Monthly Update for October

6th Circuit

Bankruptcy: *Auday v. Wet Seal Retail*, _ F.3d _, 2012 WL 5259002 (6th Cir. Oct. 25, 2012).

http://www.ca6.uscourts.gov/opinions.pdf/12a0370p-06.pdf

In *Auday*, four days before the employee was terminated, she and her husband filed for bankruptcy. Three months later, the employee's attorney informed the bankruptcy trustee of a possible age discrimination claim, information that was not shared with the bankruptcy court. After the bankruptcy court discharged the bankruptcy, the trustee applied for the authority to hire the employee's attorney to pursue the discrimination claim. The application was granted, appointing the attorney as "special counsel for the trustee." The discrimination lawsuit, however, was filed by the employee and was dismissed by the district court on the basis of judicial estoppel.

The Sixth Circuit vacated the dismissal of the employee's age discrimination claims and remanded for the purpose of dismissing the case without prejudice or allowing the employee to amend the complaint to substitute the bankruptcy trustee as the plaintiff. The court noted that the trustee, not the employee, sought permission to employ counsel. Additionally, the trustee did not abandon the claim, which would have returned it to the employee.

FLSA: *Henry v. Quicken Loans*, _ F.3d _, 2012 WL 5259000 (6th Cir. Oct. 25, 2012).

http://www.ca6.uscourts.gov/opinions.pdf/12a0369p-06.pdf

In *Henry*, the Sixth Circuit affirmed a jury verdict finding that mortgage bankers fell within the administrative exemption of the Fair Labor Standards Act ("FLSA"). The trial focused on whether the mortgage bankers' primary duties involved both "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" (*i.e.*, the "management-related prong") and "the exercise of discretion and independent judgment with respect to matters of significance" (*i.e.*, the "discretion-and-independent-judgment prong").

Addressing the management-related prong, the Sixth Circuit noted that the witnesses' testimony diverged and that the jury acted within its bounds when it concluded that the employees' primary duty did not involve selling financial products, which would not have qualified the employees for the administrative exemption. Turning to the discretion-and-independent-judgment prong, the Court noted that the fact that Quicken provided a ten-step guideline and supervisory checks was not dispositive. The Court concluded that the jury made a reasonable finding of fact that the employees compared and evaluated possible courses of conduct and made a decision after considering various possibilities. The Court also rejected the employees' argument to review the administrative exemption as a matter of law, concluding that this case involved a material fact dispute about the bankers' primary responsibilities. Finally, the Court rejected the employees' reliance

on Department of Labor opinion letters, noting that they applied to distinct scenarios.

Age Discrimination and Retaliation: *Blizzard v. Marion Technical College*, _ F.3d _, 2012 WL 5040544 (6th Cir. Oct. 19, 2012).

http://www.ca6.uscourts.gov/opinions.pdf/12a0362p-06.pdf

In *Blizzard*, an employee sued her employer for age discrimination and retaliation under federal and state law following her termination. The district court granted summary judgment on all claims and the employee appealed.

Addressing the discrimination claim, the Sixth Circuit concluded that the plaintiff-employee presented evidence that she was replaced by a younger employee. The Court rejected the employer's attempt to identify one employee as the replacement because that employee only temporarily assumed the plaintiff's responsibilities. Instead, the employee who was hired three months later to fill the plaintiff's position was the replacement. Next, the Court noted that while an age difference between a plaintiff and a replacement of ten or more years is generally significant, a replacement who is six to ten years younger must be considered on a case-by-case basis. Here, the district court reasonably exercised its discretion when it concluded that the six-and-a-half year age difference was sufficient to create an inference of age discrimination.

Ultimately, however, the employee's discrimination claim failed because she could not establish pretext. The Court held that "a formal termination letter is not the only evidence a court may use to determine the reasons for an employee's dismissal," thus rejecting the employee's argument that the termination letter was the only proper statement of the reasons behind her termination. The Court also determined that the district court improperly failed to consider the employee's opinion testimony contesting the facts behind the employer's stated reasons for firing her as a method of demonstrating pretext. Despite this error, the employer was still entitled to summary judgment under the Court's "modified honest belief rule" because the employer made a reasonably informed and considered termination decision. The Court also rejected reliance on alleged age-related comments because two of the statements "could just as easily refer to tenure" (rather than age) and because the remarks were unrelated to the decision to terminate.

