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3rd Circuit

***Connelly v. Steel Valley School District*, filed January 24, 2013, addressed the constitutional right to travel in the context of public employment.**

At issue in *Connelly* was a salary policy that granted advanced salary placement for newly-hired teachers with prior in-state teaching experience. The school district, located in Pennsylvania, granted at least partial advanced credit for every year of prior teaching experience in Pennsylvania. The *Connelly* plaintiff, who had amassed nine years of teaching experience in Maryland, received only one year of advanced credit.

The *Connelly* plaintiff filed suit in federal court under 42 U.S.C. Sec. 1983, alleging that the school district salary policy violated the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment by violating his right to interstate travel. The district court dismissed the suit for failure to state a cognizable claim. The Third Circuit affirmed.

The right to interstate travel is a fundamental right that has three recognized components: (1) the right of a citizen of one state to enter and leave other states, (2) the right to be treated as a "welcome visitor" and not as an "unfriendly alien" when temporarily present in another state, and (3) the right of those choosing to become permanent residents of a new state to be treated like other citizens of that state. Strict scrutiny applies when a state creates distinctions between newcomers and longer term residents, or conditions the receipt of certain governmental benefits on the duration of the recipient's residence in the state.

The *Connelly* plaintiff contended that the school district's policy violated the third prong of the right to interstate travel. The Third Circuit disagreed. The school district "classification is based on the location of teaching experience, not duration of residency. Thus, Connelly is being treated no differently than lifelong residents of Pennsylvania." A lifelong Pennsylvania resident who's teaching experience had been earned entirely in Maryland schools would have been treated exactly as the *Connelly* plaintiff had. "When the receipt of a government benefit is conditioned on factors other than the duration of residency, we apply rational basis review ... Because Steel Valley's salary classification treats citizens differently based only on their teaching experience irrespective of their residency, strict scrutiny does not apply."

The Third Circuit found a rational basis justification for the school district's policy in the desire to place greater value on familiarity with the Pennsylvania Department of Education's "rigorous academic standards and assessments," and on having a "better grasp on what methods are more successful in achieving the goals the DOE has established," than on teaching experience generally.

The Third Circuit found any impact on the plaintiff's right to interstate travel to be merely an "incidental burden" not rising to a constitutional level, and expressly rejected the argument that the policy's deterrent effect against non-residents gave rise to a constitutional issue. "The relevant distinction when evaluating a claim asserting a violation of the fundamental right to travel is between long-term and short-term residents, not current residents and *prospective* residents." (Emphasis in original).

The *Connelly* Court also summarily rejected the argument that a policy that "discriminates between



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teaching experience in Maryland versus Pennsylvania" requires strict scrutiny. "The Supreme Court has never found that a classification based solely on the location of work experience is sufficient to trigger strict scrutiny without a showing of disparate treatment between new and old residents."

***Mandel v. M&Q Packaging Corp.*, filed January 14, 2013, involved, among other claims, a Title VII claim for hostile environment sex harassment.**

The *Mandel* plaintiff was employed by the defendant from October 25, 1996, to May 23, 2007. She alleged that throughout her employment, she had been subjected to an ongoing campaign of sexually offensive comments and conduct from male managers, supervisors and owners, culminating in a meeting at which a manager referred to her as a "bitch" and screamed at her to "shut the f**k up." She resigned from the defendant shortly thereafter.

In *Mandel*, the Third Circuit was called upon to consider the "continuing violation" doctrine as applied to Title VII cases by the United States Supreme Court in *Nat'l R.R. Passenger Corp. v. Morgan*. Under this doctrine as expounded in *Morgan*, discriminatory acts that are not individually actionable may be aggregated to make out a hostile environment claim under Title VII. The claim will be deemed timely filed so long as the acts are linked into a pattern of actions that are part of the same unlawful employment practice, and at least one of the acts falls within the applicable limitations period.

Prior to *Morgan*, Third Circuit case law required that the subject matter, frequency and degree of permanence of the underlying acts be considered to distinguish "continuing violations" from a series of isolated occurrences. "Permanence" was defined as

"whether the nature of the violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate." The district court relied on this pre-*Morgan* case law to deem the majority of the plaintiff's alleged acts as lacking permanence, and therefore untimely raised. The district court then dismissed the balance of the hostile environment claim based on the remaining allegations.

On appeal, the Third Circuit held that "following *Morgan*, permanency is not required to establish a continuing violation," and overruled its pre-*Morgan* precedent to the extent it held otherwise. The *Mandel* Court remanded the matter to the district court to apply the *Morgan* standards appropriately.

Oral argument was heard before the United States Supreme Court on *Symczyk v. Genesis Healthcare Corporation* on December 3, 2012. I reported on the Third Circuit's decision in the case in the October 2011 FBA Labor and Employment Law Update.

Submitted by:

Stephen E. Trimboli, Esq.

Trimboli & Prusinowski, L.L.C.

210 Park Avenue - Suite 302

Florham Park, New Jersey 07932

(973) 660-1095 Phone

striboli@trimprulaw.com



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6th Circuit (December)

Watts v. UPS, Inc., 701 F.3d 188 (6th Cir. 2012).

<http://www.ca6.uscourts.gov/opinions.pdf/12a0405p-06.pdf>

LMRA Preemption I: LMRA Did Not Preempt Federal ADA Claims for Disability Discrimination Even Though Defense Involved Interpreting a Labor Agreement

Plaintiff Teresa Watts suffered a major work-related back injury at UPS. She later applied to take part in UPS's light-duty return-to-work program, which was designed to assist the reentry of people recovering from work-related injuries. Citing language in the labor agreement, UPS concluded that Watts was not qualified for the program and refused her request. Watts claimed the refusal was based on her disability. She sued under the ADA.

After a jury trial, the court granted judgment as a matter of law to UPS, concluding that the Labor Management Relations Act [LMRA] preempted the claim because it required an interpretation of the labor agreement. The Sixth Circuit reversed. The purpose of LMRA preemption is to ensure that a uniform federal analysis of labor matters prevails over inconsistent *state-court* interpretations. That rationale does not apply to federal statutory claims. Moreover, regardless of whether Watts could have asserted an anti-discrimination right under the labor agreement, she chose instead to bring a statutory discrimination claim independent of the agreement. Notably, the court distinguished cases brought by railway workers, which invoke preemption by the Railway Labor Act [RLA]. Unlike the LMRA and the National Labor Relations Act [NLRA], the RLA contains mandatory arbitration procedures, and UPS

neither argued that Watts was under any mandatory arbitration obligation nor that she failed to exhaust any remedies. The claim was not preempted.

Paul v. Kaiser Found. Health Plan of Ohio, 701 F.3d 514 (6th Cir. 2012).

<http://www.ca6.uscourts.gov/opinions.pdf/12a0404p-06.pdf>

LMRA Preemption II: LMRA Did Not Preempt State-law Discrimination and Retaliation Claims Even Though Defense Involved Interpreting a Labor Agreement

The Kaiser Foundation argued that federal labor law preempted an Ohio disability discrimination and retaliation case because a collective bargaining agreement prevented the company from granting the accommodation plaintiff requested (or at least the one it thought plaintiff requested). The Sixth Circuit disagreed, ordering that the case be remanded the state courts.

