



Monthly Update for April

3rd Circuit

<http://www.ca3.uscourts.gov/opinarch/114345p.pdf>

In *Grane Health Care v. National Labor Relations Board*, decided April 5, 2013, the Third Circuit addressed the question whether the National Labor Relations Board's successorship doctrine applies when a private employer assumes control of a privatized public entity.

The Laurel Crest Nursing and Rehabilitation Center was a public facility owned and operated by Cambria County, Pennsylvania, and was subject to Pennsylvania's public sector labor law. Under that law, the Pennsylvania Labor Relations Board (PLRB) had certified Local Union No. 1305 as the exclusive union representative of Laurel Crest's nursing aides, housekeepers, and other nonprofessional employees. On January 1, 2010, Cambria County sold Laurel Crest to Grane Healthcare Co., a private company that in turn created a new entity, Cambria Care Center, to operate the now-privatized facility. The majority of Laurel Crest employees applied for and were granted employment by the privatized facility. However, Grane and Cambria Care each refused to recognize Local Union No. 1305 as the exclusive representative of the nonprofessional employees. They also refused to recognize a separate union that had been awarded limited representation rights by the PLRB for Laurel Crest's nurses. For good measure, Grane refused to hire four of the five Local 1305 officials who applied for positions with the privatized facility, as well as a member of the nursing employees' union who had opposed the Laurel Crest sale.

The National Labor Relations Board (NLRB) affirmed an administrative law judge's decision that found, *inter alia*, that Grane and Cambria Care, deemed to be a single employer, had violated the National Labor Relations Act (NLRA) by refusing to recognize and bargain with Local 1305. Grane

appealed, and the Third Circuit affirmed the NLRB.

The NLRB had applied its successorship doctrine to find that Grane and Cambria Care were obligated to recognize Local 1035. Under this doctrine, a new employer has a duty to bargain with an incumbent union that had represented the predecessor's employees when there is "substantial continuity" between the predecessor and successor enterprises. Grane conceded that "substantial continuity" existed between Laurel Crest's operations and those of the privatized entity. However, Grane argued that, as a matter of law, the successorship doctrine could not apply when the predecessor was a public entity. Public bodies are not subject to the NLRA; therefore, according to Grane, a private entity could not lawfully inherit a NLRA bargaining obligation from a public body.

The Third Circuit disagreed. A bargaining obligation under the NLRA could lawfully be imposed if "the majority support Local 1305 established under Pennsylvania law could, consistent with the NLRA, establish a presumption of majority support under federal law." The Third Circuit found "significant support" on the record "for the {NLRB's} determination that certification under {Pennsylvania law} provides substantially similar protections for employers and employees as Board certification under federal law." Both federal and Pennsylvania law allow majority support to be established by certification following a secret ballot election, and both allow for the filing of decertification petitions in appropriate instances. The similarity between federal and Pennsylvania labor law was underscored by the fact that the Pennsylvania Supreme Court often looks to NLRB precedent for guidance in interpreting Pennsylvania's public sector labor law.

Although "there may be instances where the process of establishing majority support under state law is so unreliable that the Board's application of the successorship doctrine would be irrational, this is not so here."



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In so holding, the Third Circuit joined the Seventh and District of Columbia Circuits "in approving the application of the successorship doctrine in this context."

Thus, for the *Grane* Court, it was immaterial that the previous employer in a successorship situation was a public body. The critical question is whether the union representing the previous employer's employees had established majority support among the employees by way of procedure substantially as reliable as those provided under federal labor law. This would clearly be the case, for example, when the union representing the previous employer's employees had established majority support by way of a secret ballot election. A closer question would arise when a union establishes majority support by way of means permitted under a state's public sector labor law that are not recognized under federal law, such as a "card check" procedure based solely on the submission of union authorization cards.

The *Grane* decision has obvious implications for private businesses interested in acquiring and operating publicly-operated enterprises. At least three circuit courts of appeals have found no general legal prohibition against the application of the NLRB's successorship doctrine in cases in which the predecessor employer was not subject to the NLRA. Private businesses seeking to acquire public enterprises must therefore be prepared to take successorship issues into account.

