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U.S. Fifth Circuit Update

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CASES TO KNOW FROM THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT: MAY 2022-23

This paper summarizes opinions of general interest in civil litigation from the U.S. Court of Appeals for the Fifth Circuit, issued after mid-May of 2023.

Administrative Law

1. The Fifth Circuit was presented with a stay application in a case involving menthol flavored e-cigarettes. Initially, the FDA issued guidance for such cigarettes stating that applicants for marketing approval did not need to provide long-term studies to support their application. Relying on that guidance, R.J. Reynolds Vapor Company submitted such an application for a menthol-flavored item called the "Vuse." The FDA sent R.J. Reynolds a rejection for its other kinds of e-cigarettes—requiring evidence that the use of these items helps smokers switch to vaping—but did not mention the menthol cigarettes. But then, FDA denied R.J. Reynolds' application for the menthol cigarettes, stating that it had not provided sufficient long-term studies showing the menthol cigarettes would "promote complete switching or significant cigarette reduction" compared to tobacco-flavored products. R.J. Reynolds appealed, and sought a stay.

The Fifth Circuit granted the stay, reasoning that although FDA's orders are reviewed under the normal "arbitrary and capricious" standard of review, an agency that changes course must "take into account" parties' reliance interests in doing so. This, the Fifth Circuit explained, is called the "surprise switcheroo" doctrine. That is, "agencies must give notice of conduct the agency prohibits or requires" and "cannot surprise a party by penalizing it for good-faith reliance" on the agency's prior positions. Under that standard, the Fifth Circuit stated, the FDA's actions could not be supported. The case is currently pending on the merits.

RJ Reynolds Vapor Co. v. FDA, 65 F.4th 182 (5th Cir. 2023).

2. The mercurial chief executive of Tesla, Incorporated, Elon Musk, sent several tweets during a "tense" union campaign at Tesla's manufacturing plant in Fremont, California. The tweets implied that if the union prevailed, Tesla would take away employees' rights to Tesla stock options. Later, Musk clarified that he meant the Union's presence would make Tesla unable to offer stock options.

Nonetheless, the NLRB found that Musk posted an unlawful threat on twitter, and that one of Tesla's employees had been unlawfully terminated. Tesla petitioned for review of the agency action in the Fifth Circuit. The Court affirmed. As to the alleged threat, the Court noted that Musk's statements were materially similar to other statements that courts have held to be threats (for example, "if the Company were to go union the employees would lose all their benefits"). The Court also noted that Musk's later clarifications were not contemporaneous and therefore could not changed whether a reasonable employee would view them as a threat. After all, not every employee that saw the threat would necessarily have seen the clarification—the damage might already have been done.

We note that a rehearing petition for this case is still pending, so perhaps the panel's decision is not the last word on this interesting topic.

Tesla Inc. v. NLRB, 63 F. 4th 981 (5th Cir. 2023).

Antisuit Injunctions

In another case, the Fifth Circuit analyzed a more unusual kind of preliminary injunction: an international anti-suit injunction. A sailor brought tort and contract claims in Louisiana, after suffering serious injuries while working on a ship. Kholkar Ganpat contracted malaria, allegedly because his employer did not stock enough malaria pills, and ended up with his toes amputated. In response, his employer counter-sued in India, and as part of that lawsuit succeeded in persuading Indian authorities to arrest Mr. Ganpat. They then used that arrest as pressure to force him to settle his claims in Louisiana. Faced with this extraordinary situation, the district court issued an anti-suit injunction.

The Fifth Circuit affirmed, 2-1. For the majority, Judge James Ho held that the injunction was justified because of the foreign suit's ability to frustrate and delay the American suit. And, the Court held, comity was not at issue here because the "American suit was well underway before the Indian litigation began."

Judge Edith Jones dissented. As she put it, the majority "minimize[ed]" the concerns of international comity, and refused to "apply traditional equitable principles" (such as requiring irreparable harm before issuing an injunction.

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