Monthly Update for November

1st Circuit:

***NLRB v. Solutia, Inc.*, 699 F.3d 50 (1st Cir. 2012)**

http://www.ca1.uscourts.gov/pdf.opinions/12-1129P-01A.pdf

This case results from an employer's (Solutia, Inc.) desire to become more competitive and efficient by consolidating two lab operations into one and its obligation to bargain with the union regarding affected workers. The United Food and Commercial Workers International Union Local 414C ("Union") filed an unfair labor practice before the National Labor Relations Board as a result of Solutia's denial to bargain over certain work transfer decisions. Solutia considered these transfer decisions to be a managerial prerogative. The Board found that said lab work transfer decisions involved a mandatory subject of bargaining, so Solutia's refusal to bargain violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158 (a)(1) and (5). It also found that the recognition clause in the CBA between Solutia and the Union did not, as the Union alleged, prohibit the work transfer without Local 414C's consent. The Board Order required Solutia to return to the Union certain work it had transferred to another part of its worksite and to employees represented by another union, Local 288 back in 2009.

Thereafter, the Board filed a Petition for Enforcement before the U.S. Circuit Court of Appeals for the First Circuit. The First Circuit concluded that the Board did not err in law and its findings were supported by substantial evidence on the record. It concluded that the Local 414C had not waived its right to bargain, and that Solutia had failed to provide an adequate opportunity to bargain the effects of its decision. The First Circuit therefore granted the Board's Petition for Enforcement of its order and denied Solutia's cross-petition for review.

***Cruz v. Bristol Myers Squibb Co.*, 699 F.3d 563 (1st Cir. 2012)**

http://www.ca1.uscourts.gov/pdf.opinions/11-1617P-01A.pdf

Three employees who were terminated filed joint action against their employer, Bristol Myers, among others, alleging violation of the Age Discrimination in Employment Act (ADEA), the Worker Adjustment and Worker Benefit Protection Act, the Employee Retirement Income Security Act (ERISA), and various local laws. The District Court granted Bristol Myers' motion for summary judgment and the employees appealed. After evaluating the particular facts of the case and the applicable law, the First Circuit Court affirmed the judgment of the District Court.

The Court noted that plaintiffs seeking to join together in a single action must assert that common question of law or fact would arise in the action. In this case, the employees failed to demonstrate common circumstances and legal claims between them. For substantially the same reason, the certification of the suit as a collective action was declined under the ADEA. Furthermore, the Court emphasized that when various employees seek to bring a collective action under the ADEA, they must establish that they are similarly situated. Moreover, the modest factual showing that must be made cannot be satisfied simply by unsupported assertions. The Court determined that since the appellant, Cruz, neglected to exhaust his administrative remedies prior to filing suit, as required under ERISA, the claim was barred.

Monthly Update for November

***Matamoros v. Starbucks Corp.*, 699 F.3d 129 (1st Cir. 2012)**

http://www.ca1.uscourts.gov/pdf.opinions/12-1189P-01A.pdf

Matamoros is a class action suit regarding the practices and policies used by employers with respect to customer gratuities in relation to Massachusetts' latest version of the Tips Act. The District Court held that Starbucks violated the Act by having the baristas and shift supervisors participate in its tip-pooling policy. The First Circuit affirmed.

It was necessary to determine whether Starbucks' shift supervisors fell into the "wait staff" definition of the Massachusetts Tips Act to determine if they could participate in defendant's tip-pooling policy (the law provides that tips must be shared only amongst wait staff personnel). The controverted point with respect to the definition was if supervisors had managerial responsibilities. The law sets out that "wait staff" have *no* managerial responsibilities while Starbucks differentiated "managerial responsibility" with "limited supervisory tasks." It was expressed that "[w]hile job titles ordinarily are not dispositive in an inquiry into the application of a statute, they are not irrelevant." In the end, the First Circuit found that shift supervisors did indeed have some managerial responsibilities. Thus, the Starbucks policy violated the Tip Act. The First Circuit affirmed the class certification and the judgment, including treble damages.

***Rodriguez-Machado v. Shinseki*, __ F.3d __ (1st Cir. 2012) (2012 WL 5871052)**

http://www.ca1.uscourts.gov/pdf.opinions/12-1152P-01A.pdf

In *Rodriguez-Machado*, the First Circuit dismissed Plaintiff's appeal with prejudice for failing to comply with important appellate procedural rules. The Plaintiff appealed the grating of summary judgment dismissing her claim of age discrimination, retaliation, and hostile work environment under the Age Discrimination in Employment Act (ADEA). Yet, her opening brief offered no specific cited to the record in support of her version of the facts allegedly in dispute. In addition, Plaintiff's principal brief failed to provide the necessary caselaw or reasoned analysis to support her theories. As such, the First Circuit described Plaintiff's briefs as "textbook examples of how *not* to litigate a case on appeal".

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6th Circuit

Retiree Benefits (application of collateral estoppel doctrine): *Amos v. PPG Industries*, 699 F.3d 448 (6th Cir., Nov. 1, 2012)

http://www.ca6.uscourts.gov/opinions.pdf/12a0376p-06.pdf

In *Amos v PPG Industries*, the Sixth Circuit addressed whether retired former employees of the defendant are bound by a decision adverse to their former union in separate litigation to which the

retirees were not a party. While employed, the plaintiff retirees were represented by three labor unions for purposes of collective bargaining. In August 2001, the defendant modified the health benefits of its retirees by requiring them to pay a portion of their benefits costs. The unions sued for breach of the collective bargaining agreement in the Western District of Pennsylvania, noting that they represented the defendant's "employees." Specifically, the unions alleged that the health benefits of the defendant's retirees had vested prior to August 2001 and were thus not subject to change. The Western District of Pennsylvania disagreed and entered judgment for the defendant after the parties filed cross motions for summary judgment. The Third Circuit later affirmed.