In my October 2011 Third Circuit update, I reported on *Symczyk v. Genesis Healthcare Corporation*. In that case, the Third Circuit addressed the question whether a FRCP 68 offer of judgment that encompasses all the relief a lead plaintiff could possibly receive under her individual Fair Labor Standards Act (FLSA) claim moots her collective action under Section 216 of the FLSA if the FRCP 68 offer is filed before the lead plaintiff moves for conditional certification of her proposed class. The *Symczyk* Court held that the "relation back" doctrine developed under FRCP 23 with regard to mandatory

"opt-out" class actions applies with equal force to "opt-in" collective actions under Section 216 of the FLSA.

On April 16, 2013, by a 5-4 vote, the Supreme Court reversed the Third Circuit. Because the plaintiff had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her claim from being moot, it was appropriate to dismiss the claim for lack of subject matter jurisdiction. The majority assumed, without deciding, that the FRCP 68 offer mooted the plaintiff's claim because she had conceded as much in the lower courts, and because she had asserted no continuing interest in shifting attorneys' fees and costs. The lack of any remaining personal interest in the case rendered the matter moot. Precedent under "opt out" FRCP 23 class actions was deemed inapplicable because FRCP 23 actions are fundamentally different from FLSA "opt in" collective actions. Additionally, the plaintiff had not moved for "conditional certification" at the time her claim had become moot, and the district court had not ruled on "conditional certification" in an anticipatory fashion. And because the claims involved monetary damages and not injunctive relief, there was no danger that dismissal of the plaintiff's actions would insulate other parties' claims from review or render them non-remediable.

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7th Circuit

Nancie J. Cloe v. City Of Indianapolis, No. 12-1713 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-09/C:12-1713:J:Hamilton:con:T:fnOp:N:1115177:S:0>

Court Holds That An Employer Who Implements Alternative Accommodations Properly Engages In The Interactive Process And Further Holds District Court Erred In Granting Summary Judgment For Defendant On Plaintiff's Disability Discrimination Claim When Defendant Failed To Raise The Issue OF Wrongful Termination In Its Motion

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ADA failure to accommodate claim, but reversed summary judgment on the plaintiff's ADA discrimination and retaliation claims. The plaintiff in this case was diagnosed with multiple sclerosis which significantly impacted her ability to work. The Court, in affirming summary judgment on the failure to accommodate claim, noted that reasonable accommodation is a process and not a "one-off event." In this case, the plaintiff requested a closer parking spot to address her difficulty with walking. The Court found that the defendant properly engaged in the interactive process by evaluating and offering alternatives and acting with reasonable speed to correct any problems associated with the accommodation. However, the Court disagreed that summary judgment was proper on the plaintiff's retaliation claim based on evidence of suspicious timing of discipline, potential hostility towards the plaintiff's disability, and ambiguous statements made by the plaintiff's supervisors. The plaintiff presented evidence that her supervisors would get angry when she would leave for doctor's appointments, that they downplayed her disability and its impact on her ability to work, and showed that the timing of her

discipline was inconsistent with the timing of the defendant's past disciplinary actions. With regard to the plaintiff's disability discrimination claim, the Court found that the district court erred in finding that the plaintiff failed to show that the defendant's reason for firing her were pretextual as the defendant completely failed to raise the issue of wrongful termination in its motion. The Court commented that the plaintiff was not required to present evidence on an issue not raised by the defendant, and further reasoned that the defendant's failure to address this argument may have caused the plaintiff to exclude supporting evidence from her response. Accordingly, the Seventh Circuit remanded this claim to the district court for further proceedings.

