MSBA

LABOR & EMPLOYMENT LAW
Newsletter

WINTER 2023

Editor's Corner

BY CORI COHEN

Many thanks to the attorneys at my Firm, Gilbert Employment Law, P.C., for their thoughtful contributions to the Winter 2023 issue of the newsletter. This issue contains articles about changing legal standards for federal employees, considerations in damages awards, and an in-depth feature on the status of Maryland's recreational marijuana law and the impact on employers. We are particularly honored to feature an article by Julie A. Werner-Simon, former federal prosecutor, constitutional historian, and professor at Drexel University's Kline School of Law, University of Southern California Gould School of Law, and Drexel University's LeBow School of Business and Elizabeth A. Wilson, counsel at Gilbert Employment Law, P.C. about the intersection between Maryland's recreational marijuana laws and employment laws. This comprehensive piece on this hot, and constantly changing, topic, provides a history of the law, guidance on the intersection between the federal and state law, and an analysis of the implications for employers during all aspects of the employment process.

I also want to note that this issue is the first under the new Section Chair, Teresa Teare. I've had the pleasure of working with Teresa for many years and know her contributions to the section have been, and will continue to be, invaluable. Thus far, she has taken significant steps towards expanding learning and mentoring opportunities for members and figuring out ways to keep members updated, informed, and connected in our new normal. Please be on the lookout for exciting upcoming trainings, both in-person and virtual, meet and greets with leaders in our field, and mentoring opportunities.

I always welcome feedback on, or contributions to, the newsletter. Please feel free to contact me by email at ccohen@gelawyer.com or by telephone at (301) 608-0880 with any comments or questions.

Letter from the Chair

BY TERESA D. TEARE

This is my first "Letter from the Chair" as the Chair of the MSBA's Labor and Employment Law Council. I am very excited to lead the Council during the next two years and hope to provide quality educational and networking opportunities to the Section. By way of background, I have been on the Council for many years, first as a member, then as Recording Secretary and most recently as Chair-Elect. I know what a wonderful group of attorneys we have on the Council, and I thank each of them for their commitment to serving and volunteering their talents, knowledge, and expertise to this Section.

Before we look to what is on the horizon for the Council, I want to thank the outgoing Chair, Judge John A. Henderson, for his steady leadership through the "Covid" years. He led our Section during a challenging and unpredictable time, but did so with a calm and strong presence that we all needed at the time. Judge Henderson delivered strong continuing education programs and opportunities for mentorship in the legal community. He also made certain that we looked at the Council's initiatives and membership through a lens of diversity, equity, and inclusion, and no doubt positively impacted our Section throughout his many years of service. I know I have big shoes to fill in taking over as Chair.

Joining me on the Executive Committee of the Council are Joyce Smithey, of Smithey Law Group LLC, who serves as Chair-Elect, as well as Michael J. Neary, of Lerch, Early & Brewer, Chtd., who serves as the Recording Secretary. Both Joyce and Mike have been involved with the Council for many years and have provided direction, insight, and wisdom during their tenures. I look forward to working with them and the rest of the Council during my term.

Looking forward to our goals for 2023, the Section is planning several programs in the Winter/Spring period. In the Spring, we are planning a program with Equal Employment Opportunity Commission Chair Charlotte A. Burrows. We have invited Chair Burrows to provide our Section with an update on the EEOC's initiatives for 2023. The Council is also trying to plan a networking event with the Young Lawyers Section, an EEOC Administrative Law Judge Update on public sector employment issues, and a program on employment tax issues. We have a busy schedule planned!

That brings us to the planning for the **2023 MSBA Legal Summit & Annual Meeting**, which will take place at the Roland E. Powell Convention Center in Ocean City, Maryland from June 7 to June 9, 2023. As is tradition, the Council will have its final meeting of the year followed by a presentation on relevant employment law developments. Our meeting is open to the entire Section and we invite you to attend. We will have more details on the date and time of the meeting and program soon. For any updates, please review the **MSBA's website**.

Finally, our Council always keeps an eye on the developing legislative initiatives from the Maryland General Assembly. This year, we are keeping an eye on amendments to the Maryland Paid Family Leave legislation, called "the Time to Care Act." This legislation was passed in 2022. We are also anticipating potential legislation to increase the Maryland Attorney General's ability to enforce federal and state civil rights laws, including employment discrimination laws. We also anticipate further guidance from the General Assembly on the legalization of recreational marijuana, which goes into law July 1, 2023, which may have an impact on employees and employers.

All in all, it is going to be an exciting year! If you would like to get involved or have ideas for educational programs or initiatives, please feel free to reach out to me. As you may know, the Council is made up of volunteers. We would welcome a few more helping hands and minds!

Maryland's New Recreational Marijuana Law: Suggestions for Maryland's Policymakers & Employers

BY JULIE A. WERNER-SIMON AND ELIZABETH A. WILSON

In November 2022, Maryland Voted to Legalize Adult Recreational Marijuana – What does this Mean for Maryland Companies that Drug Test in Hiring and Firing and for Employees who use the Controlled Substance (Medically and/or Recreationally)?

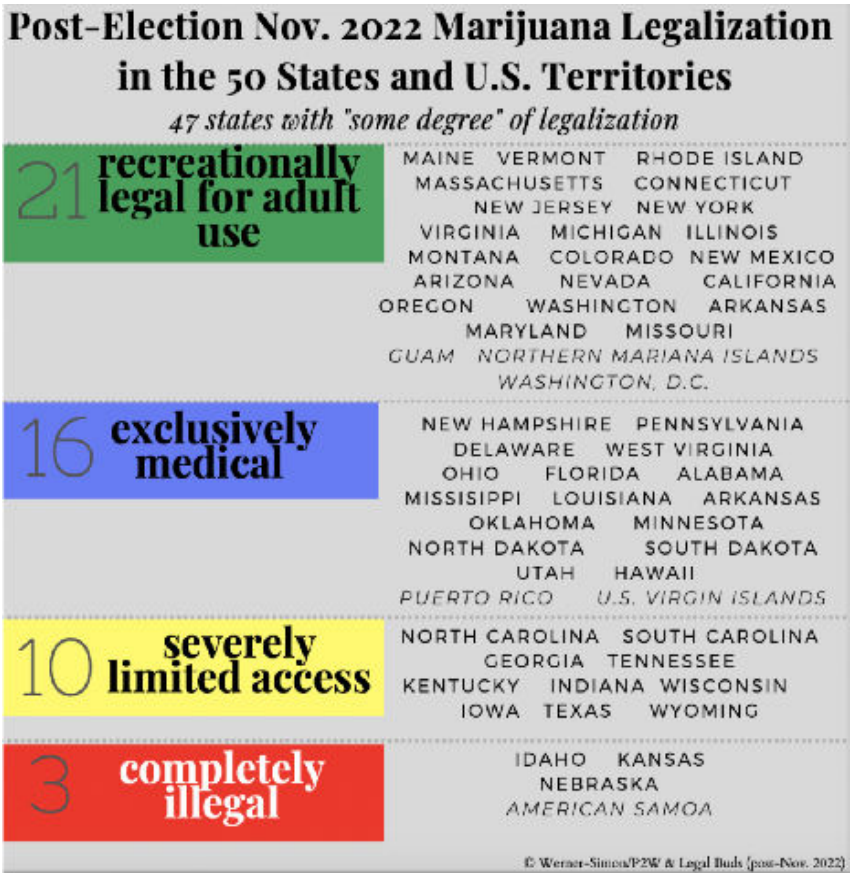
Authors' Note: The terms "marijuana" and "cannabis" are used interchangeably and are synonymous for the purposes of this non-scientific article referring to substances (dry weight or living plant form) **in excess of 0.3 percent THC** (tetrahydrocannabinol).

I. Maryland is Known as "The Free State" and in 2023 - - This Takes on a New Meaning

One of Maryland's state monikers is the "Free State."[1] Thought to be a reference to Maryland's 1864 state constitution that abolished slavery[2], more recent scholarship links the origin of the motto to the time of prohibition[3]. Maryland chafed at federal constitutional directives and refused to ban the sale of alcohol when the 18th Amendment banned the sale, manufacture and transportation of "intoxicating liquors."[4]

A. Maryland is the 21st Adult Recreational State

In November 2022, Maryland again lived up to its "free" reputation and became the 21st state to legalize recreational marijuana for adults. Maryland joins 20 other states that have legalized adult recreational use after previously legalizing medical marijuana. Maryland (as of July 1, 2023) will "roll out" recreational sales and join Maine, Vermont, Rhode Island, Massachusetts, Connecticut, New Jersey, New York, Virginia, Michigan, Illinois, Montana, Colorado, New Mexico, Arizona, Nevada, California, Oregon, Washington, Arkansas, and Missouri, which all have coexisting medical and recreational programs in their states.[5]



As of January 2023, there are only 3 states (and one U.S. territory, American Samoa) where legalization of marijuana is completely illegal under the laws of the state or territory. This leaves 47 states and four inhabited U.S. territories with varying degrees of marijuana use.

