FIVE HOT TOPICS IN EMPLOYMENT LAW 2013

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HOT TOPIC NO 1. **Shifting Causation Standards In Retaliation Cases: Game-Changers?**

In *Gross v. FBL Financial Services, Inc., 557 U.S. ___, 129 S.Ct. 2343 (2009),* the United States Supreme Court engaged in statutory language analysis and held that mixed motive "motivating factor" analysis does not apply to ADEA claims. *Gross* held that in ADEA disparate *treatment* claims, Plaintiff must prove that age was the "but for" cause of the challenged adverse employment action and that an employer does not carry the burden of proving that it would have made the same decision regardless of age.

Recently, in *University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (6/24/13),* Dr. Naiel Nassar, a medical doctor of Middle Eastern descent, alleged that the University of Texas Southwestern Medical Center retaliated against him for complaining of alleged harassment. The jury was instructed that retaliation claims, like discrimination claims, require only a showing that retaliation was a motivating factor for the adverse action, rather than its but-for cause. The jury returned a verdict for Dr. Nassar. The Fifth Circuit affirmed.

The jury instructions selected one position out of the split in the circuits on the proper standard of causation. Relying on *Gross* in the ADEA context, the First, Sixth and Seventh Circuits, had held that unless Congress included statutory language to the contrary, the plaintiff must establish that the employer's action was the "but-for" cause for the adverse action. Other Circuits that had considered the question had limited *Gross'* holding to ADEA claims.

In the Supreme Court, a 5-4 majority resolved the circuit split concerning the proper standard of causation for retaliation claims in Title VII cases and more. *Nassar* held that Title VII retaliation provisions *and similarly worded statutes* require the plaintiff to establish "but-for" causation. In other words, based on the explicit statutory language the majority identified, *Nassar* held that the mixed motive or "motivating factor" analysis does not apply to Title VII *retaliation* claims, but will continue to apply to Title VII race, color, religion, sex and national origin *discrimination* claims.

HOT TOPIC NO. 2. **Family Medical Leave Act: The Twilight Zone**

The FMLA requires employers who employ fifty (50) or more employees to provide up to 12 weeks of unpaid leave to eligible employees for purposes related to pregnancy, serious illness, or the need to care for a seriously ill dependent. The FMLA is an area of law fraught with uncertainty. The Circuit Courts of Appeal have split on various issues such as individual liability

for supervisors at public agencies versus private businesses, whether employees can release FMLA claims without DOL or court supervision, the proper standard of proof to establish a "serious health condition."

As another aspect of the uncertainty, the FMLA only generally prohibits discrimination and interference with the benefits conferred under the statute. Section 2615(a) (2), *9 U.S.C. § 2615(a) (2),* the "retaliation" provision, makes it unlawful for an employer to "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by the [FMLA]."

Section 2615(a)(1), *9 U.S.C. § 2615(a)(1),* the FMLA "interference" provision, provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided in this subchapter." Section 2614(a)(1), provides that "any eligible employee who takes leave. . . shall be entitled, on return from such leave (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position." Together, these provisions have been interpreted as prohibiting interference with FMLA leave rights.

The United States Department of Labor Regulations add some certainty by making it unlawful to "discriminate" against employees who have used FMLA leave or to use the taking of FMLA leave as a negative factor in hiring, promotion decisions, discipline or other employment actions, 29 C.F.R. §825.220(c).

Left open is the question of the extent of prohibitions on interference and retaliation for use of FMLA leave, what proof is required to establish a claim, what standards and remedies apply, the extent of the employer's right to demand medical information, what constitutes a "serious health condition" and the list goes on. Generally, in the FMLA area, employers, employees and their families are left to swim in an ocean of government agencies and battling interest groups, while their counsel try to reconcile the regulatory guidance with conflicting case law and reasonably predict outcomes.

A. Definition of "Employee" under FMLA

In *Mendel v. City of Gilbraltar, 2013 U.S. App. Lexis 16922 (6th Cir.) (8/15/2013),* the Sixth Circuit Court of Appeals concluded that volunteer firefighters were "employees" for purposes of the FMLA and FLSA. The FMLA borrows its definition of "employee" from the FLSA. Accordingly, the Sixth Circuit looked to the FLSA definition and interpreting case law. The FLSA defines "employee" as an "individual employed by an employer" and "employ" as to "suffer or permit to work." An FLSA provision excludes public agency volunteers who receive nominal fees for their services. The majority determined that the $15 per hour paid to volunteer firefighters who responded to fire was a "substantial" rather than "nominal" fee.