Claude T. Harrell, Jr., Regional Director of Subregion 33 of the NLRB v. American Red Cross, Heart of America Blood Services Region, Nos. 12-1264 & 12-1362 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-23/C:12-1264:J:Cudahy:aut:T:fnOp:N:1123110:S:0>

Court Holds Section 10(j) Injunction Appropriate to Fully Address Harm Caused By Unilateral Changes Implemented By Employer

The Seventh Circuit affirmed in part and reversed in part the district court's order with regard to the defendant-employer's unilateral changes implemented between a union election and the union's certification. The defendant's unilateral changes included, among others, suspending merit pay increases, suspending 401(k) contributions, changing health benefits, and redistributing bargaining unit work to non-union employees. The district court reinstated the merit pay increases, but refused to order rescission of the other unilateral changes, reasoning that it would require the court to "micro-manage" the employment relationship. The Seventh Circuit disagreed and found all elements necessary to grant the NLRB a § 10(j) injunction



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under the NLRA. The purpose of a § 10(j) injunction is to restore the status quo as it existed before the unfair labor practices and the unilateral changes made by the defendant-employer disturbed the status quo. The Court found that the district court's order failed to fully address the harm caused by the defendant-employer's unilateral changes and did not return the parties to their positions before the unfair labor practices occurred. Accordingly, the Court affirmed the reinstatement of merit pay increases, reversed the denial of other interim relief, and remanded the matter to the district court to grant the interim relief requested, including the § 10(j) injunction.

Steven Cromwell v. City of Mومence, No. 12-1541 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-12/C:12-1541:J:Sykes:aut:T:fnOp:N:1117457:S:0>

Court Holds Absence of At-Will Language Is Insufficient To Establish A Property Interest In Continued Employment

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants on the plaintiff's §1983 claim. The plaintiff in this case was a police lieutenant who claimed the termination of his employment was procedurally inadequate under the Due Process Clause of the Fourteenth Amendment. In order to show that he had a constitutionally protected property interest in continued employment, the plaintiff relied on language contained in the City of Mومence Police Department Rules and Regulations. This language stated that probationary employees may be fired at any time or for any reason. The regulations do not contain similar language when addressing the dismissal of non-probationary employees. In Illinois, a property interest is created when a clear promise establishes a legitimate expectation of continued employment. The Court held that the absence of at-

will language for one group of employees did not create a clear promise of continued employment on which other employees may rely. The Court also found that regulations that provide explicit grounds for discipline do not rebut the presumption of at-will employment unless the regulation expressly states that it contains an exhaustive list of permissible reasons for termination. The Court reasoned that an employer may terminate an employee for legitimate reasons unrelated to discipline and affirmed summary judgment for the defendant.

Leon Modrowski v. John Pigatto, Frank Pigatto, TAQ Properties, LLC, and Capps Management, No. 11-1327 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-08/C:11-1327:J:Wood:aut:T:fnOp:N:1114169:S:0>

Court Affirms Summary Judgment For Defendants Finding Plaintiff Was Still Obligated To Show There Was A Triable Issue Of Fact Regardless Of Deficiencies In Defendants' Motion For Summary Judgment

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants on the plaintiff's Computer Fraud and Abuse Act claim. This case involved the plaintiff being locked out of his personal email, which he voluntarily fused with his work email, by the defendants after they terminated his employment. The district court dismissed the plaintiff's Computer Fraud and Abuse Act claim finding that the plaintiff failed to allege an injury of at least \$5,000, but allowed the plaintiff to file an amended complaint. By the time the plaintiff filed his amended pleading, fact discovery had closed and the plaintiff, who had not engaged in any discovery, had not moved for an extension. Based on a "complete lack of proof" regarding the elements of the plaintiff's claims, the defendants moved for summary judgment. Rather



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than address the merits of his case or request more time for discovery, the plaintiff responded to the defendants' motion by attacking the defendants' failure to file a Local Rule 56.1 Statement of Material Facts and their failure to support factual positions with citations to the record. While the Court noted that such deficiencies could constitute grounds for denial of the defendants' motion, the plaintiff was still obligated to point to evidence showing that there was a triable issue of fact. Since the plaintiff failed to do so, the Court affirmed summary judgment for the defendants.