This equates to about 99% of the U.S. population of some 336 million inhabitants[6] having some degree of state or territorial law permitting marijuana usage.

B. But Marijuana Remains Illegal Under Federal Law

However, despite the ever-increasing number of states and U.S. territories jumping on the legalization bandwagon, cannabis remains illegal under federal law.[7] President Richard Nixon signed into law Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[8] In addition to the Controlled Substances Act

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[1] Kevin Dayhoff, Eagle Archive: Here's a Toast to Maryland's Origins as "The Free State", Baltimore Sun (Oct. 7, 2012).

[2] Md. Const. (1864) (This was the result of a state-wide referendum held in Oct. 1864 which enabled "soldiers in the field to vote: and the abolishment of slavery in the state became effective Nov. 1, 1864.)

[3] Kevin Dayhoff, Eagle Archive: Here's a Toast to Maryland's Origins as "The Free State", Baltimore Sun (Oct. 7, 2012); Maryland at a Glance, Maryland Manual Online, (retrieved Feb. 26, 2023). Marylanders peacefully resisted America's Great Experiment with prohibition and the owner of the Baltimore Sun drafted a mock-serious editorial titled "The Maryland Free State," in which he argued that Maryland should secede from the Union rather than refuse to sell alcohol, id.

[4] U.S. Const. amend. XVIII, § 2, repealed by U.S. Const. amend. XXI.

[5] See "Post-Midterms Nov. 2022 Vertical Legalization graphic" by Werner-Simon/Legal Buds ® graphics (Dec. 2022). Only the U.S. territory of the Commonwealth of the Northern Mariana Islands (CNMI), successfully adopted both adult recreational and medical at the same time 2018; Tom Angell, Governor Signs Marijuana Legalization Bill, Making History in US Territory, Forbes (Sept. 21, 2018).

[6] https://www.worldometers.info/world-population/us-population/ (retrieved Feb. 26, 2023).

[7] 21 U.S.C. § 812 (1970).

[8] 21 U.S.C. § 812 (1970).

("CSA"), the federal Drug-Free Workplace Act of 1988[9] (the "Act") mandates that the workplace must be free of drugs. This requires certain federal contractors and most federal grantees to provide a drug-free workplace in order to receive a contract or grant from the federal government. Although neither the Act nor its regulations authorize drug testing, in order to meet the requirement of certifying a drug-free workplace, employers elect to drug test unless prohibited by state law.

The pastiche of state legalization laws and the impact of federal illegality can create an employer-employee nightmare as to what practices to adopt for those who use marijuana medically or recreationally.[10] Where there are no governmental directives on the parameters of permissible state legal marijuana usage vis-à-vis the workplace, workers and employers have sought determinations from the courts.

Some state legislatures have been proactive and have set up guardrails to protect workers. But legislators in other states have stood on the employment sidelines. Despite the adoption of progressive degrees of legalization, they have done little to provide clear guidance to employers and employees. This inaction results in erratic business practices vis-à-vis drug use and testing, and costly litigation. Maryland is at risk for such chaos; but it can still chart a different course as it designs implementing legislation for the brand-new constitutional amendment legalizing adult use marijuana.

II. Maryland's Marijuana Legalization History

In 2013, Maryland started to pave a way to "degrees" of permissive use of marijuana in the state.[11] In just under a decade, the state transformed from being a state which permits only patients with state-issued medical marijuana cards to purchase and possess medical marijuana into a state where, by July 2023, any adult 21 years old or older can buy and use marijuana for recreation.[12] No longer will Marylanders—as a prerequisite to usage—need to get a medical provider's approval, register with the commission, pay for a marijuana card and prove that they suffer from any of the qualifying conditions.

Here is a brief history of those efforts:

A. Maryland's Steps Toward and the Successful Implementation of Medical Marijuana Legalization

In 2013, the Maryland General Assembly established the Maryland Medical Cannabis Commission ("MMCC") to "develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner."[13] A year later, in 2014, then-governor Martin O'Malley signed HB 881 into law and Maryland had legalized medical marijuana.[14]

> **My employer tests for drug use including cannabis. Can they test me if I am a medical cannabis patient? Can they fire me if I use medical use cannabis?**

Maryland Medical Cannabis Commission Patient FAQ (Frequently Asked Questions) on drug testing (2023)

Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).[15]

This is even though, theoretically, under Maryland law, just having a medical marijuana card ("being a qualifying patient") must not result in the denial of any right or privilege of a patient complying with Maryland law.[16] Maryland medical marijuana card holders can be drug tested at work and fired because of a marijuana-positive drug test.

B. Decriminalization

On the same day in April 2014, Maryland's governor also signed off on decriminalization legislation.[17] There is no universal definition of decriminalization of marijuana,[18] so states have taken different approaches. Maryland's decriminalization approach left the criminal statutes "on the books," while reducing punishment for the offenses.[19] Adults in possession of less than 10 grams of marijuana would be subject to modest civil rather than criminal penalties. The state took one step back when then-newly elected Governor Larry Hogan vetoed legislation that decriminalized smoking marijuana in public places and owning paraphernalia. But the General Assembly overrode the veto, and under current law, smoking marijuana is a civil rather than criminal offense as is possession and use of paraphernalia.[20] Still, those in the business community have been left flying blind on setting marijuana policies for their employees.

Because decriminalization is not legalization, and Maryland's medical program does not prevent termination for usage (even by a patient), Maryland employers have had to adapt on their own. This is even though Maryland, as a medically legal state, has already cultivated a robust market for marijuana, with usage levels placing it in the top 15-20% of states with degrees of legalization.[21]

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[9] 41 U.S.C.A. § 8101 through 8104.

[10] Lisa Nagele-Piazza, Marijuana Laws and the 2022 Workplace, SHRM (Mar. 31, 2022).

[11] Maryland Medical Cannabis Commission, Maryland Medical Cannabis Commission FY 2021 Annual Report, (retrieved Feb. 26, 2023).

[12] Sarah Meehan, FAQ: What You Need to Know About Medical Marijuana in Maryland, Baltimore Sun (Mar. 20, 2018); Kyle Jaeger, Maryland Lawmakers Unveil Bill to Launch Marijuana Sales, Months After Voters Approve Legalization on the Ballot, Marijuana Moment (Feb. 3, 2023).

[13] Maryland Medical Cannabis Commission, supra note 12.

[14] Md. HB 881 (2014).

[15] Maryland Medical Cannabis Commission, Patient FAQ, (retrieved Feb. 26, 2023) (explaining that state law permits drug testing by Maryland employers and that employers can "take action" against those who test positive).

[16] Md. Code Ann., Health–Gen. § 13-3313.

[17] Md. SB 364 (2014).

[18] Jordan Blair Woods, Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. Rev. (2015)

[19] Md. SB 364/CH015 (2014) (amending various provisions of the Maryland Code, Courts and Judicial Proceedings and Criminal Law and Procedures articles).

[20] Md. SB 517 (2016). (In 2015, Maryland's General Assembly passed SB 517, which decriminalized both the smoking marijuana in public spaces and the possession of marijuana paraphernalia, id. It was vetoed by then new-Maryland governor Larry Hogan, in May 2015. Subsequently, in January 2016, with Maryland's legislature overrode the veto and the public consumption and paraphernalia type of decriminalization immediately became the law in Maryland, id.

[21] Ovetta Wiggins, Maryland Studied How Much Marijuana Adults Consume, Washington Post (Jan. 5, 2023).

