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Making Sense of Recent Employment Law Cases

Presented by
Laura M. Dinon
John S. Gilliam

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Today's Presenters



Laura M. Dinon
(231) 348-6417
ldinon@plunkettcooney.com



John S. Gilliam
(248) 433-7082
jgilliam@plunkettcooney.com



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Outline of Discussion

- Supreme Court decisions
- Sixth Circuit decisions
- Michigan decisions
- Legislative update
- What to watch for: employment law trends
- Questions





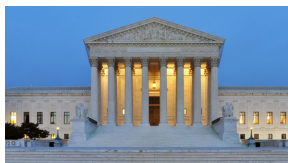
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U.S. Supreme Court

- Supreme Court continues to consider critical questions that implicate labor and employment law.
- Important takeaways from 2021-2022 term ...



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Viking River Cruises v Moriana

(Jun. 15, 2022)

- 8-1 ruling – Federal Arbitration Act allows employers to enforce arbitration agreements regarding individual claims asserted under the California Private Attorneys General Act.
- Highly anticipated for California employers but may have implications in a broader realm: can compel **individual arbitration** of claims.

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Dobbs v Jackson Women’s Health Organization (Jun. 24, 2022)

- Overturning *Roe v Wade* and *Planned Parenthood v Casey* and holding that there is no right to abortion in the U.S. Constitution; returned the authority to regulate abortion to the individual states.
- Employment Implications:
 - May see benefits changes (reproductive healthcare coverage)
 - Emotional responses/protests (freedom of speech, etc. issues may be implicated)
 - EEOC: employers may not discriminate against employees on the basis of an employee’s decision to have an abortion (Title VII).

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National Federation of Independent Business v Depart. of Labor (Jan. 13, 2022)

- 6-3 decision
 - Court blocked the Biden administration’s vaccination-or-testing requirement for “large” employers.
 - Generally supportive of state pandemic initiatives but said that the federal government lacked the power to impose sweeping requirements on workplaces throughout the country.



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Biden v Missouri (Jan. 13, 2022)

- 5-4 opinion
- Separation from *National Federation*, the Supreme Court allowed a different policy to go forward requiring COVID-19 vaccinations for most health care workers at facilities that receive Medicaid and Medicare funds.
- Federal law gives the U.S. Health and Human Services secretary responsibility for protecting the safety of patients and controlling the spread of infectious diseases.



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Kennedy v Bremerton School District (Jun. 27, 2022)

- 6-3 opinion
- Conservative majority sided with a former high school football coach who was fired after leading postgame prayers on the 50-yard line.
- Coach’s prayers at the public school event were protected by the Constitution’s guarantees of free speech and religious exercise.
- Did not violate the prohibition on government endorsement of litigation



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Sixth Circuit Updates

- Continued slowdown during pandemic
- Most notable case since last year was OSHA ETS ruling – temporarily dissolving the stay (before being reversed by SCOTUS in *National Federation*).
- Continues to trend *pro-employee* with a few notable exceptions



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Rachel Post v Trinity Health-Michigan **(Aug. 12, 2022)**

- Sixth Circuit affirmed dismissal of ADA claim.
- Post was previously an employee of the hospital, but in 2013, the hospital “outsourced” its anesthesiology department and was employed by Wayne State University Physician Group – an independent contractor for the hospital.
- Claims against hospital could not proceed because the ADA’s employment provisions do not allow suits against third-party, non-employers.



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Sims-Madison v Dana Commercial Manufacturing, LLC **(Mar. 28, 2022)**

- Employee referenced discussions of “retirement” to try to support her age discrimination allegations against the company.
- The Sixth Circuit found that it was the plaintiff herself who first introduced the idea of possible retirement.
- “Mere inquiries or comments about a potential retirement” generally are not enough to prove pretext, but statements about retirement can become actionable if they involve pressure on an employee to retire or a bias against older workers.
- Note: tread lightly!! Can still be evidence of pretext and subject to a “he said/she said” dispute.



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Bledsoe v Tennessee Valley Authority Board of Directors (Jul. 27, 2022)

- Employee sued, alleging violation of Age Discrimination in Employment Act (ADEA) and Rehabilitation Act
- After returning from medical leave, employee’s supervisor frequently commented on employee’s health and age.
- Employee was demoted following an ethics investigation.
- Court held that factual dispute existed whether employee’s supervisor used ethical concern as a pretext to convince the other committee members to demote employee.