In January 2005, while the Pennsylvania action was still pending, a handful of the defendant's retirees filed a lawsuit against it in the Southern District of Ohio, alleging virtually identical claims to those lodged in the Pennsylvania action. After the Third Circuit affirmed the lower court's decision in the Pennsylvania action, the defendant moved for summary judgment in the Ohio case. It argued that the basis of the Pennsylvania court's judgment – that the health benefits of the retirees had not vested – collaterally estopped the plaintiff's from arguing the contrary in the Ohio case. The district court agreed and entered judgment for the defendant.

The Sixth Circuit reversed. Noting that the doctrine of "issue preclusion" bars repetitive litigation of the same issue between the same parties, the Court explained that the plaintiffs – the individual retirees – were not parties to the Pennsylvania case. Next, the Court rejected the defendant's argument that two known exceptions to the "nonparty" rule applied. First, it disagreed with the defendant that the nature of the retirees' relationship with the union as its bargaining representative was the sort of "pre-existing substantive legal relationship" recognized by some courts. The recognized relationships, however, are limited to those arising from property law (e.g., "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor"). The Court explained that the retirees were *not* members of the unions at the time of the Pennsylvania judgment. "So there is no relationship that binds the plaintiffs here to the decision there."

Second, the Court rejected the argument that the retirees were adequately represented by someone with the same interests who was a party to the Pennsylvania suit – what the Sixth Circuit, and previously the U.S. Supreme Court, referred to as "virtual representation." Citing the Supreme Court's decision in *Taylor v Sturgell*, the Sixth Circuit explained that the theory of "virtual representation" is viable only if, among other things, there existed in the prior litigation "special procedures to protect the nonparties' interests or an understanding by the concerned parties that the first suit was brought in a representative capacity." The "special procedures" identified by the Supreme Court include those for class actions – "i.e., the procedural safeguards contained in Federal Rule of Civil Procedure 23." Because the district court in the Pennsylvania action "neither certified a class (nobody asked it to) nor employed any other 'special procedures' to protect the retirees' interests in that action…the plaintiffs here are not bound to the Pennsylvania decision by reason of any special procedures there." Without the "assent of the retirees," the Court concluded, "a union may not represent retirees in litigation that could bind them."

Fair Labor Standards Act (unpaid break time): *White v. Baptist Memorial Health Care Corp.*, __ F.3d __; 2012 WL 5392621 (6th Cir., Nov. 6, 2012)

http://www.ca6.uscourts.gov/opinions.pdf/12a0379p-06.pdf

In *White*, the Sixth Circuit rejected claims brought by a former nurse seeking unpaid wages for missed and unpaid meal breaks. The defendant maintained a policy requiring employees who worked shifts of six or more hours to receive an unpaid meal break that was automatically deducted from the employees' paychecks. Under the policy, employees were to report on an "exception log" each missed or interrupted meal break so that the defendant could properly compensate them for the additional time worked. Each employee signed a statement acknowledging that she understood the policy and that to be compensated for missed or interrupted meal breaks, she had to record the time in her "exception log."

Each time the plaintiff followed the defendant's procedures for tracking missed or interrupted meal breaks, she was compensated. The plaintiff alleged, however, that there were other times when she missed her meal breaks but was not compensated. Although she had complained from time to time to her supervisors that she did not receive a lunch break, the plaintiff never told her supervisors or the defendant's human resources department that she was not compensated for those missed meal breaks. She eventually stopped using the "exception log" altogether, but did not maintain any other records showing that she actually missed meal breaks. The plaintiff sued in the U.S. District Court for the Western District of Tennessee alleging violations of the Fair Labor Standards Act for not compensating her for working during meal breaks.

The U.S. District Court for the Western District of Tennessee granted the defendant's motion for summary judgment. The Sixth Circuit affirmed, following reasoning in similar cases by the Fifth, Eighth, and Ninth Circuits.

Noting that automatic meal deduction systems are lawful in the FLSA, the Sixth Circuit held that "if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." It rejected the plaintiff's argument that the defendant should have known about the unpaid time because of her complaints to her supervisors. According to the Sixth Circuit, "When an employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA."

Title VII Gender Discrimination (pattern-or-practice): *Serrano, EEOC v. Cintas Corp*, __ F.3d __; 2012 WL 5458182 (6th Cir., Nov. 6, 2012)

http://www.ca6.uscourts.gov/opinions.pdf/12a0383p-06.pdf

At issue in *Serrano* is the scope of the EEOC's authority to pursue a pattern-or-practice claim on behalf of a class of individuals and other administrative matters. The plaintiffs filed a Title VII, gender discrimination lawsuit on behalf of women allegedly discriminated against by the defendant, a uniform supply company, during the hiring process for its Service Sales Representative position. One unsuccessful female applicant filed a charge of discrimination with the EEOC in April 2000 challenging the defendant's hiring practices. In July 2002, the EEOC later issued a reasonable-cause determination. The EEOC sent a conciliation notice to the defendant on the same day. The defendant did not respond to it. Three years later,

the EEOC notified the defendant that it was terminating the conciliation process as "unsuccessful."

In May 2004, before the EEOC terminated the conciliation process, the claimant filed a Title VII class-action lawsuit in U.S. District Court for the Eastern District of Michigan. After the conciliation process ended, the EEOC, citing its authority under § 706 of Title VII, intervened in the lawsuit alleging a pattern-or-practice claim. Section 706 expressly gives the EEOC authority to bring a civil action on behalf of a person after conciliation efforts fail.

