Co-Sponsors Affordable Care Act CLE Program with the New Orleans Chapter of the FBA

On Dec. 19, 2013, the L&E Section joined with the New Orleans Chapter of the Federal Bar Association to present a 1-hour CLE on "Understanding the Affordable Care Act." L&E Section Chair Karleen Green of Phelps Dunbar and Layna Suzanne Cook of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC addressed the Affordable Care Act from both the employment and health care law perspectives. ■

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