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Michigan Legal Developments

- Generally, speaking – significantly fewer new laws took effect in 2021/2022.
- December 2020 – Michigan Legislature passed COVID-19 leave laws.
 - PA 339 of 2020 is still effective.
- Flurry of recent activity:
 - ELCRA prohibits gender identity discrimination.
 - PMLA / minimum wage / tip credit could *dramatically* change.



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PA 339 of 2020 – Reminder

- Outlines COVID-19 **isolation/quarantine** periods
 - Incorporates changing federal, state and local health guidelines
 - Typically requires review of county health department requirements / CDC guidance
- Prohibits employers from taking certain actions against employees who do not report to work during those periods, as well as those who oppose violations of the Act or report health violations related to COVID-19.



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MIOSHA COVID-19 Rules

- June 22, 2021 – rescinded COVID-19 Emergency Workplace Rules
 - Adopted federal OSHA Emergency Temporary Standards for healthcare employers
- MIOSHA encourages employers to follow CDC guidance for vaccinated and unvaccinated individuals.
 - No need for COVID-19 Preparedness and Response Plan, daily screening records, training, etc.
 - Do need to comply with general requirement to maintain a safe workplace (i.e., don't throw "caution to the wind").



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Michigan Court Updates

- **James v Quanta Serv. Inc., 2022 WL 1658843 (E.D. Mich. Jun. 1, 2022)**
- Pending litigation under Title VII of Civil Rights Act of 1964
- Claims involving hostile work environment and denial of promotion because of his race
- Plaintiff's motion in limine to exclude EEOC notes, opinions, findings
- Defendant wanted to introduce charge form for impeachment purposes.
- Court found the defendant should be allowed to use the charge of discrimination to impeach the plaintiff's testimony.



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Whitcher v McLaren Lapeer Region

(E.D. Mich. Jan. 19, 2022)

- Former human resources manager filed suit alleging retaliation under Title VII and Elliot Larsen Civil Rights Act (ELCRA).
- Court granted summary judgment to employer based on employee's failure to engage in protected activity under the opposition clause or participation clause of Title VII and ELCRA.
- What are the opposition clause and participation clause?
- Court held plaintiff could not establish prima facie case of retaliation.



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Walls v Graphic Packaging Corp.

(W.D. Mich. Apr. 19, 2022)

- Employee was terminated for leaving his scheduled shift four hours early without permission to go to a doctor’s office.
- Employee filed suit, alleging violations of ELCRA, Persons with Disabilities Civil Rights Act (PWDCRA) and public policy.
- Retaliation and discrimination under PWDCRA
- Pretext and legitimate, non-discriminatory business reason
- Because employee could not establish prima facie case of retaliation or that legitimate, non-discriminatory reason was pretextual, dismissal was affirmed.



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McNeill-Marks v MidMichigan Med.

Ctr-Gratiot (Mich. App. Feb. 10, 2022)

- Employee appealed dismissal of former employee’s claim under Whistleblower Protection Act (WPA).
- At issue was whether plaintiff met the reporting requirement of WPA by informing her attorney of a violation of a personal protection order that she had against a family member.
- Discussion of the elements of WPA claim
- Trial court correctly held the plaintiff failed to make a “report” under the WPA, and summary disposition was proper.



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TBI Solutions, LLC v Gall

(Mich. App. Feb. 24, 2022)

- Former employee challenged arbitration provision in employee agreement, arguing he did not sign the agreement and could not be bound by provision.
- In arbitration, employer received award of damages, plus attorney fees and costs as prevailing party.
- Former employee challenged enforcement of arbitration award of attorney fees and costs.
- Collateral estoppel precluded re-litigation of issue.
- Court affirmed trial court’s confirmation of arbitration award.



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Naylor v Mich. State Police

(Mich. App. Mar. 17, 2022)

- Case involved sex discrimination under ELCRA.
- Prohibited conduct under ELCRA, MCL 37.2202
- Elements of a prima facie case
- Issue on appeal was whether employee suffered an adverse employment action.
- While positions held same rank, same title and had identical pay, benefits and retirement access, court found denial of lateral transfer was an adverse employment action.