The district court granted the defendants' motion on the pleadings as to the EEOC's pattern-or-practice claim, and it granted summary judgment in the defendant's favor on the thirteen individual-claimant claims. The district court also granted the defendant attorneys' fees as the prevailing party. The EEOC appealed, challenging the district court's rulings that, among other things: (1) the EEOC could not pursue a pattern-or-practice claim under § 706 of Title VII, (2) the EEOC failed to satisfy its administrative prerequisites to suit; and (3) the defendant was entitled to attorneys' fees.

The Sixth Circuit reversed. First, citing to the U.S. Supreme Court's decision in *Int'l Brotherhood of Teamsters v. U.S.*, it rejected the defendant's argument that only § 707 of Title VII, not § 706, expressly gives the EEOC authority to pursue a lawsuit if a defendant is engaged in a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." The defendant argued that giving the EEOC authority to pursue a pattern-or-practice claim under § 706 would render § 707 superfluous. According to the Sixth Circuit, however, *Teamsters* suggests that the inclusion of the "pattern or practice" language in § 707 "simply means that the scope of the EEOC's authority to bring suit is more limited when it acts pursuant to § 707." The Court explained that § 707 permits the EEOC to pursue only a particular type of claim – a pattern-or-practice claim, with limited remedies – if it acts without first receiving a charge filed by an individual. This, according to the Court, is a an "important distinction" between the two sections that does not, as the defendant argued, render § 707 "superfluous."

Second, the Court addressed whether the EEOC exhausted all prerequisites before filing its § 706 claim. It rejected the district court's reasoning that the EEOC never investigated or sought to conciliate on a class-wide basis. Pointing to the EEOC's reasonable-cause notice, the Sixth Circuit explained that the defendant had notice that the EEOC indeed investigated and reached out to the defendant to conciliate. And, according to the Court, "the EEOC is under no duty to attempt further conciliation after an employer rejects its offer."

Finally, the Sixth Circuit reviewed the district court's decision to award to the defendant attorneys' fees as the prevailing party because it deemed the EEOC's failure to comply with its Title VII administrative prerequisites to be "unreasonable conduct." Because it reversed the district court's conclusion that the EEOC failed to exhaust administrative prerequisites and because the defendant was no longer the prevailing party, the Sixth Circuit concluded that the fee award demanded reversal, and in any event, was an abuse of discretion because the EEOC did not engage in any "unreasonable" or "frivolous" litigation conduct.

Affirmative Action: *Coalition to Defend Affirmative Action v. Regents of the Univ of Mich*, __ F.3d __; 2012 WL 5519918 (6th Cir., Nov. 15, 2012)

Monthly Update for November

http://www.ca6.uscourts.gov/opinions.pdf/12a0386p-06.pdf

On July 1, 2011, a three-judge Sixth Circuit panel declared unconstitutional Michigan's 2006 voter-approved state constitutional amendment prohibiting sex- and race-based preferences in university admissions, government hiring and contracting. The amendment, commonly known as "Proposal 2", prohibits universities and governments in Michigan from using affirmative action programs that give "preferential treatment" to groups or individuals based on their race, gender, color, ethnicity, or national origin for public employment, education, or contracting purposes.

The three-judge panel held 2 to 1 that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it burdens racial minorities by altering Michigan's political process along racial lines. In other words, the Court concluded that because less onerous avenues to effect political change remain open to those advocating consideration of non-racial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to go down a more arduous road – i.e., amending the constitution – without violating the Fourteenth Amendment.

Michigan's Attorney General sought *en banc* review, which was granted. On November 15, 2012, the Sixth Circuit, sitting *en banc*, ruled Proposal 2 unconstitutional in a closely divided decision. The Sixth Circuit majority specifically declined to "weigh in on the constitutional status or relative merits of race-conscious admission policies" addressed in *Gratz v. Bollinger* and *Grutter v. Bollinger*. Instead, according to the Court, "the sole issue before [it] is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions – something they are specifically allowed to do under *Grutter*."

Echoing the prevailing reasoning in the July 2011 panel decision, the *en banc* Court explained that, by now requiring supporters of race-conscious admissions policies to amend the state constitution, Proposal 2, despite being enacted by popular vote, works a real and substantial denial of the equal protection of the laws. Citing two U.S. Supreme Court decisions, *Hunter v. Erickson* and *Washington v. Seattle School District No. 1*, the Sixth Circuit explained that if Proposal 2: (1) has a "racial focus, targeting a policy or program that inures primarily to the benefit of the minority," and (2) "reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process," the enactment must be struck down "absent a compelling state interest."

The Court concluded that Proposal 2 met both elements of the test, and that the government defendants did not articulate a compelling state interest to justify the special burdens it places on minority groups. Notably, the Sixth Circuit struck down as unconstitutional only those provisions of Proposal 2 affecting Michigan's public colleges and universities.

One significant debate between the majority and dissent of the *en banc* Court focused on whether university admissions policies affected by Proposal 2 were actually a part of a "political process." According to the dissent, admissions decisions lie outside the political process because the governing boards of the universities delegate the responsibility for establishing admissions standards to politically

unaccountable admissions committees and faculty members. The majority rejected that position because the three University defendants' boards, created by the Michigan constitution and popularly-elected, have ultimate governing authority to set admissions policies. Finally, the Court also rejected the dissent's reasoning that the *Hunter* and *Seattle* cases are inapposite because they dealt with government enactments that burden racial minorities' ability to obtain "protection from discrimination" through the political process, whereas Proposal 2 burdens racial minorities' ability to obtain "preferential treatment" through race-based admissions policies. According to the Sixth Circuit, the *Hunter/Seattle* doctrine "works to prevent the placement of special procedural obstacles on minority objectives, whatever those objectives may be." The Equal Protection Clause, the Court noted, does not impose "an outcome-based limitation on a process-based right."