Amazon, with some 15 delivery stations in Maryland in addition to nine full-size fulfillment and sorting centers[22], is one of the top ten employers in Maryland.[23] Though known for requiring drug testing, the company recently changed its policies to attract more workers. In January 2022, Amazon announced that it would exclude marijuana from its comprehensive drug testing program and reinstate employment eligibility for previously-disciplined employees during earlier pre-hiring and random drug testing.[24] Amazon adduced compelling reasons for this policy change that Maryland lawmakers should heed:

F*irst, we recognized that an increasing number of states are moving to some level of cannabis legalization—making it difficult to implement an equitable, consistent, and national pre-employment marijuana testing program. Second, publicly available national data indicates that pre-employment marijuana testing disproportionately impacts people of color and acts as a barrier to employment. And third, Amazon's pace of growth means that we are always looking to hire great new team members, and we've found that eliminating pre-employment testing for cannabis allows us to expand our applicant pool.*[25]

C. Adult Recreational Wins in Maryland in November 2022; Adult Recreational to Begin July 1, 2023

Maryland legalized adult recreational marijuana using the state's constitutional amendment ballot process. Maryland voters, in the November 2022 midterms, approved a constitutional amendment by a margin of **67.2% to 32.8%**, of those voting.[26] As a result, as of July 1, 2023, individuals 21 or older may legally use and possess and consume up to 1.5 ounces of cannabis flower, 12 grams of concentrated cannabis, or a total amount of cannabis products that does not exceed 750 mg THC. This amount is known in Maryland as the "personal use amount."[27]

While the initial legislation[28] accompanying the constitutional amendment provided only broad-brush parameters for the adult market, the rules of implementation are being crafted now by the General Assembly. On February 3, 2023, an omnibus bill setting out implementing legislation for the constitutional amendment legalizing marijuana was introduced in both Houses of the General Assembly as HB 556 and SB 516. A hearing on HB 556 was held on February 17, 2023. The two bills will now go to committees in the Assembly.

Legislators are proposing to dissolve the existing current Maryland Medical Cannabis Commission ("MMMC") that currently oversees the state's medical program. In its stead will be a new Cannabis Regulation and Enforcement Division located in the Office of the Executive Director of the Alcohol, Tobacco, and Cannabis ("ATC") Commission. By June 30, 2023, the current MMCC will be absorbed by the new commission, the ATC, that will monitor both adult recreational and medical programs. This is an indication that going forward, the state will treat cannabis similarly to alcohol; it will be a highly regulated industry.[29]

Despite Marylanders assent to adult recreational legalization and the impending implementation of the constitutional amendment on July 1, 2023, early indications are that, apart from regulations and practices for those in or seeking to become part of the cannabis business sector, the impact of marijuana usage on employers and employees and in personnel matters itself is not a high priority.

> **While Subtitle 13 of the omnibus bill provides that "neither the States nor any of its political subdivisions may deny a benefit, an entitlement, a driver's license, a professional license, housing assistance, social services, or other benefits," [to a legal marijuana user]**

> **Nothing in this section may be construed to prevent or prohibit any employer from denying employment or a contract to an individual or disciplining an employee or a contractor for testing positive for the presence of cannabinoids or cannabinoid metabolites in the urine, blood, saliva, breath, hair, or other tissue or fluid of the employee's or contractor's body, if the test was conducted in accordance with the employer's established drug testing policy.**

Before the adult recreational implementation is reconciled and becomes law, Maryland lawmakers, in session now until April 10, 2023, should establish policies that make it easier for employers and employees in the state to navigate the marijuana usage issue. This was not done when Maryland legalized medical marijuana or during any of the phases of decriminalization.

It can be done as Maryland implements recreational marijuana legalization. In order to maintain a healthy and profitable business environment, Maryland businesses need to attract nationwide talent. And with (per a 2021 Gallup poll) almost half adult Americans having at least "tried" marijuana,[30] Maryland businesses need to be proactive with their marijuana policies so that they do not drive away prospective employees who legally indulge. Lawmakers should assist with this end.

With Maryland's recreational implementation policies being formulated as this article goes to press,[31] now is the time for Maryland to review and mirror well-considered regulations already in place in other adult recreational states and localities in other parts of the country.

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[22] Jeff Clabaugh, Virginia, Maryland Among Top States for 150,000 Seasonal Amazon Jobs, WTOP News (Oct. 18, 2021).

[23] Dwight A. Weingarten, Who Were 2022's 10 Biggest Employers Across Maryland?, HM Media (Jan. 4, 2023).

[24] Beth Galetti, Amazon is Supporting the Effort to Reform the Nation's Cannabis Policy, AboutAmazon (Jan. 25, 2022).

[25] Id.

[26] Maryland Question 4 Election Results: Legalize Cannabis, N.Y. Times (Dec. 8, 2022).

[27] Maryland Medical Cannabis Commission, Legalization of Non-Medical Cannabis, MMCC (retrieved Feb. 26, 2023).

[28] Summary of Maryland's HB 837 and SB 833: Cannabis Reform, Marijuana Policy Project 1995 (retrieved Feb. 21, 2023).

[29] Kyle Jaeger, Maryland Legislative Marijuana Workgroup Meets to Prepare for Legalization as Polls Signal Referendum Passage, Marijuana Moment (Oct. 19, 2022).

[30] Kaia Hubbard, Record High: More Americans Are Trying Marijuana, Gallup Poll Finds, U.S. News & World Rpt (Aug. 17, 2021).

[31] HB0566 and SB0516, introduced simultaneously, are intended to design a regulatory framework for the cannabis industry in Maryland. A hearing on HB 566 was held on February 17, 2023, and proposed amendments are now being submitted. See section V, infra..

III. Options for Maryland Lawmakers in Adopting Specific Marijuana Workplace Policies

According to NORML, the National Organization for the Reform of Marijuana laws, "Seven states, [including] Nevada, New York, New Jersey, Connecticut, Montana, Rhode Island, California and Missouri, have passed laws protecting employment rights of recreational marijuana . . with Nevada's only protecting pre-employment drug testing.[32] NORML also reports that cities, including Philadelphia, have recently enacted ordinances protecting employment rights of marijuana users, either for city employees or for all workers in their cities - - with all anti-marijuana discrimination laws having "some exemptions for federally mandated drug testing and sometimes for safety-sensitive positions."[33]

i.e., collection through destruction. Some employers will need to create new policies and Some of the 21 recreational states provide job protections for workers, like **California** which in September 2022 passed a law prohibiting employers from discriminating against workers who use marijuana off-site and off-duty.[34]

Other states with just medical legalization like **Pennsylvania** protect those workers with state-issued medical marijuana cards from businesses taking adverse actions against the employee so long as the employee is registered as a patient with the state and their jobs are not classified as hazardous or dangerous.[35]

But state permissive worker protection laws related to marijuana usage do not inoculate an employer from violations of federal law. Marijuana, still federally illegal, places employers and employees on a tightrope. However, having a state-compliant personnel policy can serve to reduce issues that arise from federal illegality.[36]

Maryland, which already has a robust medical marijuana program, should immediately protect Maryland's more than 139,000 medical marijuana users[37] by adopting regulations/legislation that make clear what an employer and an employee can do regarding state-legal marijuana usage.

Maryland's lawmakers can look to other states that have addressed employment issues up front, in the legalization legislation or ballot initiative or through the passage of employment "safe harbor" marijuana usage laws.

A. Pre-Hiring Drug Testing

Currently, Maryland's law allows employers to conduct drug tests for the use of alcohol and controlled substances.[38] Maryland's employee drug testing laws specifically state that employers do not need to accommodate use in the workplace, and employers can discipline or terminate an employee who tests positive for off-duty marijuana use—even if it is being used for a medical condition.[39]

Maryland should take a page from the **city of Philadelphia** which passed a law (effective last year in 2022) prohibiting pre-employment drug tests for marijuana as a condition of employment. Philadelphia, the most populous city in Pennsylvania, a medical marijuana state, has crafted an anti-marijuana testing ordinance with specific exceptions for higher-risk occupations.[41] "Higher risk or sensitive occupations" can be synonymous with "hazardous, dangerous or essential to public welfare and safety."[42]

The need for Maryland to adopt this bar to most pre-employment drug testing for low-risk occupations is great. This is because a positive drug test for the presence of marijuana (metabolites) in a person's body does not prove impairment or even a date certain on when the user has ingested the substance. Cannabis has a long half-life[43] and most currently used tests cannot differentiate between a person who is currently "under the influence" and a person who used cannabis a month earlier.[44]

Maryland should adopt legislation that makes it unlawful for any (non-federal) employer who is not in a hazardous or sensitive industry, to fail or refuse to hire a prospective employee because the prospective employee submitted to a drug screening test and the results indicate the presence of marijuana. Thereafter, laws can be updated, if necessary, as new drug tests are developed and become more widely available that will allow more accurate results necessary for on-the-job testing.

B. Post-Hiring Drug Testing and Termination

1. Off-site

Given that Maryland has been a medically legal marijuana state and will, by July 2023, have an adult recreational program, post-hiring drug testing for marijuana should be circumscribed. Post-hiring testing should be reserved for employees who appear "under the influence, whose usage is negatively impacting an employer's operations, those in hazardous or sensitive jobs, and of course, because of federal illegality, exempting any federal employee or contractor who must comply with the Federal Drug Free Workplace Act of 1988."[45]

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[32] State and City Laws Protecting Marijuana Users' Employment Rights, California NORML (retrieved Feb. 26, 2023). Note: At the time of publication, Washington state's Senate Bill SB 5123 is under consideration. The law would prevent employers from penalizing employees in the hiring process for off-duty use of marijuana. SB 5123 passed in the Washington state senate on Feb. 22, 2023; shortly it will be sent to Washington's House of Representatives for consideration. If SB 5123 becomes law, it would only prevent certain drug tests before hiring. It would not preclude on-the-job drug testing. WA Senate passes bill to bar hiring discrimination for cannabis use, The Seattle Times (Feb. 22, 2023).