Plaintiff Dana Paul was a unionized radiology technician. Due to major, work-related back problems, she could not lift or turn disabled or elderly patients. For years, she performed CT-scan duties for her Ohio employer, Kaiser. During a job consolidation, her duties expanded to include x-ray duties, which were more physically demanding and required her to lift and turn patients. She asked Kaiser for an accommodation that another technician be available to assist her when necessary. During interactive discussions, Kaiser focused on changing Paul's schedule to overlap with others. It temporarily changed her assignment and tried to work with the union to put her on the day shift and exempt her from weekend work. The union, however, refused to approve the approach due to



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seniority issues with other employees. When these efforts fell through, Kaiser switched Paul to an unpaid status.

Paul initially took steps to grieve the matter. The labor agreement prohibited “handicap-based discrimination,” and provided that discrimination in violation of the agreement would be settled by the agreement’s grievance procedures. But Paul ultimately failed to follow through with arbitration. Instead, she filed Ohio state-law discrimination and retaliation claims against Kaiser, seeking compensatory and punitive damages, attorney fees, costs and equitable relief. Her complaint did not mention the labor agreement and did not seek any particular relief available through that agreement (e.g., reinstatement).

Kaiser removed the case, arguing that because the court had to interpret the labor agreement, the LMRA completely preempted the claims. Kaiser also argued that Paul’s failure to follow through with arbitration barred further relief. The district court agreed and entered judgment on the pleadings.

The Sixth Circuit reversed. The plaintiff is the master of the complaint. The defendant has the burden of establishing LMRA preemption, which will only be appropriate if resolving the claim requires the court to interpret the labor agreement, or if the plaintiff invokes rights created by the labor agreement. A federal defense does not preempt a state claim. Discussing *Smolarek v. Chrysler Corp.*, 879 F.2d 1326 (6th Cir. 1989) (en banc), the court held that a defending employer’s reliance on terms in a labor agreement does not overcome the “paramount policies of the well-pleaded complaint rule” and does not preempt the claim. Although the labor agreement contained rights that Paul could have invoked, she neither invoked those rights nor sought relief created by the agreement. Her claims also were not

inextricably intertwined with the labor agreement. She did not dispute Kaiser’s interpretation of the agreement. Instead, she asserted that Kaiser misunderstood the accommodation request and that the labor agreement did not resolve her issues. Thus, although the question was “a close one,” Kaiser failed to show that removal was appropriate.

Bhd. of Locomotive Eng’rs v. United Transp. Union, 700 F.3d 891 (6th Cir. 2012).

<http://www.ca6.uscourts.gov/opinions.pdf/12a0400p-06.pdf>

Labor Arbitration: Court Illuminates and Expands Its Highly Deferential Approach

In a dispute under the RLA, the court discussed the great degree of deference the federal courts give to labor arbitrators’ decisions. Although the RLA contains a mandatory arbitration scheme that the NLRA lacks, the case is of interest outside the railroad context because the court reviewed and analyzed the test for arbitrability under the NLRA.

Two railway workers received promotions that caused them to switch unions (from the United Transportation Union [UTU] to the Brotherhood of Locomotive Engineers and Trainmen [BLET]). Due to a difference in the language of the two unions’ collective bargaining agreements, the workers lost seniority when they changed jobs. Whereas the BLET agreement gave workers seniority from the day of their promotion to the engineer position, UTU workers had seniority from the date of their original hire as a trainman. The UTU filed a grievance on their behalf, which purported to limit the arbitrators’ jurisdiction to interpreting the agreements, rather than changing them or



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establishing new rules. BLET was invited to participate in the proceedings, and its agreement was also considered. Ultimately, the arbitration panel entered an award in favor of the workers, ordering that they be ranked in accordance with their seniority as trainmen. BLET appealed.

Judicial review of railway arbitration decisions has been exceptionally deferential, with intervention saved only for instances when the arbitration board (1) fails to comply with the statute (i.e., the RLA); (2) fails to stay within its jurisdiction; or (3) is tainted by fraud or corruption. More generally, this deference is appropriate not only when deciding whether to turn disputes over to arbitrators in the first instance (i.e., deciding if a question is arbitrable), but also in upholding the conclusions that arbitrators reach. Labor agreements are not ordinary contracts. They are generalized codes for industrial self-government, which are also intended to provide a forum for resolving many disputes that cannot be entirely anticipated by the draftsmen or the contract language. Thus, under the *Steelworkers Trilogy* and recent Sixth Circuit precedent, an arbitrator's decision will be upheld unless the arbitrator "1) acted outside his authority by resolving a dispute not committed to arbitration; 2) committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award; or 3) was not even arguably construing or applying the contract in resolving legal or factual disputes." 700 F.3d at 901 (internal quotation marks omitted). The court will only vacate an arbitrator's decision in exceptionally egregious situations. The court added that it will also generally defer to the arbitrator's decision to resolve questions that are not technically presented in the parties' submissions. Thus, arbitrators have a good deal of power to interpret the limits of their authority. Although the BLET argued that the panel lacked the power to "invalidate" portions of its agreement, the court analyzed the dense facts and concluded that the

arbitration panel's ten-page opinion awarding seniority to the workers appropriately harmonized the various labor agreements, interpreted the common law of the shop as a whole, stayed within the panel's jurisdiction, and reached an adequate good-faith interpretation of the agreements' terms. Thus, the court affirmed the arbitrator's decision.

Dixon v. Univ. of Toledo, _ F.3d _, Case No. 12-3218, 2012 WL 6554693 (6th Cir. Dec. 17, 2012); *Dye v. Office of the Racing Comm'n*, _ F.3d _, Case No. 11-1828, 2012 WL 6582389 (6th Cir. Dec. 18, 2012).

<http://www.ca6.uscourts.gov/opinions.pdf/12a0408p-06.pdf> (Dixon)

<http://www.ca6.uscourts.gov/opinions.pdf/12a0409p-06.pdf> (Dye)

First Amendment Retaliation: Court Clarifies Protected-Speech and Political Affiliation Claims

The Court issued two opinions concerning retaliation by government employers in *Dye* and *Dixon*. The First Amendment prohibits at least two kinds of retaliation; i.e., based on protected speech and based on political affiliation. In *Dye*, the Sixth Circuit applied the same fundamental analysis to both kinds of claims. The plaintiff must first establish a prima facie case that (1) she engaged in constitutionally protected activity; (2) she suffered an adverse action that would deter a person of ordinary firmness from engaging in that activity; and (3) the adverse action was motivated in part by the protected activity. The burden then shifts to the employer to establish by a preponderance of the evidence that it would have made the same decision anyway. Unlike the *McDonnell-Douglas* burden-shifting framework, the burden does not shift back to the plaintiff to prove pretext.



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The protected activity is different for the two claims. The opinions explain that in political-affiliation cases, the constitution prohibits adverse action due to political affiliation unless the government has a vital interest supporting the action. In protected-speech cases, the court first determines whether the speech relates to a matter of public concern. If it does, the court balances the government's interests as an employer in regulating the workplace under the so-called *Pickering* test. The *Pickering* balance is presumed to weigh in the government's favor if a policy-making employee is fired for making policy-related statements. In any case, the speech must also be outside the plaintiff's official duties pursuant to *Garcetti v. Ceballos*.