Workers' Compensation (Black Lung Benefits): *Dixie Fuel Co., LLC, et al v. Director, Office of Workers' Comp Programs, U.S. Dep't of Labor,* __ F.3d __; 2012 WL 5935574 (6th Cir., Nov. 28, 2012)

http://www.ca6.uscourts.gov/opinions.pdf/12a0392p-06.pdf

In *Dixie Fuel*, a former coal miner for the plaintiff company had tried to obtain benefits under the federal Black Lung Benefits Act for two decades. He worked as a coal miner for thirteen years between 1972 and 1988. He also smoked half a pack of cigarettes every day for at least ten years. From 1990 to 2010, he tried to convince the federal government that he was entitled to benefits under the Act because his exposure to coal dust, not his smoking, caused a disabling pulmonary impairment called pneumoconiosis (or "black lung").

On the coal miner's third attempt at benefits, a U.S. Department of Labor Administrative Law Judge granted benefits under the Act, concluding that he suffered from pneumoconiosis caused by his job in the coal mines. The federal Benefits Review Board affirmed. The company appealed, and the Sixth Circuit concluded that the ALJ erred "by failing to adhere to a key regulatory directive in weighing the medical evidence concerning [the coal miner's] disease."

At issue before the Sixth Circuit was whether "substantial evidence" supported the ALJ's conclusion. First, the Court noted that under the Act a claimant may establish work-related pneumoconiosis through x-rays, autopsies, biopsies, and medical opinions. Although the record here contained x-rays that the ALJ believed alone established entitlement to benefits, it also contained two biopsies that "came back negative," several CT scans that "may have been inconclusive," and several physicians who testified against an award of benefits. "The ALJ erred by singling out the x-ray evidence to the exclusion of the other [contrary] evidence" because the Act "commands judges to consider "*all* relevant evidence'." As a result, the Sixth Circuit reversed and remanded, with a directive that "the ALJ…quickly, fairly and finally resolve this long-running claim" because "if [the coal miner] deserves benefits under the Act, he should not have to wait this long to obtain them."

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7th Circuit:

***Bahri Begolli v. Home Depot U.S.A., Inc., et al.* (7th Cir. 2012)**
http://www.ca7.uscourts.gov/tmp/NN0JYHB9.pdf

Seventh Circuit Holds That a Title VII Statute of Limitations Defense Should be Treated Like Any Other Defense Including Resolution by a Jury After a Timely Demand by Plaintiff

The Seventh Circuit reversed the district court's judgment for the defendant on the plaintiff's Title VII national origin claim. After the district court found a genuine dispute as to when the plaintiff became aware of the adverse employment action in question (failure to hire due to the plaintiff's national origin, Albanian), the district court held an evidentiary hearing and determined that the plaintiff waited more than 300 days prior to filing his charge with the EEOC. The Seventh Circuit reversed the district court's holding finding the district court's reliance on *Pavey v. Conley, 544 F. 3d 739* (7th Cir. 2008), a prisoner's civil right case, to be misguided in the context of Title VII. The Court was able to distinguish the present case from *Pavey* due to the differences between the purposes and requirements of the Prisoner Litigation Reform Act (PLRA) and Title VII. The Court noted that the purpose of the PLRA is designed to keep prisoner grievances in prisons and out of courts while Title VII is designed to provide a federal judicial forum, complete with jury if desired, for persons complaining about employment discrimination. The Seventh Circuit also found the fact that the PLRA requires exhaustion of administrative remedies while Title VII does not to be a significant factor. This is because a successful statute of limitations defense ends the litigation while a finding that a prisoner fails to exhaust administrative remedies shifts the litigation to another forum.

***Jay Embry v. City of Calumet City, Illinois et al.* (7th Cir. 2012)**
http://www.ca7.uscourts.gov/tmp/NN1FFREQ.pdf

Seventh Circuit Applies Elrod-Branti Standard in Analysis of Whether Position was "Policymaking" Position and Also Finds No § 1983 Retaliation

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's political patronage retaliation claim under § 1983. The defendant vowed not to ratify the plaintiff's appointment because of the plaintiff's political beliefs which resulted in his dismissal. The Court rejected the plaintiff's claim that *Connick-Pickering* (balancing the government's interest in promoting the efficiency of its public services against the employee's free speech interests) applied as the plaintiff could not identify any statement of public concern unconnected to political affiliation or policy views that led to the termination of his employment. Instead, the Court applied the *Elrod-Branti* standard (a position is "policymaking" if it can be demonstrated that party affiliation is an appropriate requirement for the effective performance of the public office involved) and found that the plaintiff held a policymaking position. The Court also held that alleging employment termination based on political allegiance was on its own sufficient to apply *Elrod-Branti*. Here, the plaintiff's job duties (consisting of broad discretionary authority, implementing and

developing policy, managing large amounts of people and funds) and the structure of his appointment (appointed by whoever current mayor is) led the Court to conclude that this was a policymaking position and the dismissal was not violative of the First Amendment.

Deloria J. Johnson v. Eric Holder Jr., Attorney General of the United States **(7th Cir. 2012)**
http://www.ca7.uscourts.gov/tmp/NN1FFRLE.pdf

Seventh Circuit Affirms Summary Judgment For Defendant on Plaintiff's Discrimination Claims Finding Plaintiff Failed to Present Sufficient Evidence Concerning Similarly Situated Employees

The Seventh Circuit affirmed the district court's determination that the plaintiff failed to establish a prima facie case of race, sex, or age discrimination by failing to produce sufficient evidence. The Court rejected the plaintiff's attempt to establish discrimination under both the direct and indirect methods of proof finding that she failed to show other employees were in fact similarly situated to her. She could not produce facts demonstrating a similar record of misconduct, performance, qualifications or disciplining supervisors. The Seventh Circuit also clarified that a district court may consider answers to interrogatories when reviewing a motion for summary judgment so long as the content of those interrogatories would be admissible at trial. As a result, the district court erred in not considering the non-hearsay statements contained in the plaintiff's interrogatory answers. However, the Seventh Circuit found this to be a harmless error as the answers to interrogatories could still not cure the shortcomings of the plaintiff's case.

