FBA Labor & Employment Law Section
Monthly 6th Circuit Updates

July 2011

Affirmative Action: *Coalition to Defend Affirmative Action, et al v. Regents of the Univ of Michigan, et al*, _ F.3d __, 2011 WL 2600665 (6th Cir. July 1, 2011),

In *Coalition to Defend Affirmative Action*, the Sixth Circuit held that Michigan's 2006 voter-approved constitutional amendment prohibiting affirmative action in public education, public employment, and public contracting violates the Fourteenth Amendment of the U.S. Constitution. Commonly known as "Proposal 2," the amendment to Michigan's constitution (Const 1963, art 1, § 26) prohibits universities and governments in Michigan from giving "preferential treatment" to groups or individuals based on their race, gender, color, ethnicity, or national origin.

The U.S. District Court for the Eastern District of Michigan concluded that Proposal 2 did not violate the equal protection clause. On appeal, the plaintiffs argued that Proposal 2 violates the equal protection clause by impermissibly restructuring the political process along racial lines and by impermissibly classifying individuals on the basis of race. On appeal, the Sixth Circuit, in a 2-1 decision, agreed with the plaintiffs' first argument and declined to address the second.

Initially the Sixth Circuit noted that the equal protection clause "is more than a guarantee of equal treatment under the law substantively," and that it "is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities." Focusing its analysis on Proposal 2's impact on university admissions policies, the Court concluded that "Proposal 2 targets a program that inures primarily to the benefit of the minority and reorders the political process in Michigan in such a way as to place special burdens on racial minorities." More specifically, according to the Court, the "special burdens" include the arduous task of now having to amend the Michigan constitution to achieve the goal of implementing race-conscious admissions policies. Because there were less onerous avenues available to effect political change other than amending the state constitution, "[t]he equal protection injury imposed by Proposal 2 is not the Michigan electorate's attempt to end affirmative action, but the method by which it sought to do so." Thus, the Sixth Circuit concluded that Proposal 2 violates the equal protection clause by so burdening all future attempts to implement race-conscious admissions policies at state universities.

NLRA: *Williamson v. NLRB*, _ F.3d _, 2011 WL 2621891 (6th Cir. July 6, 2011).

In *Williamson*, the Sixth Circuit denied a union member's petition for review of a National Labor Relations Board ("NLRB") decision that dismissed an unfair labor practice charge against a local union alleging that it violated the National Labor Relations Act ("NLRA") for fining and expelling the member for urging other unions to claim work offered by the member's employer.

In 2005, Williamson began working as a project developer and labor consultant for a new start-up company (Hydro X) that planned to harness a new technology to remove soil from the ground

around fiber-optic and high-pressure gas lines by using water pressure. Williamson's job duties involved investigating which unions could claim the hydro-excavation work and those that could offer the most cost-effective terms. During this time, he was not authorized to negotiate with the unions, accept contract proposals or otherwise bind the company.

Williamson was a longtime member of the Operating Engineers and in November 2005, the Operating Engineers' business manager filed internal charges against him for urging other unions to execute labor agreements which fell within the traditional jurisdiction of the Operating Engineers. Williamson was eventually fined and expelled from the Operating Engineers, but the disciplinary actions were stayed while he appealed. In the meantime, Williamson continued to work for Hydro X and in early 2006 began collective bargaining negotiations with the Operating Engineers. On July 21, 2006, Williamson's expulsion from the Operating Engineers became effective when his internal appeal was denied.

Williamson filed unfair labor practice charges against the union alleging that it violated §8(b)(1)(A) and (B). The administrative law judge ("ALJ") dismissed the §8(b)(1)(A) claim, but found that the union violated §8(b)(1)(B). The NLRB adopted the ALJ's dismissal of the §8(b)(1)(A) claim, but reversed the finding of the §8(b)(1)(B) violation. Williamson's initial petition for review to the Sixth Circuit was remanded to the Board because its initial decision had been made by a two-member panel, which did not constitute a valid quorum pursuant to *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635 (2010). The Board then issued a new order which incorporated the reasoning in its prior order.

The Sixth Circuit denied Williamson's petition for review. It initially held that the relevant time for determining whether the Operating Engineers violated the act was through November 2005, the date the union instituted disciplinary proceedings against him. Accordingly, Williamson's contract negotiating activities in 2006 were irrelevant. Next, the court found that Williamson's activities during the relevant period extended only to investigation, not negotiation. Finally, the Court explained that §8(b)(1)(B) is to be interpreted narrowly and protects only activities of collective bargaining and grievance adjustment. While the Supreme Court had previously explained that "some other closely related activity" is protected, the only activity that has been so closely related to collective bargaining and grievance adjustment is contract interpretation. Thus, the Court held, as a matter of first impression, that information gathering activities are not protected activity and therefore the union did not violate the NLRA by fining and expelling Williamson.

ADA Associational Discrimination: *Stansberry v. Air Wisconsin Airlines Corp.*, _ F.3d _, 2011 WL 2621901 (6th Cir. July 6, 2011).