In *Dixon*, the court addressed protected-speech claims. Crystal Dixon was the University of Toledo's VP of human resources. She spoke out as a Christian African-American woman, writing an op-ed piece that criticized the comparison between the civil rights movement and the gay rights movement. Soon thereafter, she was fired. The parties did not dispute that the matter was one of public concern. Thus, the *Pickering* test applied. According to the relevant university resolutions and evidence discussing her job duties, she was a policy-making employee in HR. The court found that her comments implicitly contradicted substantive university policies when she criticized whether LGBT individuals should have the same rights as others. Her comments bore a clear enough relation to the university's diversity and other policies. Thus, by presumption (which Dixon did not rebut), the *Pickering* balance weighed in the government's favor, and her claims failed.

In *Dye*, four agents of Michigan's Office of the [Horse] Racing Commissioner (namely, Dye, Erskine, Hall and Perttunen) argued that they were likewise punished for their speech. They tried to link

various comments either to the 2006 gubernatorial campaign or to the Commissioner's confirmation-related hearings. The court held that Dye engaged in protected speech when he voiced support for the Republican gubernatorial candidate during a Democratic administration. The others, however, did not engage in protected speech by: (1) fielding a state senator's inquiry about a discrepancy in race clocking times by two different clockers (not the Commissioner); (2) declining to testify at the Commissioner's confirmation hearings due to a purported fear of retaliation; (3) calling a state senator's aide to find out if any policy prohibited the Commissioner from talking with the senators before the confirmation hearing; (4) making personal complaints about the day-to-day experience of working with the Commissioner; (5) campaigning while on the job, addressed toward people who were regulated by the agency; and (6) vaguely alleging that they might have had discussions about who might have been a better candidate. None of this amounted to speech relating clearly to matters of public concern.

The *Dye* plaintiffs also asserted political-affiliation claims. The trial judge originally dismissed these claims, but the Sixth Circuit reversed. It held that the protected-speech and political-affiliation analyses are different, and it is error to conflate the two. As a matter of first impression, the court sided with the First and Tenth Circuits and against the Third Circuit to hold that retaliation based on perceived political affiliation is actionable. There was evidence that the Commissioner held a meeting in which she accused the plaintiffs of supporting the Republican candidate and trying to derail her confirmation hearing. Meetings with top officials denounced the plaintiffs' support for the Republican candidate. Other employees provided affidavits about the Commissioner's political animosity toward the plaintiffs. Moreover, the



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plaintiffs' unprotected speech could have created a perception by the Commissioner that plaintiffs affiliated with the opposing party. Thus, the first element of the prima facie case was satisfied.

As to the second element of the prima facie case, terminations, demotions, and lost work days are adverse actions. Under the circumstances, moreover, the evidence showed that the loss of a time-banking system was an adverse action, where the ability to "bank" excess work days to use against future paychecks had been a key benefit in the compensation system.

For the last element – i.e., causal connection – the court held that a temporal connection of two months or less between Dye's gubernatorial campaign activities and his demotion sufficed to show causation. A similar two-month time period supported a claim regarding the elimination of the time-banking system, especially when combined with testimonial evidence directly linking the action with plaintiffs' support for the Republican candidate. With respect to these two claims, moreover, the defendants failed to offer enough evidence to show that no reasonable juror could return a verdict against them. Thus, those claims survived. As to the rest of the claims, however, a lapse of more than two years between the campaign and the firing of Dye and Erskine was too long, and Plaintiffs failed to support their claims for lost work days because they simply did not address the issue on appeal.

Submitted by:

Saura J. Sahu

Miller, Canfield, Paddock & Stone, P.L.C.

150 W. Jefferson Avenue, Suite 2500

Detroit, Michigan 48226

Direct: (313) 496-7646

sahu@millercanfield.com

6th Circuit (January)

Keith v. County of Oakland, ___ F.3d ___, 2013 WL 115647 (6th Cir. Jan. 10, 2013)

ADA Case Remanded Due to Issues of Fact Regarding Whether the Plaintiff was "Otherwise Qualified" to Perform the Job and for Consideration of Whether the Employer Properly Made an Individualized Inquiry and Engaged in the Interactive Process.

Plaintiff Nicholas Keith filed suit against Oakland County, Michigan ("the County") under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 alleging that the County failed to hire him as a lifeguard because he is deaf. The district court granted the County's motion for summary judgment and the plaintiff appealed.

The plaintiff has been deaf since his birth and cannot speak verbally. He can, however, communicate using sign language and, when wearing an external sound transmitter, can detect noises such as alarms, whistles and people calling for him.

Prior to applying for a lifeguard position with the County, he enrolled in and successfully completed two of the County's lifeguard training courses. During those courses, the County provided him with sign language interpreter who relayed verbal instructions to him, but did not assist him during lifesaving or other tasks.

When the plaintiff initially applied for the position, he asked for a sign language interpreter to be present at staff meetings and during any further classroom instruction. The County did not object



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to this request and made him an offer conditioned upon a pre-employment physical.

The physician who performed the physical found the plaintiff to be “physically sound except for his deafness”. However, he indicated that the plaintiff could not function independently as a lifeguard, but that he could work in a team setting if “constantly accommodated.” He did not say whether the plaintiff could be safely accommodated and expressed doubt that an accommodation would always be adequate.

The County then consulted with a group of safety and aquatic risk management specialists who recommended that a job-task analysis be done to determine whether the plaintiff could safely perform the job with or without an accommodation. The County sent the specialists a list of accommodations that it believed could successfully incorporate the plaintiff into its team of lifeguards. The specialists questioned whether, even with these accommodations, the plaintiff could safely perform the job. Consequently, the County revoked the offer of employment to the plaintiff.

The plaintiff applied for a lifeguarding position again the following year and was denied.

After the plaintiff filed suit, the County moved for summary judgment arguing that he was not “otherwise qualified” to be a lifeguard because he could not effectively communicate with other lifeguards, patrons, emergency personnel and injured persons. The County further argued that hiring an additional lifeguard as an interpreter was not a reasonable accommodation.

The plaintiff challenged these arguments by stating that he would only require an interpreter for staff meetings and classroom instruction and that the County failed to make an individualized inquiry into

his abilities or engage in the interactive process with him to determine whether he could be reasonably accommodated. He also provided expert testimony about his qualifications through a variety of witnesses.

The district court found that the County complied with the ADA because it made an individualized inquiry about the plaintiff's abilities and that the plaintiff failed to show that he could perform the essential communication functions of his job with or without a reasonable accommodation. With regards to the County's alleged failure to engage in the interactive process, the Court found that even if the County failed to do so, that did not result in a violation of the ADA under the circumstances.

On appeal, the Sixth Circuit found that both the physician who performed the plaintiff's pre-employment physical and the risk management consultants with whom the County worked failed to make an individualized inquiry about the plaintiff's abilities. However, the Court agreed with the district court's ultimate finding that the County properly made such an inquiry because it observed the plaintiff during lifeguard training, accommodations were proposed to integrate him into the lifeguard team and both staff and management were on board with the plan to hire him. The Court, therefore, questioned why the County then ultimately chose not to hire the plaintiff based on opinions and advice of others who failed to comply with the ADA and directed the district court to consider this question on remand.

The Sixth Circuit also remanded the case because it found that reasonable minds could differ regarding whether the plaintiff was “otherwise qualified” to perform the essential functions of the job and whether he could perform those functions with or



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without a reasonable accommodation. Because the County never objected to his requested accommodations, the district court erred when it determined that he was unqualified as a matter of law.