Equal Employment Opportunity Commission v. Thrivent Financial for Lutherans **(7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/NN0F4DQ1.pdf

Seventh Circuit Holds That an Employer Must Have Notice That An Employee is Ill or Physically Incapacitated Prior to Initiating an Interaction for the Confidentiality Provision of § 12112(d)(3) of the ADA to Apply

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ADA claim. The plaintiff alleged that that the defendant violated the medical record confidentiality requirements of the ADA. This case involved a plaintiff who, after missing a day of work without notifying the defendant, responded to the defendant's inquiry into his absence by sending the defendant information about a medical condition of which the defendant was previously unaware. The defendant would later disclose this medical information to other prospective employers. The EEOC argued that the ADA's confidentiality provisions protect all employee medical information revealed through job-related "inquiries." The Seventh Circuit looked to the statutory language and found that by using the "and" instead of "or" that the adjective "medical" modifies both "examinations" and "inquiries" in the statute. As a result, the defendant had no duty to keep such information confidential as a medical record unless it was provided in response to a "medical inquiry." The Court determined that this interpretation was supported by case law and other content from this section of the ADA. Therefore, the Court held that an employer must already have notice that an employee is ill or physically incapacitated prior to the inquiry for the confidentiality provision of Section 12112(d)(3) to apply. In this case, since the inquiry related solely

to his absence, and not his medical condition as there was no prior knowledge of the medical condition, the provision did not apply.

***Josalynn M. Brown and Carolyn Wilson v. Advocate South Suburban Hospital and Advocate Health & Hospital Corporation* (7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/NN0I496P.pdf

Seventh Circuit Affirmed the District Court's Grant of Summary Judgment on Plaintiffs' Title VII Race and Retaliation Claims

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants on both plaintiffs' Title VII race discrimination and retaliation claims. This case involved two African-American nurses who complained to the defendants that they were being treated less favorably than nurses who were not African-American, that the defendants' staff was unprofessional, and that patient care and safety issues had to be addressed. The Court first turned to the plaintiffs' race discrimination claim and found that under either the direct or indirect method of proof, there was insufficient evidence to survive summary judgment. The plaintiffs could only offer evidence that the defendants did not properly address their complaints of discrimination and relied only on an unsupported assertion identifying similarly situated employees. This evidence, the Court held, was insufficient to survive summary judgment. The Court similarly held that the plaintiffs' retaliation claim failed to meet the standard of proof under either the direct or indirect methods, finding that getting a "cold shoulder" from a boss, the silent treatment from colleagues, or being called a trouble maker, a cry baby, or a spoiled child failed to constitute actionable adverse employment action. The Court pointed out that it is unclear whether a negative performance review alone could constitute retaliatory action. However, here, the review was never given to the plaintiffs or put in their files, thus not rising to the level of an actionable adverse employment action.

***Latice Porter v. City of Chicago* (7th Cir. 2012)**

http://www.ca7.uscourts.gov/tmp/N1102HS2.pdf

Seventh Circuit Affirms Summary Judgment for Defendant on Police Department Employee's Title VII Claims of Religious Discrimination and Retaliation

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's religious discrimination and retaliation claims. This case involved a former employee of the Chicago Police Department who claimed that the defendant failed to accommodate her religious practice, discriminated against her based on her religion (Christian), and retaliated against her. Noting that a reasonable accommodation of an employee's religious practice need not be the employee's preferred accommodation or the most beneficial, the Court held that the plaintiff's supervisor's mention of another available shift without a formal offer was sufficient to qualify the employer as offering a reasonable accommodation under Title VII. The plaintiff was then obligated to pursue this option before claiming that the defendant would not adequately accommodate her religious practices. Turning to the plaintiff's disparate treatment claim, the Court stated that though a change of schedule could constitute an adverse employment action if the employer is exploiting a known vulnerability of the plaintiff and the schedule change resulted in a significant actionable loss, here, this was not the

case. The Court also determined that the plaintiff failed to present evidence that the decisionmakers were aware of her protected activity when she suffered the alleged adverse employment action (a change in schedule that was less desirable to the plaintiff). Finally, the Court determined that the plaintiff's hostile environment claim could not succeed, holding that being called "church girl" and other minor or sporadic inappropriate or rude comments by her supervisors did not rise to the required level or severity or pervasiveness.

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8th Circuit:

Greater St. Louis Construction Laborers Welfare Fund et. al. v Park-Mark, Inc., No. 11-3746 (8th Cir., November 23, 2012) (Employer denied refund of overpayments made to welfare funds under ERISA)

http://www.ca8.uscourts.gov/opndir/12/11/113746P.pdf

Summary: The Greater St. Louis Construction Laborers Welfare Fund, among others and their trustees (the "Funds") brought an action against Park-Mark, Inc. to recover delinquent payments under ERISA, 29 U.S.C. §§ 1001-1461. Park-Mark, in turn, sought set-off and a refund for overpayments made to the Funds between 2004 and 2009. The Eighth Circuit Court of Appeals upheld the district court's summary judgment for the Funds, holding that equity did not favor a refund based on the facts of the case.