Renee Majors v. General Electric Co., No. 12-2893 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-16/C:12-2893:J:Miller:aut:T:fnOp:N:1119097:S:0>

Court Holds That Plaintiff's Request For Another Employee To Perform An Essential Function Of A Job Is Not A Reasonable Accommodation Under The ADA

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's ADA and retaliation claims. The plaintiff in this case suffered an injury that restricted her ability to lift more than 20 pounds. Subsequent to being placed on this restriction, the plaintiff was passed over for appointment to a position that she would have been awarded under the seniority-based bidding procedure. The Court found that the plaintiff was not medically qualified for the position since an essential function of the job required intermittent moving of heavy objects which she could not do, and thus, she was not eligible for reasonable accommodation. Turning to the plaintiff's Title VII retaliation claim, the Court found that the plaintiff failed to successfully establish a causal link between her EEOC filing and the alleged retaliation (denying her overtime hours and the opportunity to work certain Fridays labeled "lack of work" days). The

plaintiff attempted to show this causal connection by claiming that the alleged adverse actions began less than two weeks after she filed her EEOC charge and arguing that her comparators worked substantially more overtime hours and "lack of work" Fridays. The Court found that the plaintiff's alleged comparators were similar only in job title and were in different job classifications and that the plaintiff had failed to offer evidence showing that this explanation was pretextual. Since the plaintiff could not show more than temporal proximity, which the Court noted is not sufficient to maintain a retaliation claim, the Court affirmed summary judgment for the defendant.

Emilio Martino. v. Western & Southern Financial Group, No. 12-1855 (7th Cir. 2013)

<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2013/D04-25/C:12-1855:J:Williams:aut:T:fnOp:N:1124593:S:0>

Court Affirms Summary Judgment On Plaintiff's Title VII Claims Finding That Plaintiff Did Not Provide Sufficient Evidence To Show Defendant's Proffered Reason For Terminating His Employment Was Pretextual

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's religious and national origin discrimination and defamation claims. This case involved an employment agreement that prohibited employees from working other jobs if such work totaled more than five hours a week or had an average weekly pay of more than one hundred dollars. In this case, the plaintiff was asked to resign a pastoral position he held which violated this agreement. Shortly after, the defendant was unable to obtain documentation from the plaintiff that verified his eligibility to work in the United States and terminated the plaintiff's employment. Following company policy, the defendant notified its insurance company of the plaintiff's involuntary termination



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and attached the termination letter which stated that the plaintiff failed to provide employment eligibility documents. The Seventh Circuit addressed the plaintiff's discrimination claims and found that the plaintiff failed to show that the defendant's proffered nondiscriminatory reason was pretextual. The plaintiff attempted to argue that the defendant treated his comparators differently, that there was suspicious timing, and that he should have been given more time to provide employment eligibility documentation. The Court found none of the comparators were similarly situated because one had previously provided paperwork proving eligibility and the other's outside work did not violate the company policy. The Court then held that temporal proximity alone did not create a genuine issue as to pretext and that the plaintiff had waived the argument that he was entitled to additional time to provide documentation by not raising this issue in the district court. Turning to the plaintiff's defamation claim based on the termination letter sent to the insurance company, that Court held that the statements in the letter were not false and could therefore not support a defamation claim. Even if the statements were defamatory, the Court held that the claim failed under both *per se* and *per quod* analyses as the statements in the letter were not so "obviously and naturally harmful" to support a *per se* claim, nor did the plaintiff present evidence of special damages, required for claims of defamation *per quod*.

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8th Circuit

***Hudson v. United Systems of Arkansas*, No. 12-2572 (8th Cir. March 7, 2013) (Title VII – Sex, Disability, Jury Award for Mental Anguish).**

<http://media.ca8.uscourts.gov/opndir/13/03/122572P.pdf>

Shaunta Hudson sued her former employer, United Systems of Arkansas ("United Systems") for sex and disability discrimination following her termination in June 2009. A jury awarded her approximately \$180,000 in damages including \$100,000 for mental anguish. United Systems appealed the denial of its post-trial motions for judgment as a matter of law and for remittitur of the mental anguish damages. The Eighth Circuit affirmed the Eastern District of Arkansas.