[33] State and City Laws Protecting Marijuana Users' Employment Rights, California NORML (retrieved Feb. 26, 2023).

[34] Cal. Gov't Code § 12954 (Deering, Lexis Advance through the 2022 Regular Session).

[35] Act 16: Guide for Employers and Employees, Marijuana Policy Project (retrieved Feb. 21, 2023).

[36] United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) (power of the federal government to investigate, prosecute and imprison those who use or possess with intent to distribute marijuana is circumscribed where the purported offenders are fully compliant with the medical legalization regulations of the legalized state).

[37] Maryland Medical Cannabis Commission, FY2021 Annual Report, MMCC (retrieved Feb. 21, 2023).

[38] Md. Code Ann., Health–Gen. § 17-214.

[39] Workplace Drug Testing Laws in Maryland, HealthStreet (retrieved Feb. 26, 2023).

[40] Phila. Code Ch. 9-5500 et seq.

[41] Phila. Code Ch. 9-5501(1)-(10).

[42] Rhode Island Cannabis Act, 2022 R.I. HB 7593.

[43] Priyamvada Sharma, PhD, Pratima Murthy, and M.M. Srinivas Bharath, Chemistry, Metabolism, and Toxicology of Cannabis: Clinical Implications, Iran J Psychiatry (Fall 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3570572/ (according to a 2012 study reported by the National Institute of Health entitled "Chemistry, Metabolism, and Toxicology of Cannabis: Clinical Implications, "[c]annabis has a long half-life in humans (67 days)").

[44] Id.

[45] Drug-Free Workplace Act of 1988, 41 U.S.C.S. §§ 8101-8106.

Currently, the Maryland Code allows for immediate termination of public employees for "illegal sale, use, or possession of drugs on the job." Md. Code Ann., State Pers. & Pens. § 11-105 (3). State employers have terminated employees for violations of 11-105(3) based on a positive marijuana test. However, Maryland courts have interpreted 11-105 in a more forgiving way. In Bond v. Dep't Of Pub. Safety And Corr. Servs., 161 Md. App. 112, 125–26 (2005), the Court of Special Appeals reversed an administrative law judge decision affirming the termination of a public employee based on a positive marijuana test,[46] holding that it was "unreasonable" to conclude from a positive test alone that the employee "smoked, possessed, or was under the influence of marijuana at work" in the absence of any other evidence. Additionally, Maryland's medical marijuana law authorizes the imposition of "civil, criminal or other penalties" for a state-legal marijuana user – if the usage "constitutes negligence" in the operation of the business.[47]

Maryland should adopt **New York**'s approach. With the advent of adult recreational use, New York amended its labor code to prohibit discrimination against employees who engage in the "legal use of consumable products, including cannabis in accordance with state law." Maryland should modify current laws to make clear that marijuana, as of July 2023, will be considered a "legally consumable product." Authorized employer marijuana discrimination would be limited to hazardous, sensitive, or high-risk businesses that ban usage, or where employees have violated the state's marijuana legalization laws, and in those instances where employers suspect that workers are impaired at the workplace.[48]

2. On-Site Usage

There is no state or territory that permits workers to use medical marijuana in the workplace. To do so would be violative not just of the federal Controlled Substances Act, but also the federal Drug-Free Workplace Act of 1988.[49]

However, this could change in the not-too-distant future. President Joe Biden, in December 2022 signed into law the "Medical Marijuana and Cannabidiol Research Expansion Act,[50] H.R. 8454," (the Cannabis Research Bill) which will ramp up federally funded research into marijuana as medical treatment. President Biden also, in October 2022, directed to the Secretary of Health and Human Services and the Attorney General to "expeditiously" review how marijuana is scheduled under federal law (part of the president's Pardon Proclamation for federal offenders convicted of marijuana possession)[51] and will necessarily involve the medical marijuana efficacy studies required for any re- or de-scheduling under the CSA.[52] Medical marijuana is steps closer to becoming mainstream medication though no state yet permits marijuana to be taken at work like other medications that individuals with chronic conditions may bring to work to take or ingest on site (think asthma and bronchial inhalers). The normalization of marijuana as medication will come.

California has opened the (schoolhouse) door a crack. In 2019, California's governor signed into law a bill permitting school children, under a medical provider's care, who take medical marijuana to treat qualifying medical maladies and who need the medication during the school day, to have the medicine be administered on campus by the school nurse, parent or the student's guardian.[53]

Maryland in 2020 passed a similar bill with one exception being that the school nurse need not be the person administering the medication.[54] This practice by Maryland in the usage of medical marijuana at schools could be adapted to the workplace as marijuana medication becomes mainstream.

C. Reasonable Accommodations

Maryland's employers are not required to accommodate medical marijuana users in the workplace. Currently, Maryland's approach tracks with the federal Americans with Disabilities Act. Medical use of marijuana (illegal under federal law) cannot be considered a reasonable accommodation.[55]

This is one of many of the collateral consequences of federal illegality.[56] These consequences include the fact that patients who use medical marijuana are not permitted to deduct medical marijuana on their federal tax returns or have medical marijuana covered by health insurance or worker compensation programs.

Maryland lawmakers tried to remedy some of this in HB 628 introduced in October 2022 but failed to win passage.[57] This bill would have prohibited an employer from discriminating against an individual who is legally authorized to use medical cannabis or tests positive for the substance (1) if the patient is legally authorized to use medical cannabis, and (2) expressly authorizes Maryland's Workers' Compensation Commission ("WCC") to require an employer or its insurer to provide medical cannabis to an injured employee receiving workers' compensation benefits as part of the injured employee's medical treatment.

Now that Maryland will be fully legal (medical

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[46] Bond v. Dep't Of Pub. Safety And Corr. Servs., 161 Md. App. 112, 125-26 (2005).

[47] Md. Code Ann., Health-Gen. §13-3314(a)(1).

[48] See 2021 N.Y. ALS 92, 2021 N.Y. Laws 92, 2021 N.Y. Ch. 92, 2021 N.Y. SB 854; See also New York's Labor Code Section 201-D(4-a) (which in pertinent part provides that employers can still prohibit employee conduct based on an employee's use of marijuana (to include circumstances) where the employee, while working, manifests specific articulable symptoms of marijuana impairment that decrease or lessen the employee's performance of their tasks or duties or the employee, while working, manifests specific articulable symptoms of marijuana impairment that interfere with the employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws).

[49] 41 U.S.C.S. §§ 8101-8104.

[50] Medical Marijuana and Cannabidiol Research Expansion Act, H.R. 8454, 117th Cong. (2021-2022).

[51] The White House, Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana, The White House Briefing Room (Oct. 6, 2022).

[52] 21 U.S.C.S. § 811.

[53] 2019 Bill Text CA S.B. 223 (2019); See also, Melissa Schiller, California Governor Signs Law Allowing Medical Cannabis on School Campuses, Cannabis Business Times (Oct. 10, 2019).

[54] Maryland Medical Cannabis Commission, Guidelines for Public Schools Allowing the Administration of Medical Cannabis to Students, MMCC (retrieved Feb. 22, 2023).

[55] 42 U.S.C.S. § 12114; Rebecca Akers, Marijuana, Marijuana Cards, and Reasonable Accommodations Under the ADA, Employment Law Handbook (Dec. 6, 2021).

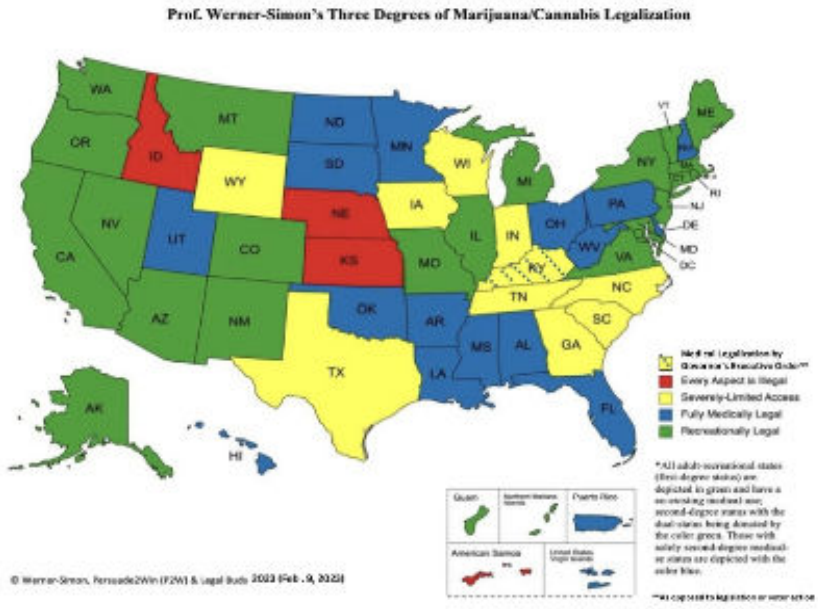
[56] Because marijuana is federally illegal, marijuana businesses cannot deduct ordinary and necessary business expenses on their federal tax returns pursuant to 26 U.S.C. 280E, Expenditures in connection with the illegal sale of drugs.