Facts: Park-Mark agreed to be bound to a CBA with the Eastern Missouri Laborers' District Counsel, which required monthly contributions to the Funds, providing health insurance and retirement benefits to its employees pursuant to ERISA. In February 2010, during the course of other litigation between the parties, the Funds notified Park-Mark that its accounting firm's audit revealed $548,257.39 in overpayments made for hours worked by employees, but not performed within the jurisdiction of the CBA. The Funds did not provide credit for the overpayments. Consequently, Park-Mark stopped making payments to the Funds from October 2010 through December 2010, from which the instant action arose. The Funds sued for the delinquent payments, Park-Mark's affirmative defense sought a set-off and requested the overpayments be refunded.

Court's Analysis: In upholding summary judgment for the Funds, the Court recognized that ERISA contributions made by mistake of law or fact may be returned within 6 months of such mistake, and that an employer has a federal common law action for restitution. The Court noted that while Park-Mark may have made the payments under an erroneous legal or factual understanding (that it had to make payments for all hours worked under the CBA including those outside of the CBAs jurisdiction), a refund is not automatic; Park-Mark

must demonstrate that restitution is equitable. The Court held that Park-Mark did not meet its burden to show that restitution would be equitable; as its employees received insurance coverage benefits and pension benefits reflecting the overpayments, if overpayments were returned to Park-Mark, the Funds would be required to deduct pension credits from the employees that were based on the overpayments, which would adversely affect the employees.

In looking at the factors, the Court held that the delay in brining the claim for the overpayment was "inexcusable" and "prejudiced the Funds" who would have to unwind six years of payments. The Court also noted that Park-Mark authorized the overpayments for five years, ratifying the previous payments. Further, the Court held that equity does not favor a refund where no unjust enrichment occurred; as Park-Mark failed to present evidence that the Funds were unjustly enriched, the Court weighed this factor in the Funds' favor. Finally, the Court, reviewing whether the Funds' decision to retain the overpayments was "arbitrary and capricious," concluded that, as the Funds decided to retain the overpayments only after determining it would adversely impact the employees' pension credits, the retention was not arbitrary and capricious.

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11th Circuit:

Employee Must Apply for Position To Argue Decision Not to Hire Was Retaliatory

***Aaron Jackson v. Miami-Dade County, et al* (November 2, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201113293.pdf

Lieutenant-employee brought retaliation suit under Title VII against Employer County's Corrections and Rehabilitation Department for failure to promote. After Plaintiff was denied a promotion with the Department, he filed a claim with the EEOC in 2004 sounding racial discrimination. Plaintiff declined to pursue to charge, and rather, continued employment. In 2007 and again in 2009 and 2010, the Department posted a vacancy for a captain position. Plaintiff lacked certain educational requisites, and did not apply. In 2010, Plaintiff filled another charge with the EEOC, and claimed retaliation for filing the previous charge, due to the Department's requirement of a bachelor's degree for the position, which Human Resources had deemed an unnecessary requirement. The lawsuit followed. The District Court granted the Department's Motion for Summary Judgment, and concluded that Plaintiff's claim failed because he did not apply for the position, nor would he have been chosen, as he lacked the educational requirements. The Eleventh Circuit affirmed, finding no prima facie case.

Gender Wage Disparity Claim Fails When Employer Shows Relocation Costs Required Higher Wage, and Agent Offering Wage Did Not

Monthly Update for November

Know of Disparity

***Irma Moten v. Broward County Medical Examiner and Trauma Services* (November 5, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201211414.pdf

Pro se Plaintiff appealed District's Court's grant of Summary Judgment in favor of employer. Plaintiff claimed violations of Title VII and the Florida Civil Rights Act, due to the Defendant's racial discrimination for hiring a white male for the same position as Plaintiff, but at a higher rate of compensation. The Eleventh Circuit affirmed, finding that the Defendant sufficiently set forth non-discriminatory and legitimate reasons for the higher rate of pay, including that 1. Defendant needed to fill the position; 2. Defendant needed to offset the male's relocation costs with a higher wage; 3. the male had more experience; 4. the official who offered the position and rate did not know Plaintiff's compensation rate at time of offer.

Pretermination Hearing for Public Employee Does Not Require Claimant's Presence to Suffice as Adequate Due Process

***Bobby Strickland v. Columbia County Board Of Education, et. al.* (November 6, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201212231.pdf

Plaintiff appealed District Court's grant of summary judgment in favor of the Board, and based on Plaintiff's allegations that the Board violated his due process rights under his employment agreement with the union. In 1995, Plaintiff was hired by the Board as a school bus driver, and was categorized by the Board as a classified employee. In 2007, the union made an agreement with the Board that it would draft an expanded grievance policy for classified employees. Plaintiff joined the union in 2009. The same year, Plaintiff was involved in an incident on his route, wherein witnesses claimed they saw Plaintiff push a student. The Board's Director conducted an investigation, recommended termination, and placed Plaintiff on administrative leave. Plaintiff filed an appeal, and the Assistant Superintendent as well as the Superintendent also recommended termination, and informed Plaintiff of his right to request a hearing, which he did. However, without a hearing, the Board approved the termination. Plaintiff filed a subsequent Complaint, claiming violation of his due process, and citing to the Board's decision to not provide him a hearing.

The Eleventh Circuit upheld the decision, holding that no agreement required Plaintiff's attendance at a hearing, but rather stated that he would be provided the opportunity to appeal, which he was. The Court further held that even if Plaintiff had a property right in his continued employment, he was provided an adequate pretermination process, as he was invited the opportunity to submit materials for consideration.