B. Interference and Retaliation FMLA Claims

In *White v. Dana Lighting Axle Mfg., LLC, 2013 US App Lexis 16279 (8/7/2013),* the Sixth Circuit recently proclaimed the plaintiff's burden of proof when bringing an FMLA interference claim: (1) plaintiff was an eligible employee; (2) the defendant was an employer as defined under the FMLA; (3) plaintiff employee was entitled to leave under the FMLA; (4) plaintiff employee gave the employer notice of his intention to take leave; and (5) the employer denied the employee FMLA benefits to which he was entitled. *But see Donald v. Sybra*, Inc., 667 F.3d 7575 (6th Cir. 2012) (applying *McDonnell Douglas* analysis in FMLA interference claim); *Jaszczyszyn v. Advantage Health Physician Network, 504 Fed. App. 440 (6th Cir. 2012*) (affirming that honest belief defense applies in an FMLA interference claim).

In *Potenza v. City of New York, 365 F.3d 165 (2d Cir. 2004),* the Second Circuit held that FMLA motive-based *discrimination* claims should be evaluated under the same standard as Title VII claims. In other words, the Second Circuit concluded that a Plaintiff must prove that: (1) he exercised rights protected under the FMLA; (2) he was qualified for the position; (3) he suffered an adverse employment action; and, (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. The Second Circuit concluded that the *McDonnell Douglas* could be applied to (motive-based) discrimination claims. The Second Circuit made no express ruling as to whether interference claims are motive-based clams.

The burden of proof in interference claims under the FMLA remains subject to debate. *Thomsen v Stantec, Inc., 2013 U.S. LEXIS 751 (Jan. 14, 2013)* sought to have the Court consider the issue. On January 14, 2013, the Supreme Court denied a petition for the writ of certiorari.

2. Strong Employer FMLA Policy Enforced

In *White v. Dana Light Axle Mfg., LLC, 2013 US App Lexis 16279 (8/7/2013)1,* concerned an FMLA interference claim. The employer's FMLA policy was very explicit and went beyond the bare minimum that would normally be required. *White* concerned the fourth element; namely, whether an employer may impose and enforce its own internal notice requirements, even if those requirements go beyond the bare minimum that would generally be sufficient under the FMLA to constitute proper notice.

In *White,* the employer's FMLA policy required a medical certification and for the employee to call in daily in order to receive an excused absence. The employer's policy stated that the employer could deny or delay the FMLA leave if the FMLA policy requirements were not met. The employee sought FMLA leave for hernia surgery. Initially, the employee

1 This case is also denoted as *Srouder v. Dana Light Axle Mfg*. However, only Plaintiff White appealed to the Sixth Circuit.

submitted an incomplete medical certification and was given an opportunity to complete it by a certain date. Subsequently, the employee failed to comply with the employer's FMLA policy requirement to call in daily. His failure to comply with the frequent call-in policy resulted in unexcused absences and his termination.

Holding. Noting revised FMLA regulations as of January 2009, 2 the Sixth Circuit Court of Appeals held that an employer may enforce its usual and customary notice and procedural requirements against an employee claiming FMLA-protected leave, unless "unusual circumstances" justify the employee's failure to comply with the employer's requirements. White had produced no evidence demonstrating the type of "unusual circumstances" that would have justified his failure to follow the call-in requirements of Dana's attendance policy. The District Court's grant of summary judgment to the employer on the FMLA interference claim was affirmed. *Contrast Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. 2012), (casual comments made to a supervisor about a parent's poor health did not constitute adequate notice of FMLA leave); *Pagel v. TIN Inc.*, 2012 U.S. App. LEXIS 16548 (7th Cir. 2012) (employer's knowledge of an employee's own health condition was tantamount to implicit demand for leave).