Lastly, with regards to the allegation that the County failed to properly engage in the interactive process, the Sixth Circuit also disagreed with the district court's conclusion that the plaintiff's failure to show that a reasonable accommodation was possible negated any need for the County to engage in the interactive process. Because the Sixth Circuit found that he met his burden in showing a potential reasonable accommodation, the district court also needed to address whether the County met its obligations in this respect.

Martinez v. Cracker Barrel Old Country Store, Inc., ___ F.3d ___, 2013 WL 115587 (6th Cir. Jan. 10, 2013)

Sixth Circuit Finds that Plaintiff Failed to Establish Prima Facie Case of Reverse Race Discrimination.

Plaintiff Mary Martinez filed suit alleging "reverse" race discrimination under 42 U.S.C. § 1981 and the Michigan Elliot-Larsen Civil Rights Act ("ELCRA") against her former employer Cracker Barrel Old Country Store, Inc. ("Cracker Barrel"). Cracker Barrel moved for summary judgment, which was granted by the district court. The plaintiff appealed.

The plaintiff worked for Cracker Barrel in its Flint, Michigan store from 1995 to 1999, until she voluntarily resigned, and then joined the company again in 2000 until her termination in 2010. During her last 10 years of employment, she held the position of retail manager. She was ultimately

terminated after she made inappropriate racial comments during a series of conversations with four co-workers about the Haiti earthquake, the plight of those in Haiti and the use of the Michigan "Bridge Card", which is a public assistance program used by several Cracker Barrel employees. She did not dispute that the conversations occurred, but claimed that she had been singled out from the other employees who participated in the discussions.

When Cracker Barrel conducted an investigation into the plaintiff's alleged comments, it learned that she had made other inappropriate racial comments, including calling the Bridge Card the "ghetto Bridge Card" (a term which Cracker Barrel prohibited in its workplace) and refusing to handout paychecks to employees who relied on those cards. Cracker Barrel also discovered, however, that African-American employees were also calling the Bridge Card the "ghetto card" and imposed policy reviews on those employees. Nevertheless, the company stated that it held managers like the plaintiff to a higher standard than lower-level employees and, therefore, terminated the plaintiff's employment.

After the district court granted summary judgment to Cracker Barrel, the plaintiff appealed. On appeal, the Sixth Circuit stated that in order to establish a prima facie case of race discrimination under the ELCRA, the plaintiff must prove by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances indicate that race played a role in the adverse employment action. The Court explained that under federal law, in order to satisfy the first element in a "reverse" race discrimination case, the plaintiff must "demonstrate background



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circumstances to support the suspicion that the defendant is the unusual employer who discriminates against the majority.” However, because the plaintiff also brought her claim under Michigan state law, she did not need to meet that heightened standard of proof.

Ultimately, the Court found that the plaintiff could not provide direct or circumstantial evidence that her race played any role in her termination or that she was treated differently than any similarly-situated non-Caucasian employee. Therefore, she could not establish a prima facie case and her claim failed.

Cardenas-Meade v. Pfizer, Inc., 2013 WL 49570 (6th Cir. Jan. 3, 2013)(unpublished)

Summary Judgment Affirmed for Employer Who Terminated Employee for “Moonlighting” for a Competitor During Medical Leave.

Plaintiff Rebekah Cardenas-Meade is a former employee of Defendant Pfizer, Inc. (“Pfizer”). When she started her employment at Pfizer, she went through its training program, which all sales representatives are required to complete. After 18-20 months, the training program culminates in a 3 day evaluative session called “Phase VI.” When the plaintiff failed the written exam at Phase VI, she told her supervisors that she was having marital and family issues.

The plaintiff then went on to complete Phase VI, but failed. As a result, Pfizer placed her on probation and told her that she would have 6 months to pass Phase VI or would be terminated. However, she never returned to work. Instead, she requested medical leave claiming that she suffered emotional trauma during Phase VI. She also alleged that she failed Phase VI because her supervisors treated her in

a discriminatory and abusive manner after she disclosed her marital and family care issues to her supervisors, and that their treatment constituted gender and disability discrimination.

Pfizer sent the plaintiff to a psychologist for treatment. The psychologist diagnosed her with severe anxiety and depression. The plaintiff and her psychologist together requested 3 accommodations in order for the plaintiff to be able to return to work. However, each involved transferring the plaintiff to a different supervisor. Pfizer responded that, according to company policy, it could not transfer her because she had yet to complete Phase VI. Because her doctor would not release her to return to the same supervisors, Pfizer extended her leave of absence.

Although the plaintiff knew that Pfizer had a policy prohibiting employees from “moonlighting” with a competitor, the plaintiff took a second job as a sales representative for another pharmaceutical company during her medical leave with Pfizer. She claims that she did so because she considered her employment to have been terminated when Pfizer would not transfer her and when her benefits and income ended during her medical leave. She also filed an EEOC Charge alleging gender and disability discrimination.

When Pfizer learned of the plaintiff’s second job with a competitor, it terminated her employment. Pfizer did not know about her EEOC Charge at that time. Shortly thereafter, the plaintiff filed another EEOC Charge alleging retaliation.

After the plaintiff received a Notice of Rights letter from the EEOC, she filed a complaint alleging a violation of the Family Medical Leave Act, disability discrimination, gender discrimination and



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retaliation. The district court granted Pfizer's motion for summary judgment. The plaintiff then appealed the entry of judgment only on her disability discrimination and retaliation claims.

On appeal, the Sixth Circuit found that the plaintiff failed to meet her burden of showing that she was disabled within the pre-amendment version of the ADA as she was unable to show that the limitations she had on her non-work activities were anything more than short-term or temporary. She also failed to show that Pfizer regarded her as disabled.

The Court also found that the plaintiff failed to establish that any adverse employment action was taken as a result of her protected activity. At all times, Pfizer followed the recommendations of the plaintiff's physician and was under no obligation to allow her to return to work for different supervisors. In addition, Pfizer terminated the plaintiff after it learned that she had taken a second job for a competitor, which is a legitimate, non-discriminatory reason for termination. The plaintiff offered no evidence to suggest that this reason was pretextual.

Therefore, the judgment of the district court was affirmed.

Submitted by:

Leigh M. Schultz

Miller, Canfield, Paddock & Stone, P.L.C.

277 South Rose Street, Suite 5000

Kalamazoo, Michigan 49007

Direct: (269) 388-6810

schultzl@millercanfield.com

7th Circuit (December)

Kevin Kasten v. Saint-Gobain Performance Plastics Corp. (7th Cir. 2012)

www.ca7.uscourts.gov/tmp/Q60MGFWB.pdf

Court Reverses Summary Judgment Finding Ambiguous Statements, Suspicious Timing and Shifting Reasons for Employment Termination Sufficient to Support a Jury's Inference of FLSA Retaliation

The Seventh Circuit reversed the district court's grant of summary judgment for the defendant on the plaintiff's FLSA retaliation claim. This case had previously been heard by the Supreme Court in 2011. The Supreme Court held that oral complaints may qualify as protected activity under the FLSA if it provides the defendant-employer with "fair notice" that the employee is asserting his or her rights under the statute. 131 S. Ct. 1325 (2011). This case involved a manufacturing and production employee who made complaints to the defendant about the location of the time clock, claiming its location violated the FLSA. Subsequent to making various complaints about the time clock's location, including one comment that he was contemplating filing a lawsuit against the defendant, the defendant terminated the plaintiff's employment. Though the defendant produced evidence of multiple occasions of discipline, the Court, proceeding under the direct method, found sufficient evidence of suspicious timing, ambiguous statements, and shifting reasons for the termination of the plaintiff's employment from which a jury may reasonably infer retaliation.