Close Proximity Between Co-Worker Complaints Regarding Plaintiff Harassment and Plaintiff's Termination Help to Negate Claim that Plaintiff's Termination was Pretextual

***Anyanwu v. Brumos Motor Cars, Inc.* (November 13, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201112488.pdf

Plaintiff appealed District Court's grant of Summary Judgment based on his claims of racial discrimination and subsequent retaliation. Plaintiff is a black male who was employed in car sales with Employer, and drove a Ferrari to work. Initially, the Employer would not allow Plaintiff to park his Ferrari in the lot, though they allowed him to park other cars. Later, the Employer changed its position, but only after Plaintiff signed a release against the Employer for liability on the car within the Employer property. However, Plaintiff claimed other employees were permitted to park similar cars without a release. Later, Plaintiff was terminated – allegedly for violating the company's sexual harassment policy. In 2007 and 2008, two employees filed complaints against Plaintiff sounding in sexual harassment. Following an investigation, Plaintiff was terminated. Plaintiff denied the allegations and claimed the complaints were pretextual.

On appeal, the Eleventh Circuit held that Plaintiff failed to submit sufficient evidence of racial discrimination, and reiterated the principle that only the most blatant remarks, whose intent could be nothing other than discrimination, are direct evidence of discrimination. Further, the Court found Plaintiff did not establish a prima facie case, as he could not show that the parking prohibition or release requirements were adverse employment actions. Finally, and with regard to the retaliation claim, the Court held Plaintiff could not establish the reasons for termination were pretextual, and noted that the proximity between the harassment complaints and the termination supported the Defendant's allegations that the termination was legitimate.

Comment "Puerto Ricans will never be promoted in the Miami Field Office because they don't know how to speak or write English," Does Not Independently Substantiate a Hostile Work Environment Claim

Magda Pizzini v. Secretary for the Department of Homeland Security, et. al. **(November 8, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201210214.pdf

Plaintiff appealed District Court's grant of Summary Judgment on behalf of her Employer, the Department of Homeland Security, and based on Plaintiff's claims alleging hostile work environment, retaliation, and race and national origin discrimination. More specifically, the District Court held Plaintiff did not meet the severe and pervasive element of her hostile work environment claim. On appeal, the Eleventh Circuit was not persuaded by Plaintiff's argument that the evaluation of this element should include the totality of the circumstances, and upheld the District Court's decision. Instead, the Court found that Plaintiff's evidence failed to show she was singled out for unequal treatment, and that the comment "Puerto Ricans will never be promoted in the Miami Field Office because they don't know how to speak or write English," did not "independently satisfy the serve or pervasive prong. The Court reasoned that the statement only occurred once, was not accompanied by a physical threat, and did not unreasonably interfere with Plaintiff' work performance.

With regard to the retaliation claim, the Court also found Plaintiff's evidence unpersuasive. Pointedly, Plaintiff did not file her EEOC Charge (ie engage

in statutorily protected activity) until after the materially adverse action. Similarly, the Court held Plaintiff's performance reviews could not stand as a materially adverse action, as they were overall positive.

Non-Party to a Contract May Not be a "Stranger" For Purposes of Tortious Interference Claim if Interwoven in Contract and Has a Direct Economic Interest In Contract

***Justin Lee v. Caterpillar, Inc*. (November 9, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201210051.pdf

Plaintiff appealed the District Court's Order granting former employer's, Caterpillar, Motion for Summary Judgment following Plaintiff's claim of wrongful termination by the Employer's contractor. Plaintiff alleged in his Complaint that Caterpillar caused the contractor to terminate Plaintiff by falsely reporting he had been involved in an altercation at the Employer's plant, and brought a claim for defamation. The District Court rejected Plaintiff's argument that his Complaint contained any additional causes of action than the defamation claim, and found Plaintiff failed to state any additional claims, anyway. including a claim for tortious interference. On appeal, the Plaintiff argued the District Court erred in not finding he had set forth more than one cause of action. The Eleventh Circuit affirmed the lower court's decision, finding that the Plaintiff failed to show there was interference by a "stranger," as a necessary prong to a claim for tortious interference. Rather, the Court concluded that stranger is interpreted broadly, and parties with a direct economic interest in a contract are not strangers, even when they are not parties to the contract, and especially when they are interwoven in the contract.

Knowledge By Most Decision Makers of Protected Activity Is Sufficient to Show Causal Connection of Adverse Action for Purposes of Title VII Retaliation Claim

***Alonzo Freeman v. Perdue Farms, Inc.* (November 9, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201113098.pdf

Plaintiff appealed the District Court's grant of Summary Judgment in favor of his former employer, Perdue Farms, and with regard to a Title VII wrongful termination and retaliation claim. Plaintiff is an African American male employed as a shipping and receiving supervisor. Initially, Plaintiff received strong performance evaluations. However, shortly then after, a former employee informed Plaintiff that the white, director of operations of the plant had a rope in the form of a noose hanging in his office. The former employee stated that when he questioned the director about it, he replied, "you never known when I may need it." Plaintiff reported this to Human Resources, and the director denied knowledge of the noose. After an investigation, the noose was not found, until Plaintiff stated it could be found in a top drawer in the director's office, where it was eventually located. Upon locating the noose, the Human Resources manager joked it could be used as a belt, and threw it out. Plaintiff made a follow-up complaint to the director regarding Human Resources' handling of the situation, and was told the director would look into the situation. However, no further investigation ensued regarding the

comments. Later, an investigation revealed that the noose was actually confiscated by the director from display of a white maintenance supervisor.

After Plaintiff's complaint, he reported having issues with white managers, and complained to Human Resources regarding the same. At the same time, a white manager lodged a complaint against the Plaintiff, and stated that he had witnessed another white manager attempt to apologize to Plaintiff and that Plaintiff stated he "wanted to break his face." Plaintiff was then suspended. Following an investigation, it was determined there was no harassment by the white managers. Later, the Employer received further complaints about Plaintiff's behavior, and held a meeting to determine what should be done about his "increasing frequent and escalating misconduct." It was determined Plaintiff would be offered the option to resign or be terminated. Plaintiff refused to resign, and was terminated. Following his termination, Plaintiff's photograph was placed at the entrance of the plant, allegedly because it was company policy to do the same when someone is terminated for an incident relating to violence. Plaintiff filed a subsequent claim with the EEOC.