3. Employer's Honest Belief Is FMLA Defense

FMLA retaliation claims involve the employer's motive for the adverse action. In cases in which the employer's motive for an action is in question (i.e., retaliation), employers may rightfully investigate suspected abuses of FMLA leave and assert "good faith" or "honest belief" as basis for the action. In *Hall v. Ohio Bell Telephone Company, 2013 U.S. App. Lexis 12825 (6th Cir.) (6/17/2013),* the employer suspected FMLA abuse, undertook an investigation and ultimately terminated the employee for FMLA abuse. The employer's decision was affirmed.

In *Jaszczyszyn v. Advantage Health Physician Network, 504 Fed. App. 440 (6th Cir. 2012*), the Plaintiff attended a festival while totally incapacitated and on FMLA leave. Her conduct was revealed to her employer vis-a-vis photos on her Facebook page. Upon termination, Plaintiff sued for FMLA retaliation and interference. The Employer argued its honest belief that Plaintiff was abusing her FMLA leave. The District Court granted summary judgment.

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2 The *White* Court noted that *29 C.F.R. § 825.304(e)* provides:

> An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

In affirming as to the retaliation claim, the Sixth Circuit accepted the honest belief rule which provides that so long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext. The Sixth Circuit agreed that the plaintiff failed refute the employer's honest belief that her behavior in the photos was inconsistent with her claims of total disability. The Sixth Circuit neither accepted nor rejected the honest belief rule as to the interference claim, declining to rule on whether an FMLA interference claim is motive-based or imposes strict liability of something less. Instead, the Sixth Circuit concluded that the plaintiff had all of the FMLA leave to which she was entitled. Thus, no interference could have occurred.

In Scruggs v. Carrier Corporation, 688 F.3d 821 (7th Cir. 2012), a private investigator determined that Scruggs had abused FMLA leave on one of three occasions. Scruggs sued for FMLA interference and retaliation. In affirming summary judgment, the Seventh Circuit accepted the "honest belief" rule on both claims. The Seventh Circuit reasoned as follows.

"An employee who takes leave under the FMLA is only entitled to reinstatement if he "takes leave under [the FMLA] for the intended purpose of the leave." 29 U.S.C. § 2614(a)(1). Thus, "an employer can defeat an interference claim by showing, among other things, that the employee did not take leave 'for the intended purpose.'" *Vail v. Raybestos Prods. Co., 533 F.3d 904, 909 (7th Cir.2008) (quoting Crouch, 447 F.3d at 986).* In the Seventh Circuit, because an employee has "no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed," *29 C.F.R. § 825.216(a)*, an employer need only show that "it refused to reinstate the employee based on an 'honest suspicion' that she was abusing her leave," Vail, 533 F.3d at 909. *Accord Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 681 (7th Cir.1997)* ("In other words, because Navistar lawfully could have terminated Kariotis after suspecting she committed fraud while on duty, the company can discharge her after suspecting she committed fraud while on leave.").

4. FMLA Light Duty Work: A Non-Starter

An employer is obligated to return an employee returning to work from FMLA leave to an equivalent position. The applicable FMLA regulation considers an equivalent position as one that is "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."

But, what about an employee's obligation to return to work able to perform the job? Can employee demand to return to work to perform light duty under the FMLA?

In *James v. Hyatt Regency Chicago, 707 F.3d 775, 2013 WL 514097 (7th Cir. 2013)*, reh. denied, 2013 U.S. App. Lexis 7076, the Seventh Circuit rejected the proposition that under the FMLA an employee who can only perform light duty work can be returned to his former position. When his employer refused to return him to work on "light duty," James sued Hyatt for FMLA interference and retaliation. The District Court dismissed. Noting its prior holding in *Hendricks v. Compass Group, USA, Inc., 496 F.3d 803, 805 (7th Cir. 2007)*, that, "[t]here is no such thing as 'FMLA light duty,'" the Seventh Circuit affirmed. Since James had no entitlement to light duty work, the Seventh Circuit found that no interference with James' FMLA benefits occurred. The Seventh Circuit also concluded, in turn, that Hyatt's failure to assign James to light duty was not an "adverse action" under the FMLA. The dismissal of the FMLA retaliation claim was likewise affirmed. (Note: *James* also included an ADA failure to reasonably accommodate claim which was also rejected.)