Phyllis Johnson, et al. v. Meriter Health Services Employee Retirement Plan and Meriter Health



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Services, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/NS0MSB13.pdf>

Courts Affirms Lower Court's Multiple Subclass Certification and Interprets Wal-Mart Stores, Inc. v. Dukes Decision as Leaving Intact Class Members' Ability to Collect Incidental Monetary Relief

The Seventh Circuit affirmed the district court's class certification in an ERISA suit. The case involved a class action challenging a pension plan. The class is composed of various subclasses which were divided based on different dates of eligibility, early retirees, as well as many other factors that create differences among the groups. The defendants first argued that because the subclasses asserted multiple claims they failed to satisfy the requirement of Rule 23(b)(2) that the defendant have "acted . . . on grounds that apply generally to the class." The Seventh Circuit, however, stated that the requirement applies individually to the subclasses rather than the class action out of which the subclasses have been created. Therefore, if the subclasses can separately meet the standards in Rule 23(b)(2) each of them satisfy the standard. The Court further rejected the defendants' argument that under *Wal-Mart Stores, Inc. v. Duke*, a Rule 23(b)(2) class is precluded from recovering monetary relief. The Court interpreted the *Wal-Mart* decision as leaving intact the remedy of incidental monetary damages for members of a 23(b)(2) class. The rationale was because the subclasses are initially seeking a reformation of the pension plan, a declaration of the rights that the plan confers, and an injunction ordering the defendants to conform the text of the plan to the declaration, that any monetary relief that occurs from applying the reformed plan to various individuals are mechanical and incidental to the declaratory and injunctive relief. The Seventh Circuit also rejected the defendant's

argument that the different classes may be in conflict as too hypothetical to bar certification as the defendants failed to identify a single plaintiff who would experience such a conflict.

International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast LLC v. Illini Concrete, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/O00V46RF.pdf>

Court Lacks Proper Appellate Jurisdiction To Hear Interlocutory Appeal Regarding A Motion to Compel Arbitration When The Contract At Issue Involves "Transportation Workers" And Is Thus Exempt From The Federal Arbitration Act

The Seventh Circuit concluded that it lacked proper appellate jurisdiction to hear the defendants' interlocutory appeal. The appeal sought review of the district court's denial of defendants' motion to compel arbitration under the Federal Arbitration Act. This case involved an allegation by the plaintiff union representing concrete mixer drivers and other employees that defendant Illini Concrete's sale of assets to defendant Kienstra was a ruse to avoid honoring the collective bargaining agreement entered into between the plaintiff union and Illini Concrete. After a limited remand to the district court and supplemental briefing by the parties, it was clear that Illini Concrete cement truck drivers occasionally crossed state lines from Illinois into Missouri. Section 16(a)(1) of Federal Arbitration Act, which generally allows interlocutory appeals of district court rulings, exempts contracts of transportation workers engaged in the movement of goods in interstate commerce. The defendants put forth four arguments



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as to why the exemption should not apply, all of which were rejected by the Court, which found this case materially indistinguishable from *Central States, Se. & Sw. Areas Pension Fund v. Central Cartage Co.* The first two, that the employees delivered their employer's goods rather than goods belonging to third parties and that the workers were part of an intrastate collective bargaining agreement, were deemed irrelevant because the focus is on the employees' acts. The third argument, that only a small portion of the employees' work took them across state lines, was rejected because the text of the law draws no such distinctions. The fourth argument, that the district court only found Illini Concrete employees who had crossed state lines and not any Kienstra employees, was rejected because the basis of defendants' motion to compel arbitration was based on a collective bargaining agreement between Illini Concrete and Kienstra.

KS Energy Services, LLC, v. Hilda L. Solis (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/O00UA6GD.pdf>

Court Finds Substantial Evidence to Support ALJ's Determination That Employer Violated OSH Regulation Requiring Adequate Protective System For Construction Workers

The Seventh Circuit denied the employer's petition for review of the Administrative Law Judge's determination. The ALJ had found the employer was subject to a fine for violating 29 C.F.R. § 1926.652(a)(1), requiring construction employers to protect employees in an excavation by using an adequate protective system to protect employees from cave-ins. This case involved a construction company that was cited by OSHA for having too steep a slope in a trench, based on the classification

of the soil in which the trench was dug. The Court reviewed this agency decision under the substantial-evidence standard and found the agency had sufficient evidence to make its decision. The Court found that "substantial" in this context "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Although the OSHA inspectors in this case did not test all of the soil, the Court found the ALJ was presented with sufficient evidence to determine that the soil would be classified as the agency determined. The Seventh Circuit also stated that the inspector's testimony along with testimony from other witnesses could be relied on in making a determination.

Arthur L. Lewis, Jr. v. City of Chicago (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/O80VMR8P.pdf>

Court Holds Would-Be Intervenors' Action Untimely In A Case That Had Been Pending For 14 Years And Had A Final Judgment Entered

The Seventh Circuit held that the district judge did not abuse her discretion in denying the would-be intervenors' motion to intervene as untimely. Here, the Seventh Circuit reviewed the district judge's decision not to allow intervention in a case that had been pending for 14 years and final judgment had been entered. The initial litigation in this case arose due to the Chicago Fire Department requiring potential firefighters to achieve an unjustified minimum score on a civil service examination that had a disparate effect on black applicants and was found to violate Title VII. All of the would-be intervenors have been working as firefighters for the City of Chicago since 2005 and were aware of



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this litigation since at least 2005. The would-be intervenors contend that it was their belief that, even though they were hired from the “qualified” pool (applicants who scored from 65-88 on the examination), that they would receive extra seniority, pension credits, or back pay as a result of the lawsuit and further claim that it was not until after judgment that they learned that class counsel had decided not to seek any relief on behalf of persons hired from the “qualified” pool. The Seventh Circuit held that if the class definition was modified in 2007, as the district judge mentioned in her opinion, then the focus would lie properly on the statute of limitations, which is tolled until the district judge either declines to certify a class or certifies a class that would exclude particular plaintiffs. However, the Court found no order modifying the class in 2007 (or any order defining the class at all) and thus concluded that the would-be intervenors remain members of the original class of plaintiffs. As such, the Court reasoned that the would-be intervenors’ action was untimely, as judgment had already been entered, and damages calculated.

Douglas Richards v. NLRB and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC, et al. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/OM0IQR7J.pdf>

Court Holds Petitioners Lack Standing To Appeal Final NLRB Order, Finding Petitioners Are Not “Aggrieved” Under the NLRA

The Seventh Circuit held that the petitioners lacked standing to challenge the NLRB’s final order striking down a union policy requiring members to annually object to and opt-out of paying dues used to support

political activities (or other activities unrelated to collective bargaining). In addition to asking that the renewal policy be struck, the petitioners, who had always filed objection to paying the dues, also sought relief on behalf of others in the form of refunds for members of the collective bargaining unit who might have failed to renew their objections, which the NLRB did not grant. The Court noted that only persons who are “aggrieved” by the NLRB’s final order may petition for review of the decision. As the petitioners had annually filed objections to the dues, the NLRB’s order fully addressed any injury they had or may have suffered, and are thus not “aggrieved.” The Court further noted that the petitioners’ assertion that they are “aggrieved” because the NLRB failed to reimburse them for postage costs incurred when mailing their objections was untenable as the petitioners had not previously made any meaningful request for such a reimbursement and therefore the argument was waived.

