



Monthly Update for April

3rd Circuit:

In *Knepper v. Rite Aid Corporation*, the Third Circuit returned to the subject of employee class actions in wage and hour disputes, this time addressing the question whether the “opt-in” rule governing class actions under the federal Fair Labor Standards Act (FLSA) bars federal courts from hearing “opt-out” class actions under state wage and hour laws that parallel the FLSA. Various District Courts had held that allowing such “opt-out” state law claims to proceed would be “inherently incompatible” with the prohibition of such claims under the FLSA. In *Knepper*, the Third Circuit joined the Second, Seventh, Ninth and D.C. Circuits in rejecting the “inherent incompatibility” theory and allowing such state-law opt-out class actions to proceed.

Knepper had its genesis in a nationwide opt-in FLSA class action against the Rite Aid Corporation, in which it is alleged that Rite Aid had misclassified its assistant store managers across the country as overtime-exempt. After that action had been commenced in the Middle District of Pennsylvania, two class members initiated parallel opt-out class action litigations in Maryland and Ohio, respectively, under each state’s wage and hour law, each of which tracks the FLSA’s overtime pay provisions. The parallel opt-out class action litigations were commenced in federal court under the Class Action Fairness Act (CAFA), 28 U.S.C. Sec. 1332(d), which extends mandatory federal diversity jurisdiction to class action disputes in which the amount in controversy equals at least \$5 million, and in which at least one member of the plaintiff class is a citizen of a state different from any defendant (subject to exceptions not applicable here). The two parallel cases ultimately found their way to the Middle District of Pennsylvania, where they were dismissed by the District Court. The District Court found that opt-out class actions based on state employment laws paralleling the FLSA were “inherently incompatible” with the opt-in procedure mandated under the FLSA, which allegedly “expresses Congress’s intent to ... eliminate{e} representative (i.e., opt-out) actions” in wage and hour cases. On appeal, the Third Circuit reversed.

The FLSA contains a unique class action provision that requires employees to affirmatively opt into a purported class litigation. 29 U.S.C. Sec. 216(b). The provision was a component of the FLSA amendments contained in the Portal-to-Portal Act of 1947. Reviewing its history in detail, the *Knepper* Court found that the opt-in provision had been adopted to prevent labor unions from commencing wage and hour litigation as the “representatives” of unnamed claimants who were not actually participating in the suit. One of the perceived evils of such “representative” suits was that actual claimants could wait until the union had won a favorable judgment to “join” the suit and obtain remedies. Using this “one-way intervention” technique, the claimants could enjoy the benefit of a successful result but avoid being bound by an adverse result. Absent from the legislative history was any discussion of opt-out class actions, which did not come into existence until the adoption of the “modern” class action provisions of Fed. R. Civ. Pro. 23(b)(3) in 1966.

Courts have consistently held that the opt-out provisions of Fed. R. Civ. Pro. 23(b)(3) are inapplicable to claims under the FLSA because of the express opt-in class action provision of 29 U.S.C. Sec. 216(b). “The concept of inherent incompatibility seeks to extend this logic to state employment-law claims” arising “in the context of dual-filed FLSA opt-in and state law opt-out class actions where the federal court was asked to exercise supplemental jurisdiction over state law claims that paralleled the claims under the FLSA.” Although several District Courts had accepted the “inherent incompatibility” theory, four Circuit Courts had rejected it. The *Knepper* Court joined them.

First, the *Knepper* Court found “that the plain text of Sec. 216(b) provides no support for the concept of inherent incompatibility.” Sec. 216(b) refers only to actions brought under the FLSA. “Neither Sec. 216(b) nor any other FLSA provision addresses causes of action for relief under state employment law.” Because the FLSA was unambiguous in *not* barring state-law opt-out class actions, the trial court had erred in inquiring into Congressional intent.



Monthly Update for April

Second, relying on its analysis of the history to Sec. 216(b), the *Knepper* Court rejected the contention that Congress had intended to eliminate opt-out class actions in wage and hour cases. “Congress created the opt-in scheme primarily as a check against the power of unions ... and as a bar against one-way intervention by plaintiffs who would not be bound by an adverse judgment. Neither purpose speaks to the propriety of an opt-out class action, especially since modern Rule 23 opt-out actions did not exist at the time...”