5. **Windsor: FMLA Benefits For Same Sex Couples**

On June 26, 2013, the U.S. Supreme Court, in *United States v. Windsor*, 133 S.Ct. 2675 (2013), held unconstitutional Section 3 of the federal Defense of Marriage Act (DOMA), which defined marriage as between persons of the opposite sex for the purpose of many federal benefits. On August 9, 2013, the DOL issued regulatory guidance to conform to the United States Supreme Court's decision in *Windsor* holding DOMA unconstitutional. The regulatory guidance confirms that same-sex married couples are entitled to the same benefits of the FMLA as heterosexual married couples. The FMLA provides spouses with up to 12 weeks of job-protected, unpaid leave to care for a spouse with a serious health condition, or deal with certain obligations arising from a spouse being on, or called to, active duty in the military. Under the FMLA, a "spouse" is "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." *29 C.F.R. § 825.102*. As a result of *Windsor*, in states where same-sex marriage is legal same-sex couples will become eligible for certain federal spousal benefits that previously had been denied.

HOT TOPIC NO. 3. Hand Guns In The Workplace

Illinois Firearm Concealed Carry Act, 430 ILCS 66/1, *et seq.*

While the Second Amendment right to keep and bear arms does not end when a citizen leaves the house, does it extend to the right to have a concealed handgun at work or in company cars? In July 2013, Illinois became the fiftieth state in the Union to pass a gun control law, the Firearm Concealed Carry Act ("FCCA"). The FCCA requires citizens to obtain a concealed carry license ("CCL") and also have a valid Firearm Owners Identification Card ("FOID"). Under the FCCA, persons who obtain a CCL will have the right to carry a concealed hand gun into private businesses and workplaces unless the business either expressly prohibits

weapons by posting signage OR the "area" is statutorily "prohibited. The Illinois FCCA contains a "prohibited area" exception. In these prohibited areas, concealed carry is statutorily prohibited as to the business *and its parking area* – such as hospitals, libraries, airports, museums, gaming facilities, zoos and others. However, private businesses will have to cope with concealed handguns in vehicles in private parking lots. Under the Illinois law, the concealed hand gun does *not* include taser or stun guns.

Illinois is a "must issue" state. Thus, a licensee must be granted a CCL unless law enforcement can show a suspicion that the applicant is a danger to himself or herself or others or a threat to public safety. A CCL may be revoked upon entry of an order of protection, including *ex parte* orders of protection; expiration, being found ineligible for a FOID card, being under the influence of drugs or alcohol and other statutorily listed reasons.

Information about the FCCA is available on the Illinois State Police website. The first CCL's will not issue until at least 2014. In the meantime, employers should begin to plan for employees and visitors carrying concealed weapons, about adopting and instituting workplace policies, such as whether to prohibit concealed hand guns in the workplace, what to do about visitors carrying a concealed hand gun, a policy for leased or owned company vehicles, training staff in dealing with threats of violence, maintaining a system to determine the existence of a valid CCL, workplace searches and others.

HOT TOPIC NO 4. **<u>Medical Marijuana</u>**

In 2005, the U. S. Supreme Court decided *Gonzalez v. Raich, 545 U.S. 1 (2005)*. *Gonzalez* began as a 2002 raid by federal Drug Enforcement Administration (DEA) agents and a local sheriff, followed by seizure and destruction of homegrown marijuana plants from a patient who lawfully possessed the plants under California law. An arrest was made under the federal Controlled Substances Act. Ultimately, the Ninth Circuit granted a preliminary injunction against federal enforcement declaring: "We find that the appellants have demonstrated a strong likelihood of success on their claim that, as applied to them, the Controlled Substances Act is an unconstitutional exercise of Congress' Commerce Clause authority . . . ."

Review was sought. The Supreme Court was faced with resolving its earlier restrictive interpretations of the Commerce Clause and stretching the concept of "regulation of interstate commerce" to a private person growing plants in a private home in California for medicinal use.