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Chambers, et al. v Catholic Charities of Shiawassee, et al.

(Mich. App. Jun. 23, 2022)

- Former employees brought suit alleging race-based employment discrimination and retaliation in violation of ELCRA.
- Employer moved to dismiss on the basis that the parties had entered into binding arbitration agreements.
- On appeal, employees argued the trial court erred by concluding the parties were bound by arbitration agreements in employee handbook.
- Court held that arbitration agreements in handbook did not form a binding contract.



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Stegall v Resource Tech. Corp., et al.

(Mich. July 15, 2022)

- Plaintiff appealed to Supreme Court holding of COA that the public policy claim fails because exception does not extend to discharges in retaliation for internal reporting of alleged violations of the law.
- Plaintiff's public policy claim was premised on two well-recognized exceptions: (1) exercising a right conferred by well-recognized legislative enactment and (2) failure or refusal to violate the law.

Continued



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Stegall v Resource Tech. Corp., et al.

- Supreme Court recognized the COA has previously held that a plaintiff could support a public-policy claim on the basis of internal reporting.
- Supreme Court noted: “We see no reason why limiting public-policy claims to external reports would serve the welfare of the people of Michigan, especially where the WPA might otherwise preempt claims that involve reports to public bodies.”
- In *Stegall*, the plaintiff had good-faith belief of asbestos regulations violations at his workplace and followed proper internal reporting procedures.
- Internal report was sufficient to state a public-policy claim.



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Rouch World LLC et al v MDCR et al **(Mich. Jul. 28, 2022)**

- Supreme Court affirmed that the ELCRA prohibits discrimination because of an individual’s sexual orientation.
- Sexual orientation is “inextricably bound up with sex,” because a person’s sexual orientation is generally determined by reference to their own sex.



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Mothering Justice, et al v Dana Nessel & State of Michigan (Mich. COC Jul. 19, 2022)

- If upheld on appeal, will upend Michigan’s Paid Medical Leave Act (PMLA) and wage and hour laws regarding minimum wages and tipped wages.
- Case filed to challenge method used by Legislature to enact 2018 PA 368 and 2018 PA 369 as unconstitutional.
 - Began as voter-initiated laws heading for a vote on the ballot; before they hit the ballot, Legislature legally enacted and then amended during lame duck sessions (“adopt and amend”).
- **Affect of ruling STAYED UNTIL AT LEAST Feb. 19, 2023** (could be further extended)



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EEOC Trends

- COVID pandemic resulted in dramatically reduced investigatory activity (starting to ramp back up).
 - Backlog of cases and new investigators
- Rumor: *more aggressive litigation tactics in the future*
- What we see: disability rights/medical leave cases continue to be more closely scrutinized.
 - Especially in light of COVID-19 and upward trend in medical leave laws



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Medical Leave Issues

- COVID-19 effects are still being felt/processed, including mental health conditions and long-COVID cases.
 - More “intermittent leave” issues
 - More requests for leave/accommodations
 - More demands for remote work (even for traditionally non-remote jobs)
- Require careful examination of interplay between FMLA/ADA and ensuring **interactive process** is followed and **documented**.



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Closing Thoughts

- Expect to see continued expansion of workers’ rights in 2023.
- Keep a close eye on PMLA and minimum wage provisions **but don’t panic yet!** Appeals could result in multiple stays.
- Don’t diminish illness/sickness/medical conditions as not rising to the level to implicate ADA/FMLA/leave protections. Must have a well-documented and **consistent process**.
- Review your handbooks and agreements for necessary updates.
- Feel free to ask for help!




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Questions?



Laura M. Dinon
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ldinon@plunkettcooney.com




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(248) 433-7082
jgilliam@plunkettcooney.com

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Court Delays Ruling on Fate of Michigan's Paid Sick Leave, Minimum Wage Laws Until February 2023

Large employers may find that fewer Michigan employees in the state until at least February 2023 about the fate of the state's paid sick leave and minimum wage laws.

Michigan Supreme Court Affirms State's Civil Right Law Prohibits Discrimination Based on Sexual Orientation

The Michigan Supreme Court has affirmed the state's civil rights law, which prohibits discrimination based on sexual orientation.

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Have a Great Day!

Thank You

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