Third, the *Knepper* Court found a “countervailing congressional purpose” in CAFA itself, “which provides federal jurisdiction over state-law class actions that satisfy its requirements.”

In this regard, in adopting CAFA, Congress found that that State and local courts “are...sometimes acting in ways that demonstrate bias against out-of-state defendants” and “making judgments that impose their views of the law on other States and bind the rights of the residents of those States.” P.L. 109-2, 119 Stat. 4, Sec. 2(a)(4)(B) and (C), 28 U.S.C.A. Sec. 1711 Note. One of the stated purposes of CAFA is to “restore the intent of the framers of the United States Constitution by providing Federal court consideration of interstate cases of national importance under diversity jurisdiction.” P.L. 109-2, 119 Stat. 4, Sec. 2(b)(2), 28 U.S.C.A. Sec. 1711 Note. The state-law class actions in *Knepper*, which involve significant claims against an out-of-state defendant under state wage and hour laws designed to mirror federal wage and hour law, would appear to be the very sort of actions that Congress intended to be heard in federal court.

Rite Aid cited an earlier Third Circuit decision, *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3^d Cir. 2003), which had held that a district court had abused its discretion by exercising supplemental jurisdiction over an opt-out Pennsylvania wage law class action together with a FLSA opt-in class action. The *Knepper* Court distinguished *De Asencio*. Whereas *De Asencio* involved the exercise of *discretionary* supplemental jurisdiction, the *Knepper* lawsuits were brought in federal court

under CAFA, which affords federal jurisdiction *as of right* when its requirements are met. *De Asencio* also involved novel state-law claims, whereas the claims raised in the *Knepper* lawsuits were neither novel nor complex.

The *Knepper* Court also rejected Rite Aid’s argument that the FLSA pre-empted the Maryland and Ohio statutes, wryly observing that it is “counterintuitive” to suggest “that state enforcement of standards that are identical to those established in the FLSA would somehow conflict with congressional purpose.”

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5th Circuit:

EEOC v. Service Temps, Inc (4/26/2012): Posture— Texas jury found that Smith Personnel violated the Americans with Disabilities Act when it refused to let a deaf woman apply for a warehouse job, awarding her back pay, compensatory, and punitive damages. Entering judgment on the verdict, the judge added injunctive relief. On appeal, the company raised five categories of issues, ranging from jurisdiction to jury instructions. **AFFIRMED; Holding**—The district court correctly held that, to deny that a nonjurisdictional condition precedent like conciliation had been performed, Smith was required to do so with particularity in its answer. Smith had time to obtain discovery and seek leave to amend by the March 1 deadline. The district court found that Smith’s failure to account for its delay was dispositive, outweighing the other three factors for assessing good cause. Smith argues that, because the EEOC failed to provide computations for compensatory or punitive damages, the EEOC should have been precluded from seeking any damages whatsoever. Smith points to no example of an appeals court’s reversing a jury verdict or eliminating a damages award on this basis. Smith argues that the punitive damages instruction misled jurors to mistakenly substitute *Smith’s* knowledge of the ADA



Monthly Update for April

for its *agent's* when analyzing the requisite intent. The isolated introductory reference to Smith as the defendant does not rise to the level of plain error. The jury could infer from the facts that Ray had knowledge of the ADA, which is sufficient to satisfy the plain error standard. The evidence demonstrates that Ray's job duties as an account manager included hiring employees, and a reasonable jury could find that blocking someone from entering the applicant pool, while on the job, is within the scope of that duty, even if it violates a Smith policy. The district court engaged in a careful and thorough analysis of punitives, examining (1) the degree of reprehensibility of Smith's conduct, (2) whether the punitive damages bore a reasonable relationship to the compensatory damages awarded, and (3) how the punitive damages award in this case compared to awards in similar cases. The district court's award of injunctive relief was proper and terminates two years from judgment; [URL—](#)

www.ca5.uscourts.gov/opinions-pub-11-11-10262-CV0.wpd.pdf

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6th Circuit:

Sixth Circuit Affirms Dismissal of Pension Benefit Claims and Leaves Open Question About Interpretation of ERISA's Extended Statute of Limitations in Cases of Fraud or Concealment

Cataldo v. United States Steel Corp., _ F.3d _, 2012 WL 1232642 (6th Cir. 2012)

<http://www.ca6.uscourts.gov/opinions.pdf/12a0103p-06.pdf>

Using a kitchen sink approach to kitchen sink arguments, the Sixth Circuit affirmed the dismissal of retirees' pension benefit claims.