On appeal, the Eleventh Circuit found Plaintiff established a prima facie case of retaliation when he proffered evidence he engaged in protected activity by complaining of discriminatory conduct, and that he suffered an adverse employment decision when he was terminated. Additionally, he established a casual link by showing that most of the managers involved in his termination were aware of his initial complaint. Further, the complaints against the Plaintiff only surfaced after his complaint. While the Court held that the Employer established a legitimate, non-discriminatory reason for termination by the assertion that the termination was caused by reports of misconduct, it held that Plaintiff provided sufficient evidence of pretext. More specifically, the Court was persuaded by Plaintiff's evidence that the Employer misrepresented the incidents, and therefore, the Court found Plaintiff presented evidence necessary to create a genuine issue of material fact by submission of corroborating witness testimony. As such, the Court remanded the Title VII race discrimination and retaliation portion of the case to the District Court.

Four-Part Test Determines Whether Agency is State Agency or County Agency Carrying Out Personnel Functions for Purposes of 11th Amendment Sovereign Immunity

***Sherry Ross v. Jefferson County Department of Health* (November 15, 2012)**

http://www.ca11.uscourts.gov/opinions/ops/201114258.op2.pdf

Former, African-America employee brought a Complaint against the Health Department sounding in disability discrimination and race. Plaintiff claimed the Department refused her a reasonable accommodation for her fibromyalgia, and that a similarly situated white employee was treated more favorably. The Eleventh Circuit upheld the District Court's holding that the Department enjoyed 11th Amendment sovereign immunity from the disability discrimination case, pursuant to the Alabama Court of Civil Appeals conclusion that the Department is a state agency. In its determination, the Court used a four-part test to determine if an agency carries out certain functions to be categorized as an agent of the county, rather than the rate, in a performance of personnel functions. Using this test, the Court determined the agency is a state agency.

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No Evidence of Pretext in Title VII Claim When Decision Maker Was Unaware of Plaintiff's Qualifications for Another Position at Time of RIF

Derrick Lucy v. Georgia-Pacific Corrugated I, LLC **(November 15, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201210554.pdf

African American Plaintiff brought a Title VII claim; allegedly he was terminated in a reduction in force, which previously allowed for "bumping" of employees. More specifically, Plaintiff claimed the previous system allowed senior employees to take positions of junior employees, until Plaintiff was at point of bumping an all-white maintenance department. At that point, Plaintiff claimed the rules were changed and he was denied his "bumping" rights, and was subsequently terminated. While Plaintiff claimed he was entitled to the junior position, the Employer Superintendent claimed he was unaware of Plaintiff's qualifications at the time of his termination. Further, the Superintendent argued that Plaintiff never informed him of his desire to bump into the maintenance department. On appeal, the Eleventh Circuit upheld the District Court's holding that Plaintiff failed to meet his burden to proffer concrete evidence to show the Employer's legitimate reasons for termination was pretextual. Specifically, because the Employer did bump other African American employees into positions, and because Plaintiff admitted he never witnessed any racist conduct, the Court found that the Employer's reasons for termination were not pretextual.

Employee Cannot Show Constructive Discharge When She Did Not Allow Company Opportunity to Remedy the Situation Or Follow Employer's Reporting Policies

Lindsey Morgan Cramer v. Bojangles Restaurants, Inc. **(November 20, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201211750.pdf

The Eleventh Circuit affirmed the District Court's holding that former employee failed to establish Complaint sounding sexual harassment in violation of Title VII against Employer. More specifically, the Court held that Plaintiff failed to avail herself to the antidiscrimination policy of the Employer, of which Plaintiff was aware and signed, and that she could not sustain a claim for constructive discharge. Rather than following the Employer guidelines for reporting harassment occurring on five separate occasions, Plaintiff made a complaint to her immediate supervisor. Per her supervisor's advice, she followed the Employer policy with regard to the sixth incident, and called the harassment hotline. Following her call, the perpetrator was suspended and later terminated. With regard to the constructive discharge, the Plaintiff denied the Employer the opportunity to have sufficient time to remedy the situation by failing to notify the Employer of the harassment through proper channels.

Evidence of Sixteen Previous FLSA Suits Against Employer Insufficient to Show Employer On Notice of FLSA Violations for Three-Year Statute of Limitations When No Suit Resulted in Judgment Against Employer

Monthly Update for November

***David Ojeda-Sanchez, et. al. v. Bland Farms, LLC, et al* (November 29, 2012)**

http://www.ca11.uscourts.gov/unpub/ops/201113835.pdf

Mexican seasonal farmworkers brought a Complaint against employer Bland Farms, sounding in violations of the Fair Labor Standards Act and breach of contract. Following a trial, the District Court concluded that the Employer violated the Act, but awarded less than the amount claimed by the employees. Additionally, the Court found that only a two-year statute of limitations was proper in the situation, as the Employer actively tried to meet its FLSA obligations, and because there was no judgment against the company for FLSA violations, though the company was sued 16 times prior. On appeal, the Eleventh Circuit affirmed, holding that the Employer's actions were not willful and were in good faith. More specifically, the Court found the payroll clerk was a qualified accountant, who took care to record correct hours, and therefore, did not act in reckless disregard of obligations under FLSA. With regard to a reduction in the claim, the Court was persuaded by the Employer's evidence that the payroll clerk was accessible to the employees for corrections to their time sheets. The Court further found that Plaintiff's evidence supporting the amount of uncompensated time only came from the testimony of the Plaintiff's recollection of hours, and was "self-serving."

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