7th Circuit (January)

Neil J. Aslin v. Financial Industry Regulatory Authority, Inc. (7th Cir. 2013)

<http://www.ca7.uscourts.gov/tmp/ON0Z8VGC.pdf>

Court Finds Plaintiff’s Appeal Challenging the District Court’s Dismissal of his Due Process Claim Against FINRA Moot

The Seventh Circuit vacated the district court’s order dismissing the plaintiff’s claim against the defendant (FINRA) and remanding the case with the instructions to dismiss the claim for lack of subject matter jurisdiction. Plaintiff’s case alleged



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a violation of the Due Process Clause of the Fifth Amendment. This case involved a securities firm that terminated the plaintiff's employment in an effort to comply with FINRA's "Taping Rule." This rule requires a securities firm to either adopt significant monitoring measures, or terminate the employment of brokers who have worked for "Disciplined Firms" within the previous three years, if the number of such brokers reaches a certain level (dependent on the size of the securities firm). Here, the plaintiff worked for a securities firm for approximately two years when his previous employer became a "Disciplined Firm," and as such, his current firm terminated his employment. The plaintiff sought declaratory and injunctive relief to prohibit FINRA from including him on the list of brokers from "Disciplined Firms," but sought no retrospective relief. The Court noted that when the district court dismissed the plaintiff's case, the plaintiff had already been removed from the list in question and further found that this was not a circumstance capable of repetition yet evading review. Thus, the Court held that there was no longer a justiciable controversy that would provide the district court with subject matter jurisdiction. Accordingly, the Court found that the case was moot.

Anthony Smith and Flying A.J.'s Towing Company, LLC v. John Wilson and Town of Beloit, Wisconsin (7th Cir. 2013)

<http://www.ca7.uscourts.gov/tmp/PE0TGCEV.pdf>

Court Rejects Argument that "Mixed Motives" Relief Under Title VII Should Apply to Title VI, § 1981 and § 1983 Claims

The Seventh Circuit affirmed the district court's judgment in favor of defendants on the plaintiffs'

Title VI race discrimination, § 1981, and § 1983 claims. Plaintiffs, a towing company and its African American owner, claimed that they were not included on the city's towing company list due to the racial animus of the city's police chief. At the conclusion of the trial, the jury returned with a mixed verdict, finding both that the police chief's racial animus was a motivating factor in the city's failure to include the plaintiff on the list, as well as finding that the plaintiffs would not have been included on the list, regardless of the owner's race. The district court interpreted the jury's mixed verdict as precluding all of plaintiffs' requested relief and entered a judgment for defendants. Plaintiffs first challenged the evidentiary support for the jury's verdict. However, the Court found plaintiff's argument unpersuasive and reasoned that a jury could have found the police chief's testimony credible, or relied on evidence that a white-owned towing company also unsuccessfully petitioned for the list. Plaintiffs next alleged that the district court erred in concluding that the mixed verdict precluded all relief sought and in its assigning the burden of proof. The Court, however, pointed out that the "mixed motives" analysis and relief apply only to Title VII claims, and courts cannot import authorization of partial "motivating-factor" relief onto the plaintiff's Title VI, § 1981 and § 1983 claims. Finally, the Court found that as far as the Title VI and § 1981 claims, the district court did not err in assigning the defendants the burden of disproving "but for" causation when taking the jury instructions as a whole. In contrast, the district court placed the burden of persuasion on the plaintiffs for their § 1983 claim. Regardless, as the plaintiffs proposed the wording of the jury instructions and did not later suggest that the wording was erroneous, the Court refused to reverse the judgment for defendants.



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Wisconsin Education Association Council, et al. v. Scott Walker, Governor of Wisconsin, et al. (7th Cir. 2013)

<http://www.ca7.uscourts.gov/tmp/PB0UGC9W.pdf>

Court Finds Wisconsin Law Curbing Union Rights Constitutional

The Seventh Circuit affirmed in part and reversed in part the district court's mixed verdict on summary judgment and found for defendants, upholding Wisconsin Law, Act 10. The law at issue created two classes of public employees, "public safety employees" and "general employees." Among other things, the Act prohibited general employees from bargaining on issues other than "base wages," imposed rigorous recertification requirements on, and prohibited employers from deducting union dues from paychecks. The Act did not place any of these restrictions on public safety employees. The Court held that the Act does not violate the First Amendment because use of the state's payroll system to collect union dues subsidizes, rather than burdens, speech and therefore the law does not erect a barrier to speech, and further, because speaker-based discrimination is permissible when the state subsidizes speech. The Court also held that the Act does not invidiously discriminate on the basis of viewpoint because on its face, the mere fact that in practice, the two categories of unions express different viewpoints does not render the Act viewpoint discriminatory. The Seventh Circuit went on to hold that the Act is not a facade for invidious discrimination, finding that the correlation between political endorsements and access to the payroll system does not render the Act viewpoint discriminatory. The Court further rejected the under-inclusiveness argument of the unions because there is no content or viewpoint discriminatory exemption in the legislation and declined to impute the stated

impermissible motivations of a single legislator onto the entire legislative body. The Court then subjected the equal protection and recertification claims to rational basis reviews, finding a rational relationship between the disparate treatment and the intended goals inasmuch as Wisconsin reasonably concluded that public safety employees were treated differently because public safety employees filled too critical a role to risk a work stoppage. The Seventh Circuit also found that as public sector unions are costly for the state, it was rational for Wisconsin to not want to incur the cost of unions with uncommitted members. Finally, the Seventh Circuit held that the district court did not err in denying the employees' motion to intervene because, to the extent that their First Amendment interests were affected, they were aligned with the state.

In his dissenting opinion, Judge Hamilton agreed with the majority concerning the Equal Protection Clause claims, the judgment concerning the recertification provisions for unions representing general employees, and on the Motion to Intervene. Judge Hamilton, however, dissented as to the upholding of the selective prohibition on payroll deductions for dues of general employees on First Amendment grounds as he found it to be viewpoint discrimination.

Hans J. Rapold v. Baxter International Inc., (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/PE0SJKLC.pdf>

Court Affirms District Court's Refusal to Provide A Mixed-Motives Jury Instruction As the Evidence Presented Did Not Lend Itself To Coexisting Dual Causes For An Adverse Employment Action



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The Seventh Circuit affirmed the district court's denial for judgment as a matter of law and refusal to tender a "mixed-motives" instruction to the jury in the plaintiff's Title VII national origin case. Plaintiff, a Swiss national, was offered an at-will position with defendant which was later revoked before the commencement of plaintiff's employment because, as alleged by defendant, plaintiff had more than six instances in which he acted unreasonably, rudely, and in an abusively to others. In making this revocation, defendant made many references to the plaintiff's "culture" and his "Germanic" attitude. In determining whether the district court abused its discretion in not providing a jury instruction for mixed-motives, the Court found the relevant question to be whether the case is one where either plaintiff's or defendant's evidence lends itself to coexisting dual causes for the adverse employment action. While the Seventh Circuit found that the district court could have concluded that national origin played some part in defendant's decision, the Seventh Circuit found it within the district court's "wide discretion" to conclude the evidence painted an "either-or" picture that did not lend itself to the mixed-motive instruction. The Seventh Circuit also found that a plaintiff need not concede some of a defendant's stated reasons to obtain a mixed-motives instruction, but the fact that plaintiff denied allegations of any wrongdoing and that defendants hired a European to fill the position were detrimental to plaintiff's claim. Furthermore, the Seventh Circuit was not convinced that plaintiff's claim was prejudiced by the denial of a mixed-motive instruction.