Plaintiffs were current and former unionized steelworkers at a mill in Lorain, Ohio. U.S. Steel first owned the plant, then Kobe Steel and then the Lorain Tubular Company. Under U.S. Steel and Kobe Steel, retirees – like steelworkers at U.S. Steel's other plants – received a percentage of their total wages for their five best working years. At Lorain Tubular, the plan only considered their working years before 2000, which essentially yielded lower pension benefits because the post-2000 years were often higher-earning years. Later, U.S. Steel regained ownership of the plant. The plan language did not change, but plan participants "became 'hopeful'" that they would again receive benefits they had when U.S. Steel first owned the mill. At some point, however, they learned that the Lorain Tubular formula for determining final average earnings would remain in place. At around the same time, U.S. Steel offered an early retirement option. Some Lorain plant workers took that option, purportedly based upon promises by "one or more" defendants that they would receive the same early retirement benefits as steelworkers at the other plants. When they did not receive those same benefits, plaintiffs sued under ERISA and state law asserting breach of fiduciary duty, equitable estoppel, failure to provide plan documents, and other claims.

The fiduciary-duty claims were time-barred under ERISA's general 3-year statute of limitations for fiduciary actions. The claims were essentially based on allegations of fraud. In a detour, the Sixth Circuit clarified that despite various cases that might seem to the contrary, it has never actually decided whether ERISA's 6-year limitations period for claims based on "fraud or concealment" extends the period for claims based only on fraud *but not* concealment. But the court left that question unresolved for another day. It instead held that plaintiffs failed to plead fraud with particularity, so these particular claims could not properly invoke the extended limitations period.

The steelworkers also sued the union for its role in assuring them that they would have more benefits. Although the union failed to raise the limitations defense, the claim was still deficient because the union was not a fiduciary. It was not named as a fiduciary in the plan documents, did not exercise discretionary control over the plan, and did not give plaintiffs any reason to believe that it was acting as a plan administrator when making any



Monthly Update for April

assurances.

As to the equitable estoppel claim, although the Sixth Circuit recently recognized that theory of recovery in ERISA cases, plaintiffs failed to allege a claim here. Under the traditional estoppel test, they failed to adequately plead fraudulent conduct and – more interestingly – failed to prove that they reasonably relied on assurances that were in conflict with the clear, unambiguous plan language.

On a noteworthy procedural issue, the Court took an expansive view of what the pleadings incorporate by reference, for purposes of determining if a dismissal motion should be converted into a summary-judgment request. In an ERISA claim alleging the failure to produce plan documents, plaintiffs alleged that “[o]n or about March 11, 2009, the Plaintiffs sent written requests” for the documents but that “Defendant has either failed to respond or provided inadequate responses to those requests.” The court held that the defendant-pension fund could attach the letter-requests to the motion to dismiss without converting it into a Rule 56 summary judgment motion because the letters were sufficiently referenced in the complaint.

Law of the Case Doctrine Did Not Bar Employer's Second Summary Judgment Motion

Yeschick v. Mineta, 675 F.3d 622 (6th Cir. 2012)

<http://www.ca6.uscourts.gov/opinions.pdf/12a0096p-06.pdf>

Plaintiff was a former unionized air-traffic controller who lost his job when President Reagan broke the controllers' strike 1981. He applied for rehire during the Clinton administration. His application was removed from the applicant pool after he failed to update his address. For nearly ten years, the FAA did not rehire him. He sued for age discrimination. In a prior appeal, plaintiff argued that he exhausted his administrative remedies and that he raised a genuine issue for trial on his claims. The prior panel reached the exhaustion issue, held that certain parts of his discrimination claim were not barred by a failure to exhaust, and remanded for further proceedings. The district court then granted a second summary judgment motion (to which the plaintiff failed to respond) on the grounds that he had not offered sufficient evidence to show that discrimination was the but-for cause of his situation or to rebut the FAA's legitimate business reasons. The Sixth Circuit held that these issues were not explicitly or implicitly decided in the first appeal, and the law of the case doctrine did not bar

the entry of a summary judgment on these bases.