Amicus briefs were filed on both sides. Partnership for a Drug-Free America, and other anti-drug organizations, and an alliance of seven congressmen including Mark Souder and Katherine Harris filed amicus brief for the side of federal government. Fearing limitation on the federal power on their efforts, the environmentalist group Community Rights Council filed a brief for the government. The Cato Institute, Institute for Justice, NORML and other groups

opposing the War on Drugs filed briefs for Raich and Monson. The State of California, Maryland, and Washington filed briefs supporting Raich. The Attorneys General of Alabama, Louisiana and Mississippi (ordinarily conservative southern anti-drug states) filed amicus briefs challenging the federal government's exercise of authority under the Commerce Clause as an invasion of rights reserved to the states under the Constitution.

The Supreme Court ultimately upheld the DEA's enforcement of the federal CSA as a legitimate exercise of Commerce Clause. The majority opinion adopted the notion that the private person's plant growing in the private home could affect the demand in the interstate market. The highly critical dissenters characterized the majority position as an unreasonable intrusion into rights the Founding Fathers expressly left to the states and severely criticized the logic and limits of the majority's opinion. *Raich* is a tremendous debate in the constantly evolving concept of federalism. However, the Supreme Court's affirmance of the constitutionality of the CSA and the implicit continued legitimacy of the Schedule I drug classification for marijuana at the federal level provides employers some guidance--at least under federal law and for now.

In 2009, the Obama administration issued guidance to the United States Attorneys directing against criminal prosecution of patients lawfully using marijuana under state law for medical reasons as an "inefficient" use of federal resources. A multi-billion dollar industry grew up in a matter of a few years. Since then the Department of Justice has raided hundreds of dispensaries, while the IRS and other federal law enforcement officials have gone after banks and landlords who do business with them. U.S. attorneys in the states helped beat back local efforts to regulate the medical marijuana industry, going so far as to threaten elected officials with jail. As of August 28, 2013, the Obama Administration issued further guidance such that the federal government will not target citizens and businesses selling, possessing or using marijuana in compliance with state law, but will prioritize the following areas to prevent: the distribution of marijuana to minors; revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; state authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or activity; preventing drugged driving and other adverse health consequences due to marijuana use; the growth of marijuana on public lands; the possession or use of marijuana on federal property.

A. Illinois Medical Marijuana Law

On August 1, 2013, Illinois became the twentieth state to legalize medical marijuana. Illinois' law is a four year pilot project which takes effect on January 1st and is probably the strictest law among the states that have enacted a similar statute. Under the law, the Illinois Department of Public Health, the Department of Agriculture and the Department of Financial and Professional Regulation are required to promulgate administrative rules. As structured, the marijuana must

be grown in Illinois. IDPH will issue permits under an application process to be developed and will maintain a confidential registry of patients. Growing centers will be set up in each Illinois State Police District and will be registered and regulated by the Illinois Department of Agriculture. Dispensing organizations are to be registered by the Department of Financial and Professional Regulation (IDFPR), which may approve up to 60 dispensaries.

Only patients who have serious illnesses and have a long-term relationship with a doctor will be able to apply for an Illinois medical marijuana card. The new law lists dozens of qualifying illnesses, including lupus, HIV, hepatitis C and multiple sclerosis. Patients will be allowed to purchase up to 2.5 ounces of cannabis every two weeks; no one under 18 will be eligible.

Background checks for patients, caregivers, dispensary staff, and growing center staff will be required. Cultivation centers will be under video surveillance 24 hours a day. Patients are not allowed to "home-grow" cannabis. Illinois won't recognize the medical marijuana laws of other states. As of today, marijuana remains classified as a Schedule I drug prohibited under the federal Controlled Substances Act, and possession, manufacture, distribution and dispensing continue to carry federal criminal penalties.3 So long as marijuana use, possession and sale remain a federal felony, medical marijuana presents a host of issues for employers.

B. <u>Americans With Disabilities Act and Medical Marijuana</u>.

Title I of the Americans with Disabilities Act permits employers to ensure that the workplace is free from the illegal use of drugs and the use of alcohol, and to comply with other federal laws and regulations regarding drug and alcohol use. The ADA provides that any employee or job applicant who is "currently engaging" in the illegal use of drugs is not a "qualified individual with a disability." Therefore, an employee who illegally uses drugs—whether as casual user or as an addict—is not protected by the ADA if the employer acts on the basis of the illegal drug use. As a result, an employer does not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs. "Qualified individuals" under the ADA include those individuals who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs; who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs; who are regarded, erroneously, as illegally using drugs.