Julie McArdle v. Peoria School District No. 150 an Illinois Local Government Entity, and Mary Davis, Academic Officer of Peoria School District No. 150, in her individual capacity (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/PE0SJLCLC.pdf>

Court Affirms District Court's Grant of Summary Judgment Finding Plaintiffs Statements Were Not Entitled To First Amendment Protection As They Were Spoken As An Employee And The Implied Covenant Of Good Faith Did Not Provide Grounds For Breach

The Seventh Circuit affirmed the district court's grant of summary judgment for defendants on plaintiff's First Amendment, breach of contract, and tortious interference claims. The plaintiff, a former middle school principal, claimed defendants terminated her employment to prevent her from speaking about the improprieties of her predecessor, which she alleged violated her First Amendment rights. In addressing her First Amendment claim, the Court found plaintiff's speech failed to rise to a level that is entitled to Constitutional protection. In order for a public employee to maintain a successful First Amendment claim for her employer's restriction of speech, the speech must be found to have been made in her capacity as a private citizen, and not an employee. The Seventh Circuit found that the school's reputation, finances, and adherence to district policies are within the oversight of a principal, thus, plaintiff did not have a First Amendment claim. The Court reasoned, however, that speech such as the plaintiff's may be more properly protected by whistleblower protection laws and labor codes. In addressing plaintiff's breach of contract and tortious interference claims, the Court noted that the obligation of good faith and fair dealing does not create an independent cause of action and cannot create liability for defendant's exercise of an option provided for in the contract. Here, the contract at issue permitted



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defendant to terminate plaintiff's employment for any reason after one year, provided that defendant pays plaintiff for the years remaining under her contract. As the Court found no breach, the Court stated that the claim for tortious interference with a contract must fail.

Submitted by:

Ruth I. Major, Esq.

Erica Suskind, Esq.

Kevin Zezima, Esq.

The Law Offices of Ruth I. Major, P.C.

30 W. Monroe Street, Suite 1650

Chicago, Illinois 60603

8th Circuit

Hallmark Cards, Inc. v. Murley, No. 11-2855 (8th Cir. Jan. 15, 2013) (Employment Contracts)

The Eighth Circuit upheld a jury award to Hallmark of \$735,000 in damages when a former executive breached her severance agreement that required her to keep Hallmark information confidential and prohibited disclosure of Hallmark's records and documents. As a vice president of marketing at Hallmark, Murley had access to business plans, market research and financial information. When her position was eliminated, she received \$735,000 in severance benefits and agreed not to disclose Hallmark's confidential information and not to retain any Hallmark business records and documents. Murley subsequently obtained a position at another greeting card company. During an audit of the company's records, Hallmark's confidential information was discovered on Murley's computer and Hallmark was notified. Hallmark filed suit. At

trial, Hallmark presented expert testimony that Murley had deliberately destroyed files relating to Hallmark. Hallmark asked for an adverse inference jury instruction that would permit the jury to infer that Murley destroyed the files because they would have been adverse to her. The trial court instructed the jury that they were allowed, but not required, "to assume that the contents of the files destroyed would have been adverse, or detrimental to the Defendant." The jury found in Hallmark's favor and awarded Hallmark the \$735,000 paid to Murley in severance. Murley appealed, arguing that under Stevenson v. Union Pacific Railroad, 354 F3d 739 (8th Cir. 2004), an adverse inference instruction to the jury must be preceded by trial court findings that there was intentional destruction indicating a desire to suppress the truth and that there was prejudice to the opposing party. The Eighth Circuit concluded that a district court must issue explicit findings of bad faith and prejudice prior to delivering an adverse inference instruction, but that the trial court's failure to do so in the underlying matter was harmless error.

Owen v. Bristol Care Inc., No. 12-1719 (8th Cir. Jan. 7, 2013) (FLSA)

The Eighth Circuit determined that the FLSA does not override an arbitration pact containing a class action waiver. Owen filed an FLSA collective action against Bristol Care, alleging misclassification of non-exempt employees under the FLSA. The district court denied Bristol's motions to stay the proceedings and compel arbitration under a mandatory arbitration agreement signed by Owen. The Eighth Circuit reversed, finding that the Federal Arbitration Act required courts to enforce arbitration agreements unless there was a "contrary congressional command" to override this mandate. Since the FLSA contained



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no such contrary command, it did not override the arbitration agreement. As such, arbitration agreements containing class action waivers are enforceable in FLSA cases.

***Carr v. Anheuser-Busch Co.*, No. 12-1224 (8th Cir. Dec. 21, 2012) (ERISA)**

Carr was terminated from Anheuser-Busch in June 2009. Anheuser-Busch had a severance pay plan providing benefits to terminated employees. However, the company denied Carr's claim for severance due to willful misconduct because he attempted to steal company property the day before his termination. Carr brought an action under ERISA. The district court found that "willful misconduct" as a basis for denying severance benefits was consistent with Anheuser-Busch's severance plan, and did not conflict with ERISA. The Eighth Circuit upheld the decision, finding that the discretionary authority conferred upon Anheuser-Busch by the plan document entitled the company's decision to deferential review by the court.

***Pettus v. Arkansas Dept. of Education, et. al.*, No. 12-2067 (8th Cir. Dec. 11, 2012) (Race Discrimination Claim)**

In this short single-page opinion, the Eighth Circuit upheld summary judgment for the defendant, the Arkansas Department of Education, on Plaintiff Ida Pettus' race discrimination and retaliation claims. The Court held that Plaintiff's repeated failure to update her work calendar was a legitimate non-discriminatory reason for her discharge, and she provided no evidence to suggest pretext. The Court also held that an "almost three month interval" between her supervisor learning of her discrimination charge until her termination was insufficient to show

a causal connection of retaliation. Finally, the Court noted that Plaintiff's reassignment to another location in the state was not an adverse employment action.

***Milhauser v. Minco Products, Inc.*, No. 12-1756 (8th Cir. Dec. 5, 2012) (USERRA)**

The Eighth Circuit determined in *Milhauser* that reinstatement of employees under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") may include reinstatement to a terminated position. USERRA guarantees that military servicemembers are reemployed in the position they would have occupied if their military commitment had not interrupted their employment.

Douglas Milhauser took a leave of absence from his job at Minco for a military deployment. During his leave, his position was eliminated pursuant to a reduction in force. When he completed his military duty, Milhauser notified Minco and requested reinstatement. Minco informed him that his position had been eliminated. Milhauser sued Minco for violating USERRA. After a jury trial found for the employer and the district court upheld the verdict, ruling that Milhauser had been properly reinstated, Milhauser appealed the matter to the Eighth Circuit.