Finally, the employee's retaliation claim failed because she could not establish causation where the last oral complaint that constituted protected activity was made more than a year before her termination. Additionally, the employee's June 2006 performance appraisal did not constitute an adverse action (which occurred "within days" after she first engaged in protected activity and two years before her termination) because there was no evidence the appraisal reduced her compensation or possibility for future advancement.

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Monthly Update for October

7th Circuit

***Fleishman v. Continental Causality Company* (7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/MZ0KYP71.pdf

The Court Determines That In ADEA Cases, Plaintiffs Must Present Evidence That Could Lead A Jury To Conclude That Age Was A But-For Cause Of Discrimination

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ADEA and ADA claims. This case involved a question concerning the plaintiff's burden during summary judgment motions in ADEA and ADA cases. The Court held that the language in the ADEA proscribing discrimination "because of" age requires a showing that could support a jury verdict that age was a but-for cause of the adverse employment action. The Court held that the plaintiff failed to meet this burden as the statement relied upon was devoid of age related context, not contemporaneous with the adverse employment action, and the connection between the comment and the decision to terminate was not sufficient to reasonably lead a jury to believe that age may have been a but-for cause of the termination. The Seventh Circuit found the dismissal of the ADA claim appropriate because the plaintiff failed to present sufficient evidence to show he was disabled under the ADA. The plaintiff attempted to rely on the name and diagnosis of the impairment instead of showing how the impairment affected him personally. The Court held that determining whether or not a plaintiff has a disability is made on an individualized basis and plaintiff in this case failed to offer evidence that could lead a jury to believe he was disabled under the ADA.

***Povey v. City of Jeffersonville, Indiana* (7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/MZ0KC4T2.pdf

Court Holds "Regarded As" Statement By The Employer Must In Be Taken In Context And Exclude An Individual From A Broad Class Of Jobs

The Seventh Circuit affirmed the district court's grant of summary judgment for defendant on the plaintiff's claims under the ADA. This case involves a kennel attendant who injured her wrist at work and as a result of this injury was eventually terminated. Plaintiff claimed that her employer regarded her as having a substantial impairment that limited her abilities in the major life activity of working. In determining whether an individual is regarded as limited in the major life activity of working the Court held that the employer must believe, correctly or not, that the individual is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. Normally, a plaintiff would have to provide some proof of the number and types of jobs they were excluded from as a result of this impairment. However, courts have also held that sweeping statements by the employer which show that the they believed the impairment would exclude the person from a broad class of jobs beyond those at the company can be sufficient to allow a jury to conclude that an employer regarded a plaintiff as disabled. Here, the plaintiff relied on the employer's testimony that she "wasn't able to use her right hand" to show that the defendants believed that she was substantially limited in performing any job involving manual labor. However, the Court found that these statements applied only to a few individual positions and did not qualify as sweeping statements of the employer which a jury could use to reasonably conclude that the employer regarded plaintiff as disabled under the ADA.

Monthly Update for October

Vulcan Construction Materials L.P. v. Federal Mine Safety and Health Review Commission **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/MZ0KBDSU.pdf

The Court Holds That The Plain Meaning Of 30 U.S.C. § 815(C) Requires The Temporary Reinstatement Of Miner Workers To End When The Miners' Complaint Lacks Merit

The Seventh Circuit granted the plaintiff's petition for review and reversed the judgment of The Federal Mine Safety and Health Review Commission affirming the ALJ's denial of the motion to dissolve a temporary reinstatement order. This case asked the Seventh Circuit to look at the statutory language of claims filed pursuant to 30 U.S.C. § 815(c)(2), with the Mine Safety and Health Administration to determine if the statute unambiguously addressed how long a temporary reinstatement order should remain in place after the Secretary of Labor determined the discrimination claim to lack merit. The Seventh Circuit, looking at the broader context of § 815(c), found that the plain meaning of the statute required the temporary reinstatement to end when the Sectary of Labor's involvement ended. The Seventh Circuit reached this conclusion after finding that (1) that the temporary reinstatement provision is placed within § 815(c)(2); (2) that § 815(c)(2) focuses on the Secretary's involvement in redressing retaliation complaints; (3) that the term Congress employed for the Secretary's means of redress on behalf of the miner also is "complaint"; and (4) that § 815(c)(3) employs completely different terminology. It is clear that Congress meant for the term to encompass both the miner's complaint before the Secretary and the Secretary's complaint on behalf of the miner before the Commission.