In *Stansberry*, the Sixth Circuit affirmed summary judgment against an employee who alleged his termination constituted associational discrimination under the Americans with Disabilities Act ("ADA"). The employee asserted that Air Wisconsin terminated him because of unfounded fears that he would be distracted at work because of his wife's disability. In the first published opinion regarding associational discrimination published by the Sixth Circuit, the court adopted a

formulation of the *McDonnell Douglass* framework, requiring individuals to establish four elements to establish their *prima facie* case: "(1) the employee was qualified for the position; (2) the employee was subject to an adverse employment action; (3) the employee was known to be associated with a disabled individual; and (4) the adverse employment action occurred under circumstances that raise a reasonable inference that the disability of the relative was a determining factor in the decision."

The Court found that the employee's claim fell short on the fourth prong because the record was "replete with evidence that [the employee] was not performing his job to Air Wisconsin's satisfaction and devoid of evidence to suggest that his discharge was based on any unfounded fears that his wife's illness might cause him to be inattentive or distracted in the future." Alternatively, the Court held that the employee did not establish pretext. The Court stated it is irrelevant that the employee's poor performance might be due to his wife's disability under an associational discrimination theory because the employee was not entitled to a reasonable accommodation based on his wife's disability.

Workers Compensation: *Himes v. United States*, _ F.3d _, 2011 WL 2708576 (6th Cir. July 13, 2011).

The Sixth Circuit affirmed summary judgment in favor of the United States on tort law claims arising out of an injury that occurred while a worker was mowing U.S. Army grounds pursuant to a maintenance contract. The employee, Himes, worked for a contractor that provided grounds maintenance services at the Blue Grass Army Depot ("BGAD"). The contract between the United States and the contractor required the contractor to provide and maintain workers' compensation insurance for the contractor's employee who worked at the BGAD. Himes was injured after a steam pipe fell and struck him on the head, resulting in severe injuries. He received full workers' compensation benefits pursuant to the contractor's workers' compensation policy, but also filed a Federal Tort Claims Act ("FTCA") against the United States.

The Sixth Circuit addressed whether the exclusive remedy provisions of the Kentucky Workers' Compensation Act ("KWCA") protected the United States from suit. The United States asserted an "up-the-ladder" defense, in which an entity that is "up-the-ladder" from the injured employee who meets the statutory qualifications of a "contractor" is considered a "statutory employer" and is entitled to the immunity provisions of KRS §342.690. Initially, the Court held that the United States should be considered a private person under the KWCA, distinguishing a prior Kentucky Supreme Court which had held that governmental entities are not included in the definition of "person." Thus, the United States was protected as though it was a private party. The court then held that the work done by Himes was a "regular and recurrent" part of the business at the BGAD, rejecting Himes' argument that mowing was not part of the business of the Army. According to the Court, Himes was performing routine maintenance tasks necessary for the running of the facility.

Next, the Court held that the district court's quashing of certain discovery requests and the entry of a protective order was not an abuse of discretion where the requests clearly exceeded the

limited scope of the district court's discovery order. Additionally, Plaintiffs could not show how further discovery would establish a genuine issue of material fact. Finally, the Court held that the district court did not abuse its discretion by refusing to hold a hearing on the discovery motions or on the motion to dismiss, reiterating prior holdings that Rule 56 does not require an oral hearing.

Black Lung Benefits: *Morrison v Tennessee Consolidated Coal Co,* _ F.3d _, 2011 WL 2739770 (6th Cir. July 15, 2011)

Dwight Morrison worked as an underground surveyor for Tennessee Consolidated Coal Company for more than twenty years. In 1997, he was laid off as part of a reduction in force. In 2007, Morrison filed a claim with the U.S. Department of Labor for disability benefits under the Black Lung Benefits Act. To show that he was entitled to benefits, Morrison had to present evidence that he has pneumoconiosis (also known as "black lung disease"), that he suffers from a totally disabling respiratory impairment, and that the disability was due to his pneumoconiosis. A DOL Administrative Law Judge denied Morrison's request for benefits, concluding that while he had a totally disabling respiratory impairment, none of the x-ray interpretations was positive for pneumoconiosis. Thus, the ALJ did not evaluate whether Morrison was totally disabled due to pneumoconiosis. Morrison appealed to the DOL's Benefits Review Board, which affirmed the ALJ's findings as being supported by substantial evidence. Morrison appealed to the Sixth Circuit.

The Sixth Circuit noted that after the ALJ and the Board issued their decisions, Congress amended the Black Lung Benefits Act as part of the Patient Protection and Affordable Care Act. The amendment, according to the Court, revived a statutory presumption for claims filed after January 1, 2005 and pending on or after March 23, 2010. Under the rebuttable presumption, a miner who worked underground for at least fifteen years and who demonstrates that he suffers from a total respiratory disability is presumed to be totally disabled due to pneumoconiosis. Because Morrison's claim for benefits was filed and pending within the applicable time period, the Court concluded, Morrison was entitled to the rebuttable presumption. Thus, the Sixth Circuit vacated the Board's decision and remanded the matter to the ALJ, providing Tennessee Consolidated an opportunity to rebut the presumption by making an affirmative showing that Morrison does not suffer from pneumoconiosis or that the disease is not related to coal mine work.

***Submitted by*:**	
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