By virtue of the Americans With Disabilities Act, 42 U.S.C. § 12101, et seq.), qualified individuals with disabilities are protected from discrimination in employment by the ADA. To be a qualified individual with a disability, a person must have a record of having, or be perceived by the employer as having, a disability (a physical or mental condition which impairs at least

3 This most restrictive category is reserved for drugs with a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use."

one major life function) and not being able to perform the essential functions of the particular job with or without reasonable accommodation. What about medical marijuana patients who claim discrimination based on medical marijuana use?

The ADA defines "illegal drug use" by reference to federal law. Consequently, individuals who use medical marijuana violate federal law. Thus, the Ninth Circuit, after concluding that the statutory language was ambiguous, reviewed the legislative history and ultimately concluded that the ADA does not protect individuals who claim discrimination based on medical marijuana use. *James v. City of Costa Mesa, No. 10-55769 (9th Cir.) (5/21/2012).*

What about employees in drug rehab? In *Shirley v. Precision Castparts Cop, __ F.3d ___, 2013 WL 4051760 (5th Cir.) (8/12/13),* the employee twice entered an in-patient rehabilitation program for abuse of prescription medication. Both times he detoxed, but failed to complete the program. The Defendant Employer terminated him after he prematurely left the program the second time. The Employee sued for violations of the ADA and FMLA. On the ADA claim, the Employee argued that the ADA's "safe harbor" provision protected him because he was not currently engaging in the illegal use of drugs. The district court granted summary judgment to the Employer. The Fifth Circuit Affirmed. The Fifth Circuit held that merely entering a rehab program does not automatically trigger the safe harbor. The employee had used drugs illegally in the weeks preceding the termination and had failed to complete the rehab program a second time. The employer thus had good reason to believe that the illegal drug use would continue.

HOT TOPIC NO. 5 – <u>Restrictive Covenants</u>

In *Fiefield et al v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327 (6/24/13), Fiefield had worked for the predecessor company that was acquired by Premier. Fiefield was then hired by Premier in late October 2009, and as a condition of employment Fiefield was required to and did sign an employment agreement containing a two-year restrictive covenant. Fiefield signed the agreement on October 30, 2009 and started work on November 1, 2009. On February 12, 2010, Fifield resigned to go to work for a competitor. Fiefield and his new employer then filed suit against Premier seeking a declaratory judgment that the restrictive covenant agreement was unenforceable. The circuit court ruled the agreement was not enforceable because it lacked consideration. Premier appealed and the Appellate Court affirmed. The issue presented was what additional employment period after the signing of a restrictive covenant agreement is sufficient consideration to make the agreement enforceable against an at-will employee? The Court answered at least two years, even where the employee signs the restrictive covenant at the outset of employment. The First District held that regardless of whether Fiefield had signed the agreement before he started work or after he started work and whether or not he resigned or was terminated, there must be at least two years or more of continuous employment to constitute adequate consideration in support of a restrictive covenant.

Gastroenterology Consultants of the North Shore v. Meiselman, 2013 IL App (1st)123692 (4/15/13) is a good case to consider as to how to apply the *Reliable Fire* factors in a preliminary injunction setting. *Gastroenterology Consultants* was an appeal from the denial of a preliminary injunction. Therein, the First District applied the *Reliable Fire* factors to determine the enforceability of a physician covenant not to compete vis-à-vis soliciting its patients or treating its patients except in a genuine medical emergency. Ultimately, the First District found that the employer had not established a legitimate business interest in the enforcement of the covenant, and the trial court's refusal to enforce it was affirmed. In reaching its conclusion, the First District, citing *Reliable Fire Equipment Co. v. Arredondo, 2011 IL111871,¶ 16,* denoted that a restrictive covenant, ancillary to a valid employment relationship, will be upheld if the restraint is reasonable. To be reasonable it must: (1) be no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) not impose undue hardship on the employee-promisor, and (3) not be injurious to the public." *Reliable Fire Equipment Co., 2011IL111871, ¶ 17*. Read the case to see how the First District applied the factors to the evidence to conclude that the employer had no legitimate interest.