[57] Md. HB 628 (2022).

and adult) it should take a page from states that are not waiting for federal legality to adjust its laws involving reasonable patient accommodations. Maryland should allow medical marijuana patients to argue that their illnesses are covered by state law and that they are entitled to "reasonable accommodations" to include treatment with medical marijuana. At a minimum, Maryland lawmakers should pass HB 628. This would change the law in Maryland to prevent discrimination of a marijuana patient and enable them to secure treatment needed under worker compensation.

IV. Businesses: Know and Follow State Guidelines and in the Absence of Clear Guidance from Lawmakers, Make your Own Marijuana Personnel Policies, and Memorialize Them in Written Manuals, and Implement Consistently

Under federal law (the Controlled Substances Act) marijuana is still illegal. However, some 47 states now have legalized some degree of marijuana.[58]



What should employers do while the law is in a state of flux? The answer: Adopt policies in written employee personnel manuals and implement these policies consistently.[59] The policies should be clear and precise especially when delineating different standards for different employee positions such as those that carry a significant risk of harm to the employee or others (e.g. working from heights or with electricity). Other than for positions of high safety risk factors, the policies should be centered around an employee's ability to work and overall conduct, not on unnecessary testing. Employee policies also need to comport with **state law**.[60]

The Society for Human Resource Management ("SHRM") on its website[61] among other things, urges businesses to:[62]

> Know the various state laws before setting [marijuana] policies and testing rules and to understand that the company practices might need to change depending on location.

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[58] Id.; U.S. Three Degrees of Legalization Logo Map updated in 2023 from 2022 article, Werner-Simon. The State of Legal Cannabis Legalization in the U.S. 2022, Cannabis Business Times (Mar. 1, 2022), Feb. 2023 logo map by Werner-Simon/Legal Buds ® denotes Kentucky's Jan. 1, 2023 medical legalization by governor's executive order. See also Joe Sonka, Kentucky's medical marijuana executive order goes into effect Jan. 1, 2023. What to know, Courier Journal (Jan. 31, 2023).

[59] Marijuana in the Workplace: How to Craft an HR Policy That's Right for Your Company, HSI (retrieved Feb. 26, 2023)

[60] Id.; See also, Practical Guidance Safety & Health, Sample Policy – Marijuana Use, Bloomberg Law (retrieved Feb. 26, 2023)

61 Tamara Lytle, Marijuana and the Workplace: It's Complicated, SHRM (Aug. 28, 2019).

62 Id.

Attorney **Judith Cassel** of Hawke McKeon & Siscak, LLP, an expert in corporate compliance, and who has counseled a myriad of businesses (to include Fortune 500 as well as academic institutions) advises all businesses to have clearly written, personnel manuals which contain the company's policy on drug testing, hiring and firing, and the confines of permissible inquiry about drug use.

Debra Doby, a partner at Vaughan Baio & Partners, in New York, named a "Rising Star" in New York Metro Super Lawyers in 2016-2020, is an employment and insurance specialist who counsels that once companies have written personnel manuals, they must apply the rules (to include random drug testing) to all the employees from the C suite to the mailroom. Failure to equally enforce company policies for hiring and firing, and/or having policies in contravention of state law, can result in civil exposure.[63]

If there are gaps in a company's cannabis policies, disparity in a company's implementation of cannabis policies, or if a company's employment policies are in contravention of applicable state law, businesses could face huge exposure. This happened last year, in 2022, to Walmart and Sam's Club.[64] The class action complaint filed in New Jersey federal court charged the superstores with violating New Jersey's Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act which prohibits employers from rejecting a candidate for testing positive for marijuana use.[65] Having and implementing a plan to follow state regulations would have likely reduced the threat of litigation.

V. Maryland Has a Chance to Make Things Right for Businesses and Their Employees

The details for the July 2023 implementation of Maryland's new marijuana laws are being crafted now in the Maryland General Assembly. Lawmakers should understand that having employer-employee rules on drug testing and hiring and firing can help the bottom line for Maryland's employers. Having policies as proposed above and as implemented in other states can serve as guardrails in the workplace.

To date, during the open discussions of the legislators, none have proposed detailed regulations to guide employers and employees on what to do about marijuana use.

On February 17, 2023, at a public hearing concerning the implementation of adult recreational use (HB 556), over 80 members of the public gave testimony. Given two minutes, noted with an audible timer, the public raised subjects to include marijuana taxation and social equity issues. It was representatives from the construction industry (notably, an industry often deemed hazardous) who raised the subject of drug testing in the employment setting. Other than being informed by lawmakers that nothing in the law would prevent hazardous industries from testing - - no other guidance to employers appeared to be in the offing.

In fact, at the February 17th hearing, one of the implementation bill's co-sponsors, C.T. Wilson, of the 28th District, and Chair of the Economic Matters committee, acknowledged Maryland is currently facing a labor shortage. Yet his view was that employers should decide the drug testing balance for themselves. Delegate Wilson explained that Maryland lawmakers do not wish to make "marijuana smokers a protected class of people."

If other lawmakers are similarly inclined, Maryland's marijuana law will remain antiquated. The state will stand on the sidelines as other states adopt best practices in marijuana usage and employment. This means that Maryland's businesses are their own. They should update personnel manuals to reflect (in non-safety related industries) permissive use, limited drug testing, and reasonable accommodations for those who qualify. Businesses should also ensure that their articulated policies are uniformly applied throughout the business.

Taking these steps now (with or without the lawmakers) months before full-fledged adult recreation comes to fruition on July 1, 2023, will help Maryland businesses remain competitive and attract and retain workers.

With clear policies regarding marijuana usage in place, management-employee confusion will be reduced. Fewer gray areas, clearer lines of permissible behavior, and equal enforcement of company usage policies, company-wide, will surely reduce litigation exposure for Maryland's businesses. Implementation of well-considered marijuana usage policies now could prevent a lot of headaches later.

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[63] National Retailer Accused of Violating Drug Testing State Law, Business Information Group (Oct. 11, 2022).

[64] Zanetich v. Wal-Mart Stores East, Inc. et al, 1:22CV05387.

[65] Id.

Julie A. Werner-Simon, is a former federal prosecutor, constitutional law fellow, and currently teaches **Marijuana Cannabis Law** at University of Southern California Gould School of Law & Drexel University's Kline School of Law. She also serves as a legal analyst in the Emerging Industries series at LeBow School of Business at Drexel University. Werner-Simon recently received U.S. Copyright Office protection for her companies' (Legal Buds® Persuade2Win®) 2022 feature-length film **"Marijuana Cannabis Law: History, the Constitution & Degrees of Legalization."**

Elizabeth A. Wilson is Counsel at Gilbert Employment Law and formerly practiced law with WilmerHale LLC and Lewis and Baach (formerly, Baach Robinson and Lewis). She has also taught international law and human rights at the School of Diplomacy, Seton Hall University, Rutgers Law School, and Columbia University. Her monograph, People Power and International Human Rights: Creating a Legal Framework was published by the International Center on Nonviolent Conflict in 2017.

MSPB Clarifies EEO and Whistleblower Affirmative Defenses

BY ANDREW PERLMUTTER
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On September 12, 2022, the Merit Systems Protection Board issued its decision in Pridgen v. Office of Management and Budget, 2022 MSPB 31. In that decision, the MSPB revised its standards for affirmative defenses in disciplinary cases, and also clarified its analysis for performance-based adverse actions under 5 U.S.C. Chapter 43.