Anderson v. Donahoe **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/MZ0KB8EU.pdf

Court Holds Thirteen Months Between Protected Activity And Adverse Action Insufficient To Give Rise To An Inference Of Retaliation In ADA Claim

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ADA and FMLA claims. This case involved a U.S. Postal worker who filed several EEO complaints relating to his asthma, the condition plaintiff claimed required accommodation and leave from work. The Court first addressed the plaintiff's claim that USPS retaliated against him after he filed EEO charges. Proceeding under the direct method of proof, the Court determined that the plaintiff was unable to establish a causal connection between the adverse employment action, a five-day disciplinary suspension, and the filing of the charges. In particular, the court determined that the thirteen months between the protected activity and the adverse action was not sufficient to create an inference of retaliation. Further, the Court reasoned that with regards to the plaintiff's disability discrimination, accommodation and FMLA claims, the plaintiff's act of omitting these charges in his two amended complaints effectively waived these claims, despite the plaintiff's attempt to revive his causes of action by arguing them in his response to the defendant's motion for summary judgment.

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Monthly Update for October

8th Circuit

***Hill v. City of Pine Bluff, Arkansas*, No. 11-2799 (8th Cir., October 15, 2012) (To Survive § 1983 Wage Discrimination Claim, Jobs Must Be Substantially Equal; Written Warning Without Threatening Termination Is Insufficient for Retaliation Claim)**

http://www.ca8.uscourts.gov/opns/opFrame.html

The Plaintiff, Lakishia Hill, brought a wage discrimination and retaliation claim under 42 U.S.C. § 1983 and Arkansas state law against her employer, the City of Pine Bluff, Arkansas, which was summarily dismissed by the trial court. Hill was a secretary who was promoted to zoning official (salary approx. $28,000) following a course of training and mentoring to take a retiring employee's position (salary approx. $41,000). Hill asserted that City policy required that she be paid what the "position was budgeted for," which she argued was the salary the retiring employee made. Hill alleged that the failure to pay her the higher salary was wage discrimination. The trial court disagreed, holding that while Hill shared the job duties and title of the outgoing retired employee, she did not perform her job under "similar working conditions" as the retired employee (and another male zoning official) had far greater seniority and supervisory responsibilities. The Eighth Circuit Court of Appeals agreed, holding that although the jobs being compared need not be identical, "they must be substantially equal as actually performed" and that "job classifications and titles are not dispositive." Further, the Court held that Hill failed to identify a "similarly situated man who had little or no relevant work experience but was nonetheless paid a starting salary equal to the salary of his more experienced predecessor."

Hill later applied for a position as Emergency Management Coordinator, and was unanimously recommended by a five person hiring committee. The Mayor rejected the recommendation, and instead hired a male firefighter who did not apply for the position. Again, the Eighth Circuit upheld the lower court, noting that in order to show pretext, Hill must show that a less qualified applicant was hired, which he clearly was not (nor did she argue he was not less qualified than her). Hill also failed to show that the City had a policy of only hiring persons who apply for a position.

Hill's retaliation claim rested on the fact that following the filing of her lawsuit she was written up as a disciplinary measure. Yet, the Court held that in order to establish a retaliation claim under § 1983, she must show that there was a material, adverse retaliatory action that actually produced injury or harm. Since she was disciplined before filing the lawsuit as well, and the warning did not threaten termination or any other employment-related harm, there was no chilling effect and her claim failed.

***Abshire v. Redland Energy Services LLC*, No. 11-3380 (8th Cir., October 10, 2012) (FLSA-Employers May Change Workweek To Reduce Overtime Pay So Long As It Is A Permanent Change)**

http://www.ca8.uscourts.gov/opns/opFrame.html

The plaintiffs, five current and former employees, filed suit against their employer Redland Energy Services, LLC ("Redland") after Redland changed the designation of the employees' workweek, but not their work schedule, in order to reduce overtime expenses. While employees worked the same hours, fewer hours qualified as overtime. The trial court

granted summary judgment for Redland, and the employees appealed.

The FLSA requires overtime based on hours worked in a "workweek," which is not defined by the Act. The Eighth Circuit Court of Appeals noted that the FLSA does not prescribe how an employer initially establishes a "workweek" and thus looked to the DOL regulations (29 C.F.R. § 778.105) which provide that an employer may change the beginning of the workweek if it is "intended to be permanent and is not designed to evade the overtime requirements of the Act". The Court held the only limitation is that the change must be permanent, which was not at issue in the present case. The Court held that so long as a change in a workweek is intended to be permanent, and is implemented in accordance with the FLSA, the reasons for adopting the workweek change are irrelevant.

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