Hudson, an African American, was the controller for United Systems and one of four executives (the only female). At the time she was hired she advised United Systems that she had a "serious medical condition that would require ongoing monitoring and treatment". Several times during her employment she missed work for a few days in order to have surgery and recover thereafter. However, in May 2009 she underwent a surgery, but unlike before, she had a longer than expected post-surgery recovery (weeks instead of days) due to complications. She called into work each day, speaking with the receptionist to report her continued absence. Upon her return, her supervisor, owner and president Glenn Petkovsek ("Petkovsek"), confronted her in her office demanding to know why she didn't call him personally on his cell phone. She tried to get up and he ordered her to "sit down, little girl" and finally grew irate and ordered her to "get out". Hudson took the statement to mean that she was fired. When she returned the following day to get her things, the key code to the office was changed and another worker stated they were not allowed to let her in. Days later, Petkovsek offered to allow her to return to a different position with reduced hours and pay, as he did not think she could perform her



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job as controller with her “health issues and personal issues”. Hudson rejected the offer.

On appeal, United Systems argued it articulated a legitimate, nondiscriminatory reason for her termination (insubordination for failure to call his cell phone, copping an attitude and thinking she was calling him a racist) which she was unable to disprove. The Eighth Circuit disagreed, noting that his account of the facts was not “undisputed” as three other executive employees testified they never heard of his cell phone policy and Hudson provided evidence that Petkovsek belittled women all the time, talked down to them, called them “girl” or “little girl” and once told Hudson she “gave good phone” (reference to oral sex).

United Systems also appealed the denial of its motion for remittitur, arguing the evidence did not support a \$100,000 mental anguish award. Again, the Eighth Circuit disagreed, noting, importantly, that United Systems “did not challenge the submission of mental anguish damages to the jury, but only filed a motion for remittitur of the damages after the jury made its award. Remittitur is a device for reviewing the amount of a damages award, not whether there was a basis for any award at all”.

The Eighth Circuit also noted that it has upheld jury awards for pain and suffering (which are highly subjective and should be committed to sound discretion of the jury): \$200,000 for sexual harassment; \$50,000, \$100,000 and \$125,000 for Title VII discrimination claims; and \$165,000 for an ADA claim. Accordingly, it held the \$100,000 award was not “monstrous, shocking, or grossly excessive”.

Dollar v. Smithway Motor Xpress, No. 11-2093 (8th Cir. March 27, 2013) (FMLA Interference and Retaliation, Front Pay Award).

<http://media.ca8.uscourts.gov/opndir/13/03/112093P.pdf>

The Plaintiff, Christine Ann Dollar (“Dollar”) sued her former employer, Smithway Motor Xpress (“Smithway”), a national over-the-road trucking carrier, for violation of the FMLA. The Northern District of Iowa – Ft. Dodge Court found in Dollar’s favor and awarded her \$296,112 in back pay, front pay, and liquidated damages.

The Eighth Circuit vacated the front pay award, noting that it was “unduly speculative given the unique circumstances of the case” and affirmed the remaining award. Dollar was a Driver Manager for Smithway. In that role she oversaw thirty-five to forty truck drivers which required substantial interaction with the drivers. Due to depression, she missed work and was reprimanded; her job performance was “below expectations”. In June and July 2007, a series of events caused her to miss work, which ultimately resulted in her termination. Just prior to her termination, she was reassigned to the “Driver Recruiter” position (a position she could perform despite depression as it required less interaction with drivers). She was never offered FMLA and never actually performed the Driver Recruiter duties while employed. She applied for unemployment and received it once she received medical clearance to work on August 1. At the unemployment hearing, Smithway purportedly extended her an offer of re-employment (which she denied).

The Eighth Circuit held that while the FMLA does not impose a duty of reasonable accommodation like the ADA, it does require the grant of a qualifying leave for 12 weeks and to reinstate the employee to an original or equivalent position. This duty of restoration “clearly and expressly broadens the employer’s obligation beyond a narrow focus solely on the actual position held by the employee before the onset of the serious health condition and extends to equivalent positions.” The district court properly found that Dollar was transferred to the Driver Recruiter position prior to her termination, and as such, Smithway was not imposed with a larger duty to accommodate than actually exists within the FMLA.