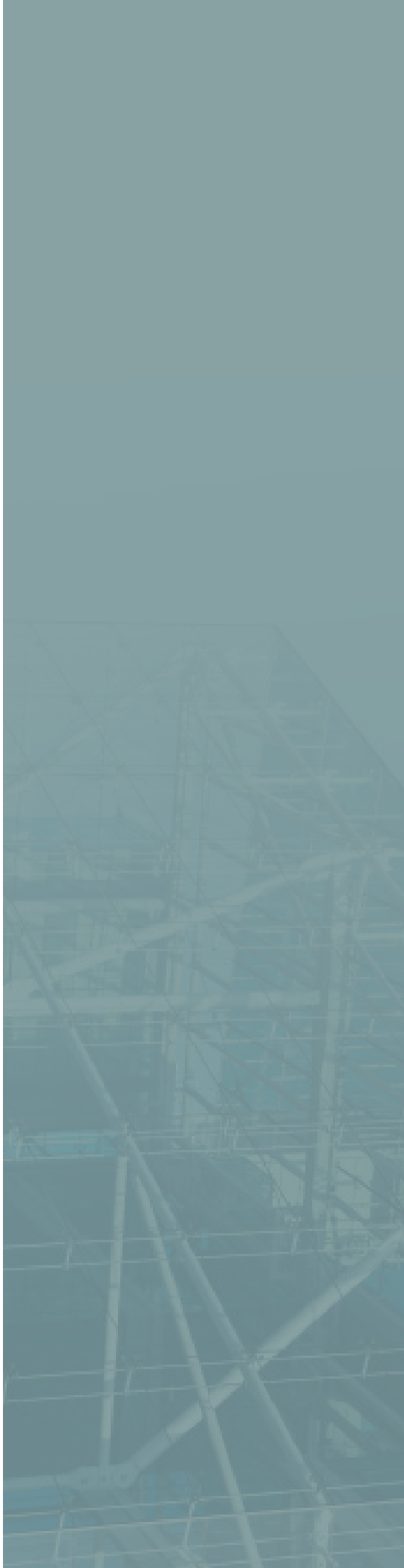
Ms. Pridgen had been removed on a Chapter 43 performance-based removal. On appeal to the MSPB, Ms. Pridgen challenged the merits of the removal action, and also raised affirmative defenses of discrimination on bases of race, color, national origin, age and disability, as well as reprisal for prior EEO activity, for prior MSPB appeals, for prior OSC and OIG activity and for prior whistleblowing. The administrative judge rejected Ms. Pridgen's arguments after hearing, and Ms. Pridgen then petitioned for review before the Board.

The Board reversed the removal, finding first that the Agency had failed to meet its burden of proof. On appeal of Chapter 43 actions, an agency has the burden of proof of showing that the appellant had unacceptable performance in at least one critical element in the employee's performance evaluation. While an agency's burden of proof is low on appeal (substantial evidence), here the Agency failed to meet that burden because the alleged performance deficiencies upon which the Agency based the removal of Ms. Pridgen were for were noncritical "strategic goals," not Ms. Pridgen's critical elements. The Board explained that the standard for a critical element is one where the entire performance evaluation is unacceptable if the element is not met; here, Ms. Pridgen would have needed to fail no less than three "strategic goals" to receive an unacceptable performance evaluation, and so the "strategic goals" were not critical elements for Chapter 43 purposes.

The Board found that the administrative judge had improperly failed to consider relevant comparator employees in connection with Ms. Pridgen's claims that she was being discriminated against. The Board found that the administrative judge had erred in excluding a comparator with the same sort of position under the same rating supervisor on the argument that their assignments differed. The Board also found that the administrative judge erred in not considering Ms. Pridgen's prior Board appeals (in which she raised EEO allegations) as a form of prior protected EEO activity for purposes of her EEO reprisal affirmative defense.

The Board also used the Pridgen decision as a vehicle to update how affirmative defenses are analyzed more generally. Those appealing disciplinary actions at the MSPB can raise 'affirmative defenses.' In MSPB proceedings an affirmative defense is a claim that the disciplinary action should be reversed, even if the charge is otherwise proven--for example, because the disciplinary action at issue was allegedly discriminatory or retaliatory. For affirmative defense, the appellant bears the burden of proof.

The Board clarified its prior precedent concerning EEO affirmative defenses. As a result of Pridgen, parties will need to plead EEO retaliation affirmative defenses in a manner different than they plead discrimination affirmative defenses. One issue was the distinction between arguing discrimination claims based on a 'but-for' discrimination analysis versus a 'motivating factor' analysis. In 'motivating factor' analysis, the employee need only show that the discriminatory intent motivated the employment decision to some extent. Under a 'but-for' analysis, the employee has to show that discrimination was not merely a factor in the employment decision, but one that was necessary to the action occurring. The standard of proof for a 'but-for' analysis is generally considered higher. However, if discrimination is not proven at the 'but-for' level, then the employee may not receive some forms of major personal relief (including, for example, compensatory damages), even if they win the case on a 'motivating factor' analysis. The Board found that employees could raise either 'but-for' or 'motivating factor' arguments for Title VII discrimination claims (here, race, color and national origin), age discrimination claims and disability discrimination claims. For retaliation claims under the Rehabilitation Act (which governs disability discrimination issues for federal employees), employees can only raise 'but-for' arguments. The Board also clarified the forms of evidence that it would consider for discrimination affirmative defenses, setting a fairly open standard for forms of permissible evidence, including direct evidence of discriminatory evidence (for example, slurs by the deciding manager connected with their stated reason for the appealed disciplinary action), comparator evidence (for example, evidence that another employee got treated better than the



appellant under similar circumstances), pretext evidence (for example, proof that that the Agency's stated excuse for the disciplinary action was false), and other circumstantial evidence (which looks at suspicious timing and other factual hints suggesting discriminatory motive, under what is referred to as the 'convincing mosaic' standard).

The Board in Pridgen also clarified the standard it set in Savage v. Department of the Army, 122 M.S.P.R. 612 (2015) regarding the McDonnell-Douglas '3-step' analysis (under which the burdens shift between the parties, with the employee first showing a basic 'prima facie' case that they were discriminated against, then the agency second stating an alleged legitimate reason for its action, and then third the employee showing that the agency's excuse was a fiction and pretext for discrimination). Under Savage, the Board had rejected McDonnell-Douglas in Board proceedings as often associated with summary judgment motions (which do not exist at the MSPB). In Pridgen, the Board said that the McDonnell-Douglas '3-step' analysis could be used as a way to organize pleading and analysis of discrimination issues, even though no summary judgment exists at the MSPB.

The Board found that the 2012 Whistleblower Protection Enhancement Act (WPEA) applied to the case, because Ms. Pridgen's removal occurred after the WPEA's effective date (even if some of Ms. Pridgen's alleged protected whistleblowing and related activity predated the WPEA). The administrative judge further erred in finding that Ms. Pridgen's disclosure that the Agency had failed to meet two deadlines from an appropriations statute to not be protected whistleblowing disclosures, and also erred by ignoring certain other protected disclosures to the Office of Special Counsel (OSC). The Board also faulted the administrative judge's finding that Ms. Pridgen's communications with OSC or the Inspector General would not be protected under 5 U.S.C. § 2302(b)(9)(C) unless the specific communication disclosed wrongdoing; the Board clarified that any such communication with OSC or the Inspector General is protected under the statute irrespective of the content of the communication.

The Board also remanded for consideration of whether Ms. Pridgen could show whistleblower reprisal even without proving managers' knowledge of her protected activity prior to the alleged retaliatory actions. The primary test included in the whistleblower reprisal basic or 'prima facie' case involves showing that the alleged retaliating managers learned about the protected whistleblowing, and then took the retaliatory action within 1-2 years of learning of the protected whistleblowing (often referred to as the 'knowledge-timing' test). The Board noted that this 'knowledge-timing' test is not the only way to plead a 'prima facie' whistleblower reprisal claim. Instead, an employee can also use other evidence to make that 'prima facie' case, including examination of the strength or weakness of the Agency's rationale for its actions, whether the relevant manager were the recipients of the protected disclosures and whether the managers had a motive to retaliate. The administrative judge also erred in discounting one of Ms. Pridgen's protected disclosures when assessing possible retaliatory motive, and also erred in failing to consider—as part of the proof of strength of intent to retaliate—the issue of whether the subject matter of Ms. Pridgen's whistleblowing disclosures made the alleged retaliating managers look bad, even if they were not the direct target of those whistleblowing disclosures.

Considerations by Courts in Awarding Front Pay as a Remedy in Employment Discrimination Cases

EXCERPTED WITH PERMISSION FROM CHAPTER 2 OF COMPENSATORY DAMAGES AND OTHER REMEDIES IN FEDERAL SECTOR EMPLOYMENT DISCRIMINATION CASES, BY GARY M. GILBERT AND DERYN A. SUMNER

Front pay is "intelligent guesswork" as the Fifth Circuit commented in Sellers v. Delgado College, 781 F.2d 503, 505 (5th Cir. 1986). An award of front pay should only be of sufficient duration to last until the employee is able to find alternative work. The length of time for front pay depends upon the facts of the particular case. For example, in Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998), the First Circuit affirmed an award of front pay for a relatively brief period to an employee who was discharged because of her mental impairments (Attention Deficit Disorder, anxiety disorder and depression). The district court had declined to order reinstatement and limited front pay to a period of six months, noting that by that time the employee should be able to find alternative work.