Under USERRA, the position to which an employee must be returned if their continuous employment had not been interrupted by military service is known as the "escalator" position. The employee does not necessarily return to the exact same position they held before leaving for military duty, but instead must be assigned to whatever position to which his step on the escalator had moved during his or her deployment. This "escalator principle" requires that an employee's



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career be considered as though his or her employment was not interrupted by military deployment. The Eighth Circuit noted that “[d]epending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated.” In upholding the jury’s verdict and district court’s decision, the Eighth Circuit ultimately determined that if an employee’s employment would have been terminated if the employee had remained employed rather than taking a military leave of absence, termination is a proper reinstatement position under USERRA.

Submitted by:

Tara Craft Adams & Corie Tarara

Seaton, Peters & Revnew, P.A.

7300 Metro Blvd. Ste 500

Minneapolis, MN 55439

tadams@seatonlaw.com

ctarara@seatonlaw.com

9th Circuit

Lawler v. Montblanc North America, -F.3d-, (9th Cir, January 11, 2013); Disability Discrimination; Retaliation; Harassment (California law)

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-16206.pdf>

Plaintiff was the manager of a Montblanc boutique retail store in a shopping mall. She worked 40 or more hours a week. It was undisputed that Plaintiff needed to be physically present in the store to perform her duties as a manager.

In June 2009, Plaintiff was diagnosed with psoriatic arthritis. Her doctor recommended that she work only 25 hours per week. While her request for a reduced workweek was pending, she broke her foot in August 2009. Plaintiff alleged the accident in which she broke her foot was an “indirect consequence” of her arthritis. After the accident, her podiatrist put her off work until early September 2009. While she was off work, she stopped by the store to use its fax machine. While there, Plaintiff alleged her boss visited the store, treating her in an “abrupt, brisk, gruff and intimidating” manner.

Just before she was scheduled to return in September, 2009, Plaintiff’s doctor recommended her leave of absence be extended to January 2010, meaning she would be absent during the busy Christmas season.

Montblanc terminated her, informing her “it is essential for a boutique manager to be in regular attendance at the boutique.” Plaintiff thereafter was, by her own admission, unable to work at all through at least September 2010.

Plaintiff sued under California law for disability discrimination, retaliation, harassment and intentional infliction of emotional distress. The district court granted summary judgment in favor of Montblanc.

In affirming, the Ninth Circuit held that Plaintiff could not establish a prima facie of disability discrimination because the undisputed evidence showed it was impossible for her to fulfill the duties of her position, including being at the store, even with reasonable accommodation. The court further held that Plaintiff could not establish a claim for retaliation because she did not present sufficient evidence to raise an issue of pretext



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concerning Montblanc's stated reason for termination, namely her inability to work. The court affirmed summary judgment on the harassment claim because a single incidence of "gruff," "abrupt" and "intimidating" conduct is not sufficiently severe to constitute a hostile environment. Similarly, the court held that plaintiff had not shown Montblanc had engaged in "outrageous" conduct sufficient to establish intentional infliction of emotional distress.

Submitted by:

James A. Odlum

Mundell, Odlum & Haws, LLP
650 E. Hospitality Lane, Suite 470
San Bernardino, CA 92408
909.890.9500

jodlum@mohlaw.com

11th Circuit

Lobo, et. al. v. Celebrity Cruises, Inc., et. al.
(January 7, 2013)

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-16206.pdf>

The case of *Lobo, et. al. v. Celebrity Cruises, et. al.*, involved claims brought by cabin stewards against their employer, Celebrity Cruises, and against the Union (FIT) that represented them, after stewards became unhappy with the union's representation. The class action was brought under the Labor Management Relations Act for tips not received. The stewards also claimed the cruise line breached the wage provisions of the collective bargaining agreement, and that the union breached the National Labor Relations Act for failure to provide fair

representation. The stewards were Indian citizens, the union was Italian, and the cruise line is a Liberian company with ships registered in the Bahamas. The court determined because the stewards were foreign employees involved in an internal wage dispute with a foreign ship, neither of the Labor Relations Acts would apply. As such, because the claims rested on protections of these acts, the court concluded that the district court properly dismissed their claims against the cruise line and the union. Additionally, because the stewards could have raised a claim under the Seaman's Wage Act, but did not, the court affirmed the district court's order that claims under this act were barred by the doctrine of res judicata.

Kragor v. Takeda Pharmaceuticals America
(December 20, 2012)

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-16206.pdf>

In *Kragor v. Takeda Pharmaceuticals*, the court held that an employer's contradictory statements were enough to support pretext argument for Plaintiff's Age Discrimination in Employment Act claim. Specifically, the court held that "it may be that a contradiction is not a sign of falsity, nor the lack of contradiction a sign of truth...but under the Age Discrimination in Employment Act, a contradiction of the employer's proffered reason for the termination of an employee is sometimes enough, when combined with other evidence, to allow a jury to find that the firing was the result of unlawful discrimination." Plaintiff, Barbara Kragor, began working for the company in 1999, and after nearly 10 years of employment, was the target of an investigation into allegations of improper gifts and benefits. Kragor was terminated by a vice president a few months later, based on the allegations. Kragor



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brought a claim under the ADEA. While the district court granted summary judgment in favor of the employer, the Eleventh Circuit reversed, specifically, due to the later statements of the corporate executive, who originally stated Kragor was terminated for violations of company policy, but later said she did everything right and should not have been fired. Based on this statement, the Eleventh Circuit found that the vice president's contradictory statements, coupled with the prima facie case, were enough to submit the case to the jury.

***U.S.A. v. Hall* (January 16, 2013)**

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-16206.pdf>

In *U.S.A. v. Hall*, the Court held Defendant's unauthorized transfer of patient information did not involve actual use of information for fraudulent purposes, even though she provided information to third parties for a monetary kickback. Defendant, Hall, worked as an office assistant in a gynecological health care office, and in her position, she had access to patient files. Such patient files included dates of birth, social security numbers, medical information, and patient names – all protected under HIPPA. Hall sold this information to her own family members, who were part of a scheme to commit identity theft. Hall was charged with unlawfully disclosing personal identity information of patients, and informed her that her co-conspirators used this information to obtain fraudulent credit cards. The district court concluded her intentional transfer of information in exchange for consideration constituted actual use of the information. The Eleventh Circuit vacated and remanded, finding the district court procedurally erred in imposing the sentence, which was enhanced per sentencing guidelines.

***Sims, Jr. v. MWM, Inc.* (January 17, 2013)**

<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/01/11/11-16206.pdf>

In *Sims, Jr. v. MWM*, Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the employer after oral argument, by concluding that no reasonable fact finder could find that the employer's decision was "but-for" his age and plaintiff had not established that the project manager acted as a mere cat's paw for the assistant project manager's discriminatory animus. In *Sims*, the Plaintiff, Solomon Sims, Jr., age 71, claimed he was discriminated against due to his age by his former employer, MWM, when he was terminated from his supervisory position at a detention facility. MWM argued Sims was let go due to a reduction in force, and presented evidence that Sims' performance was lacking, did not improve, and he was at the bottom of the list of employees in terms of quality and accuracy. The employer also submitted evidence that Sims was offered a demotion, but rejected it, and Sims admitted he was told that "age has nothing to do with it," and also admitted the only other age related comment was that he was "old and slow," though he could not pinpoint the timing of the statements.

Submitted by:

Lindsey Wagner, Esq.

Cathleen Scott & Associates, P.A.

250 South Central Boulevard Suite 104-A

Jupiter, Florida 33458

(561) 653-0008 Telephone

www.FloridaLaborLawyer.com

LWagner@csapalaw.com

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