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Smithway also appealed the damages award, arguing that Dollar failed to mitigate her damages by accepting an offer to rehire her. The district court noted that Smithway failed to plead the affirmative defense and thus waived the failure to mitigate issue. The Eighth Circuit affirmed, and noted that while the waiver is not absolute and that “inclusion of an otherwise-waived issue in a final pre-trial order may, in some cases, preserve or revive the issue for trial”, such was not done in this case and thus the award was proper.

As to front pay, the district court awarded 10 years' front pay. The Eighth Circuit noted the unique facts in this case (the fact that she was transferred to a new position that she never actually worked in before her termination), combined with “substantial changes in operations”, make such an award “unusually speculative”. The Court noted its “review of the facts in this case leaves us with the firm impression the award of front pay is too speculative and would be an impermissible ‘windfall’ for the plaintiff.” Accordingly, the award of front pay was vacated.

***Brown v. City of Jacksonville*, No. 12-1730 (8th Cir. March 29, 2013) (ADEA, Title VII, ADA, FMLA, AR State Claims; Poor Briefing; Correcting Earlier 8th Circuit ADA Analysis).**

<http://media.ca8.uscourts.gov/opndir/13/03/121730P.pdf>

The Plaintiff, June Brown (“Brown”) was a purchasing manager for the City of Jacksonville, Arkansas (the “City”). Brown was terminated by the City for failure to perform her duties and failure in personal conduct. Thereafter, she filed suit against the City alleging seven claims, which will not be detailed herein as they are straight-forward. However, there are a few key notable issues from this order worth mentioning.

Neither the district court nor the Eighth Circuit Court of Appeals appreciated the briefing by Brown.

Brown’s brief “filled as it is with unsupported legal and factual assertions, sometimes borders on incomprehensible, the precise issues she is raising in this appeal are unclear. Like the district court, we struggle to decipher seemingly inconsistent claims”. The Court then noted “[w]e echo the district court’s notice to Brown’s counsel that we are ‘not inclined to undertake this effort again in cases’”.

Also worth mentioning, the Eighth Circuit noted that the district court “improperly analyzed Brown’s ADA claim under the more restrictive requirements applicable to pre-amendment ADA claims”. However, the Court pointed out that it recently mistakenly made the same improper analysis: “[w]e recognized that at least one of our cases also did not reference the appropriate version of the ADA. See e.g. Kallail v. Alliant Energy Corporate Servs., Inc., 691 F.3d 925, 930 (8th Cir. 2012)(quoting the post-amendment version of 42 U.S.C. § 12112(a) in a case involving pre-2009 adverse employment action). Thus, the district court’s reliance on pre-amendment ADA standards, though incorrect, is understandable.”

***Knutson v. Schwan’s Home Service, Inc.*, No. 12-2240 (8th Cir. April 3, 2013) (Rule ADAAA – Federal DOT Eligibility Requirements).**

<http://media.ca8.uscourts.gov/opndir/13/04/122240P.pdf>

The Plaintiff, Jeff Knutson (“Knutson”) was a Location General Manager for Schwan’s Home Service (“Schwan’s”). The position description requires that Federal DOT eligibility requirements (driver’s license, medical certification) be met. His conditional offer of employment required him to be “DOT Qualified” for trucks over 10,000 pounds and pass a physical examination. At the time of his hire, he held a Medical Examiner’s Certificate (“MEC”) and was fully DOT qualified through July 2009. In March 2008 he suffered an eye injury and his physician refused to give him an MEC or



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waiver. Schwan's put him on 30 day leave of absence to obtain an MEC or non-DOT position. He failed to do either and was terminated.