Front pay may also be appropriate where reinstatement is not feasible and the employee has subsequently found other work. In Green v. Administrators of Tulane Educ. Fund, 284 F.3d 642 (5th Cir. 2002), front pay was awarded to a victim of sexual harassment ending after she effectively mitigated her damages by accepting a higher paying position elsewhere. But there may be times when securing other employment itself may render the need for front pay moot because the lingering effects of the employer's discriminatory actions may have ceased. Take for example, McKnight v. Gen. Motors Corp., 973 F.2d 1366, 1368, 1371 (7th Cir. 1992), where the Court for Appeals for the Seventh Circuit reviewed a decision from the district court finding that reinstatement was not appropriate "because the relationship between McKnight and GM was acrimonious, and because McKnight preferred not to be reinstated in his former position, but in a corporate finance or banking position." The appellate court observed that:

> A proper cutoff time for a damage assessment in this case should be the day when the wounds of discrimination should have healed. In this case it is certain that the sting of any discriminatory conduct ended, or should have ended, substantially in advance of the date the trial on damages commenced.

In finding no further relief was justified, the court commented that "McKnight did more than take a job in an unrelated field. He testified at trial that he had become a stockbroker, and in his post-trial pleadings requesting reinstatement, expressed a preference for a job in his new field."

Courts have set forth a variety of nonexhaustive factors to consider in determining the length of an award of front pay. The Sixth Circuit has held that awards of front pay should consider certain factors, including the employee's duty to mitigate, the availability of other employment opportunities, whether there are reasons that would limit the future employability, and the employee's work and life expectancy. See Roush v. KFC Nat'l Mgmt. Co., 10 F.3d 392, 399 (6th Cir. 1993).

The Fourth Circuit, in Hunter v. Town of Mocksville, 897 F.3d 538, 563 (4th Cir. 2018), blessed several factors a trial court enumerated in determining a front pay award, including "the plaintiff's age; the length of plaintiff's employment with the defendant-employer; the likelihood that plaintiff's employment would have continued absent the discrimination; the length of time it would take plaintiff to secure comparable employment using reasonable efforts; plaintiff's work and life expectancy;

the typical length of time other employees held the position lost; plaintiff's status as an at-will employee; plaintiff's ability to work, including the ability to work for the defendant-employer; plaintiff's subjective intention to remain in the position; and plaintiff's efforts to mitigate damages."

Awards of front pay vary significantly in duration depending on the circumstances presented. In EEOC v. Wal-Mart Stores, Inc., No. 17-cv-739-jdp, 2020 U.S. Dist. LEXIS 55734, at *13–14 (W.D. Wis. Mar. 31, 2020), the court found an award of 10 years of front pay to be appropriate, largely because of the plaintiff's lack of skills to be able to secure other work. Recognizing the rather lengthy period of front pay, the court nonetheless found it appropriate to award the difference between what the plaintiff had earned working for Walmart and the earnings he had from delivering newspapers and selling birdhouses.

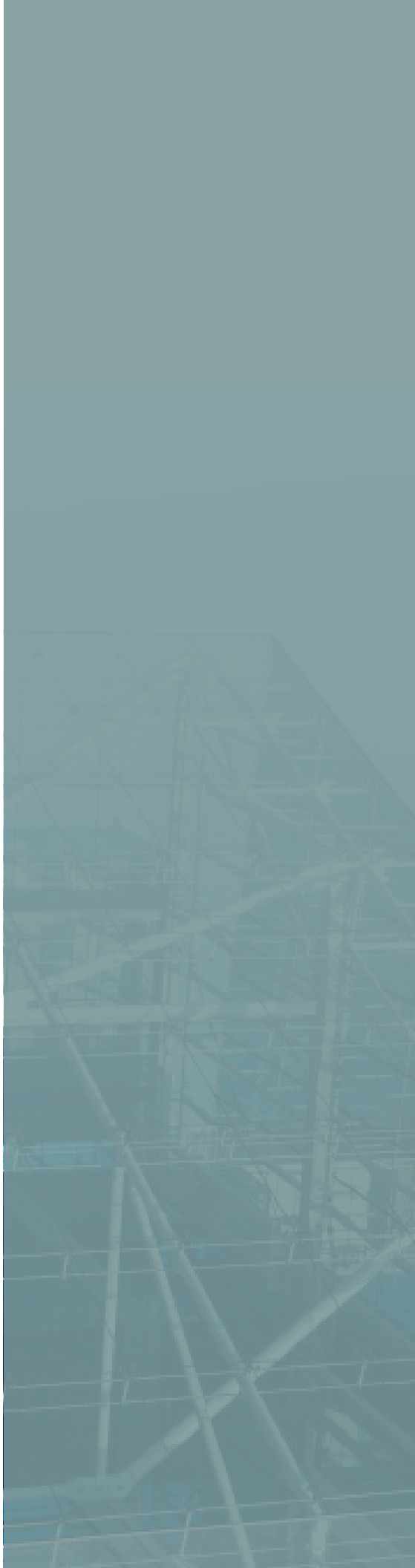
Although awards of front pay through eligibility for retirement are uncommon, other than when the employee is reasonably near retirement age, there are exceptions. For example, such an award of front pay was made to a plaintiff in his forties in Tinsley v. City of Charlotte, No. 3:16-CV-00656-GCM, 2019 U.S. Dist. LEXIS 70892, at *18–20 (W.D.N.C. Apr. 26, 2019). Finding that circumstances warranted front pay through the age of retirement eligibility was appropriate under the specific circumstances confronting the court, it explained, "Plaintiff only has nine years until he would have qualified for retirement. While Plaintiff is a young man, the amount of time until he could qualify for retirement is relatively short. Thus, the reasoning behind disfavoring an award of front pay through retirement to a plaintiff in his forties loses much of its persuasion in this case."

And in Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1041 (U.S. 10th Cir. 2021), the Tenth Circuit noted that it "has identified several factors to be considered in determining a front pay award:

> (1) work life expectancy, (2) salary and benefits at the time of termination, (3) any potential increase in salary through regular promotions and cost of living adjustment, (4) the reasonable availability of other work opportunities, (5) the period within which the plaintiff may become re-employed with reasonable efforts, and (6) methods to discount any award to net present value."

The Third Circuit affirmed an award of front pay for ten years, finding the district court had not abused its discretion in finding plaintiff was entitled to the difference in wages between what she was earning in subsequent employment and what she would have otherwise have earned had she been hired into the full time position she sought (she was then discharged from her part time employment). Donlin v. Philips Lighting N. Am. Corp., 564 F.3d 207 (3rd Cir. 2009). In Donlin, the district court sought an advisory decision on the subject of front pay from the jury (remember—equitable relief, including back pay and front pay, is always awarded by the court; only compensatory damages are awarded by the jury). When the jury recommended front pay for a period of 25 years, the district court reduced the award to 10 years. In a decision that nicely articulates the factors considered in determining the duration of front pay awards, the Third Circuit found the district court's action reasonable. Id. at 219–222.

But compare the decisions above with the decision of the Fourth Circuit in Dotson v. Pfizer, 558 F.3d 284, 299–300 (4th Cir. 2009). In Dotson, the plaintiff in an FMLA retaliatory discharge claim sought front pay from the date of termination until his planned retirement some 15 years hence. The district court determined such an award was too speculative and the Fourth Circuit agreed, holding that, "Dotson appeals the district court's denial of his request for front pay. He asked for approximately $8 million in front pay, including lost future earnings and benefits stretching fifteen years into the future—until, as Dotson explained, a planned early retirement at age 58…Under these circumstances, we do not believe the district court abused its discretion in denying Dotson front pay. At the time the court ruled on Dotson's request for front pay, Dotson had secured full-time employment in the pharmaceutical services industry, making approximately $65,000 less than the approximately $232,000 in salary and benefits he made prior to his termination. Thus, he had secured comparable, if not precisely equivalent, work at another major drug company."



Courts Confirm Exhaustion of Administrative Remedies Is a Procedural, Not Jurisdictional, Issue

BY ANNE MCENANEY
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On February 24, 2021, the 7th Circuit Court of Appeals issued its decision in McFarland-Lawson v. Ammon, reaffirming the Supreme Court's holding in Fort Bend County v. Davis, that a failure to exhaust administrative remedies in employment discrimination cases is a procedural issue, not a jurisdictional one.

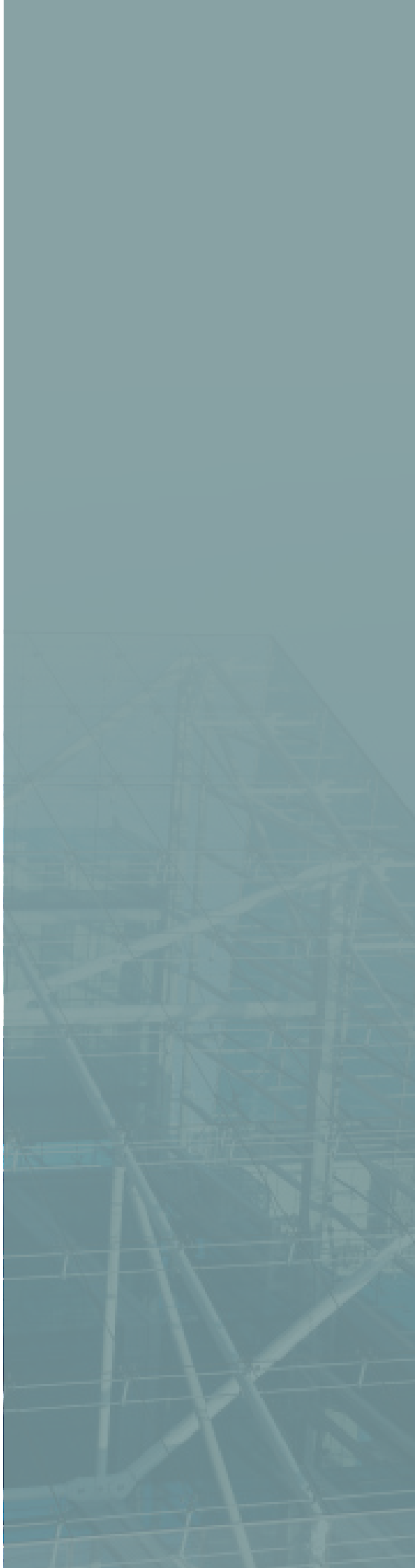
Federal employees must follow certain administrative procedures when pursuing employment discrimination claims before they can sue in federal court. See Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976); Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003). In Fort Bend County v. Davis, the Supreme Court held that a plaintiff's failure to exhaust her administrative remedies does not foreclose a federal court's jurisdiction over her claim. Fort Bend Cty., Texas v. Davis, 139 S. Ct. 1843 (2019).

Per the Civil Service Reform Act of 1978, an employee who works for an agency covered by a collective bargaining agreement that permits the filing of grievances alleging discrimination may begin the administrative process by filing either a union grievance or an Equal Employment Opportunity Commission ("EEOC") charge, but not both. 5 U.S.C. § 7121(d); 29 C.F.R. § 1614.301(a). Unions have an independent right to file a grievance on a union employee's behalf and can do so without such employee's request or approval. 5 U.S.C. § 7121(b)(1)(C)(i). The mere fact that someone initiated a union grievance does not automatically equate to an "election" of the grievance procedure by the union employee. See Kendrick v. Dep't of Veterans Affairs, 74 M.S.P.B. 178, 181 (1997). If a union files a grievance automatically, or otherwise without the unionized employee's assent, that employee may still independently pursue an EEOC charge on the same issues unless she became aware of the grievance and ratified it by failing to disavow it when given the opportunity. See id. at 182-83; Morales v. Merit Sys. Prot. Bd., 823 F.2d 536, 538-39 (Fed. Cir. 1987).

Plaintiff-Appellant McFarland-Lawson had a host of issues with her former employer, the United States Department of Housing and Urban Development ("HUD"). In March 2012, she filed her first of two EEOC charges against her former employer the United States Department of Housing and Urban Development HUD. After harsh words were exchanged during the investigation of that charge, HUD placed McFarland-Lawson on unpaid indefinite enforced leave that December. Subsequently, McFarland-Lawson's union filed a grievance against HUD for placing her on unpaid indefinite enforced leave. McFarland-Lawson, however, did not sign the grievance. She asserted that the union filed the grievance without her knowledge or her approval and that she did not participate in any meeting to resolve it. HUD denied the grievance, and the union never pursued arbitration, the final step in the administrative process.

McFarland-Lawson later filed her second EEOC charge, and in March 2016, HUD issued a final decision finding no discrimination or harassment took place. McFarland-Lawson then brought claims against HUD under the Americans with Disabilities Act, Title VII of the Civil Rights Act, and Section 503 of the Rehabilitation Act in federal district court. She broadly alleged that the adverse employment actions HUD took against her since 2011 were because of discrimination based on her disability, race, gender, and veteran status. HUD moved to dismiss Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction or Rule 12(b)(6) for failure to state a claim.

Because the union never exhausted the administrative process, HUD argued McFarland Lawson foreclosed her ability to pursue related claims in her second EEOC charge, and to pursue that claim in the district court, because the union never exhausted the administrative process. The Magistrate judge orally granted HUD's motion and concluded that any claim related to Plaintiff's unpaid indefinite enforced leave was foreclosed for failure to exhaust administrative remedies (because there was no arbitration after the grievance was denied). The Judge then entered a written order and judgment finalizing its oral ruling. The order briefly summarized the hearing and granted HUD's motion to dismiss for lack of jurisdiction. McFarland-Lawson appealed. The Circuit Court vacated and remanded the order to dismiss a HUD employee's employment discrimination claim for lack of subject matter jurisdiction. The Court rejected HUD's argument that Plaintiff's (alleged) failure to exhaust her administrative remedies was a jurisdictional defect. The Court held "[t]he proper basis for dismissing a federal employee's employment discrimination claim that has not been properly exhausted is for failure to state a claim upon which relief can be granted, not lack



of subject- matter jurisdiction. Failure to exhaust is not a jurisdictional defect. The Title VII of the Civil Rights Act of 1964 administrative charge-filing requirement is a mandatory, but non-jurisdictional, prerequisite to suit."

While it might have been appropriate to affirm the dismissal as one for failure to state a claim, the magistrate judge went beyond the pleadings in finding the dismissal appropriate. Namely, the Magistrate Judge concluded McFarland-Lawson foreclosed her ability to pursue claims related to her second EEOC charge because she filed a union grievance and did not exhaust the administrative process via arbitration. However, McFarland Lawson did not mention the grievance in her pleadings; HUD raised the grievance in its motion to dismiss. This factual dispute has legal significance because the union had an independent right to file on her behalf without her request or approval. That the union filed a grievance does not mean she elected to pursue the grievance procedure. By accepting HUD's assertion that McFarland-Lawson pursued the union grievance, the Magistrate Judge failed to construe the pleadings in the nonmovant's favor and improperly decided a factual dispute on the motion to dismiss.

Per Rule 12(d), when matters outside the pleadings are not excluded by the court as they were here, the motion must be treated as one for summary judgment. Even had the Magistrate Judge so construed the motion, he failed to give notice to the parties, denying McFarland-Lawson the opportunity to present evidence in support of her position. Therefore, the district court erred by treating failure to exhaust as a jurisdictional issue and in resolving a factual dispute about whether McFarland-Lawson filed a union grievance. Before the Supreme Court decided Fort Bend, the circuit courts were split on the issue of whether to treat failure to exhaust administrative remedies as jurisdictional or procedural. The First, Second, Third, Fifth, Sixth, Seventh, Tenth and D.C. Circuits had held that Title VII's administrative exhaustion requirement was non-jurisdictional, and employees were not required to exhaust administrative remedies prior to bringing workplace bias actions in federal court. The Fourth, Ninth, and Eleventh Circuits, however, held the opposite, and had prohibited federal courts from hearing Title VII claims for lack of subject matter jurisdiction.

With its Fort Bend decision, the Supreme court emphasized its efforts to "ward off profligate use" of the term jurisdiction. 139 S. Ct. at 1488(2019). The distinction between jurisdictional issues and mere procedural ones are significant. Subject matter jurisdictional issues may be raised at any point in litigation, and "harsh consequences." Id. (quoting United States v. Kwai Fun Wong, 575 U. S. 402, (2015)). Where statutes do not classify "a prescription as jurisdictional, courts should treat the restriction as nonjurisdictional in character." Id. (quoting Arbaugh v. Y & H Corp., 546 U. S. 500, 515-16 (2006)). Because Title VII does not so rank the exhaustion requirement as jurisdictional, the Supreme Court held an EEOC Charge is not a jurisdictional prerequisite to Title VII court action. Id. McFarland-Lawson so affirms.