Knutson sued Schwan's under the ADAAA. The District of Minnesota granted summary judgment in favor of Schwan's, and the appeal ensued. The Eighth Circuit Court of Appeals affirmed the decision, holding that even under the ADAAA's more relaxed requirements for showing a disability, Knutson was not qualified to perform an essential function of his position. Accordingly, the Court noted it need not determine whether he was in fact "disabled" under the ADAAA as he could not establish the prima facie case that he was qualified to perform the essential functions.

The parties disputed whether being DOT qualified was an "essential function". Notably, the Court held that the employer's judgment about an essential function is "considered highly probative". It may also look at written job descriptions, time spent on that function, consequences of not requiring the individual to perform that function, and the current work experience of others in similar positions. The Court concluded that all Schwan's Managers are required to obtain DOT qualification, that sales and training would be affected if a manager was not DOT qualified, and that all other Managers were DOT qualified.

Knutson argued that he only drove a truck less than 50 times between November 2007 and his injury; the Court held that his "specific personal experience is of no consequence in the essential functions equation" but rather the factors noted above. The Court held that no genuine issue of material fact exists that Knutson was not DOT qualified to drive a truck; that such qualification is an essential function of the position; and that he did not obtain an MEC. Thus, he was not qualified to perform an essential function of the job. Knutson also noted he was allowed to work for nine months following his eye injury in that position; Schwan's claimed it was "optimistic" about his recovery and once the physician refused to give him the MEC or waiver, he was placed on leave. The Court held that an accommodation is

unreasonable if it requires the employer to eliminate an essential function of the position. As such, Knutson's ADAAA claim failed.

***Hess v. City of Stuttgart et. al.*, No. 12-3211 (8th Cir. April 26, 2013) (Fourth, Fifth, Fourteenth Amendments – Failure to Take Drug Test and § 1983 Retaliatory Discharge).**

<http://media.ca8.uscourts.gov/opndir/13/04/123211P.pdf>

Shawna Hess ("Hess") worked for the City of Stuttgart, Arkansas (the "City"). During the middle of a workday she left to go to a car she had driven. She was approached by State Trooper David Chastain ("Trooper Chastain") who was performing surveillance on the car which was the vehicle of a suspected drug dealer (Hess' former boyfriend). Hess opened the door and Trooper Chastain approached and observed what appeared to be crystal meth on the console and asked her to report to his office later in the day. Trooper Chastain contacted Hess' supervisor, Tommy Lawson, to request permission for her to leave the office for an interview; he agreed. Trooper Chastain asked Hess to submit to a drug test which she refused, noting that she would "flunk it". Trooper Chastain then reported what happened at that meeting to Lawson. Lawson sought counsel of the City's personnel director, who confirmed that she believed Hess violated the City's drug policies. Lawson terminated Hess that afternoon.

The Eighth Circuit upheld the district court in all respects. As to the Fourth Amendment claim, although "a urine drug test is a search," none of the City employees attempted such search; it was the State Trooper, and thus, the claim was properly dismissed. As to the Fifth Amendment claim, the Court noted that "a urine drug test would not violate her Fifth Amendment right against self-incrimination because urine samples, which are not testimonial evidence, do not trigger Fifth Amendment protections." Finally, the Fourteenth



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Amendment claim for deprivation of protected liberty interest in a public employee's reputation was also properly dismissed as none of the defendants made public statements about her. Success on a due process claim "requires allegations that the defendant's course of action was 'conscience shocking'" which she failed to allege. Finally, the Court noted she cannot have a due process claim because "it is well established that at-will employees do not have a property interest in their continued employment, and thus their termination cannot support a procedural due process claim...When hired, Hess signed an 'Employment at Will Acknowledgment,' which explicitly recognized the signer's at-will employment status."

As to her § 1983 claim against the City's officials, the Eighth Circuit recognized that a City can only be liable 'if an action or policy itself violated federal law, or if the action or policy was lawful on its fact but 'led an employee to violate a plaintiff's rights [and] was taken with 'deliberate indifference' as to its known or obvious consequences.'" Although the Court recognized that a custom or policy can arise from a single action (such as her termination), she failed to allege facts that the City delegated final policymaking authority to those individuals sued and her claim properly was dismissed.

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