Though Speaking of "Jurisdiction," NLRA § 160 Establishes Venue Requirements

Brentwood at Hobart v. N.L.R.B., 675 F.3d 999 (6th Cir. 2012)

<http://www.ca6.uscourts.gov/opinions.pdf/12a0088p-06.pdf>

The Service Employees International Union (SEIU) prevailed in an organizing election at an Indiana health care facility. In a post-election objection, the company objected to a particular flier that the union used during its successful representation campaign. The company argued that the flier improperly used pictures of employees, suggesting that they supported the union. At the NLRB hearing on the objection, the company also sought to introduce another flier, but the Board excluded it because the filed objection only dealt with one flier. The Sixth Circuit held that the Board did not abuse its discretion in excluding the flier.

More significantly, the Sixth Circuit dealt with a venue issue in order to explain why a dispute in Indiana had made its way to the Sixth Circuit (rather than the Seventh Circuit). Despite the Board's rejection of the company's objection and the certification the union as the employees' representative, the company still refused to bargain with SEIU. The company filed a petition in the Sixth Circuit to challenge the Board's order, and the union filed a cross-petition. Sections § 160(e) and (f) in the NLRA state that the court has “jurisdiction” after the Board, the employer, or the union file a petition in certain places, including where “the unfair labor practice in question” occurred and in any court of appeals where the company “resides or transacts business.” The Sixth Circuit took the opportunity to clarify that the geographical terms of § 160 are treated as a venue provision, not as a limit on the court's subject matter jurisdiction. The Supreme Court has analyzed similar provisions about *where* to sue and has treated them as venue provisions. Recent Supreme Court authorities also emphasize that statutes will not be treated as jurisdictional unless Congress clearly says that they are. In the NLRA, Congress simply included some venue and jurisdictional terms in the same provision. “After using §§ 160(e) and (f) to spell out which circuit courts the parties should petition for review or enforcement, Congress used the provisions to establish that, once the petition and the administrative record are filed, that court's jurisdiction is exclusive.” The geographical terms were not subject matter



Monthly Update for April

jurisdictional, and the parties could properly bring the case in the Sixth Circuit (where – as a matter of fact – the company transacted significant business).

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7th Circuit:

Blue v. International Brotherhood of Electrical Workers (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/I40JYGZB.pdf>

Court Upholds Jury Verdict in Favor of Union Employee Terminated in Retaliation for Raising Concerns of Race Discrimination by Union

Union appealed a jury verdict in favor of a worker, Susan Blue, who alleged she had been retaliated against when she expressed her belief that a union worker, Alexander Phillips, may have been subjected to race discrimination. After addressing jurisdictional issues, the Seventh Circuit turned to the substantive issues in the case. In post-trial motions, the union questioned whether the trial court erred in allowing Blue to use as evidence documents from Phillip's charge of discrimination with the state civil rights agency. In addressing this issue, the Seventh Circuit found that it was not error because the timing of events concerning Phillips' charge could show that actions taken against Blue were retaliatory. For example, the state agency made a finding of probable cause as to Phillip's charge and four days later Blue was denied overtime. Similarly, a few days after the union learned of the public hearing scheduled by the state agency in the Alexander matter, Blue was formally disciplined in several ways. The Court found that the state agency's file was relevant to Blue's allegation of mistreatment and accordingly there was no error on the part of the trial court to allow the documents into evidence. The Court also rejected the union's argument that there was insufficient evidence to support the verdict because the only evidence was Blue's testimony. First, the Court held that even if this was so it would be sufficient. Second, the Court noted that other witnesses supported her account as well as did the documents from Alexander's charge with the state agency.

Copeland v. Penske Logistics, Inc. (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/I40JZU0X.pdf>

Summary Judgment In Favor of Employer and Union is Affirmed in Claim Brought By Union Members Relating to Severance Benefits

Members of a union who worked for Penske Logistics were displaced when Penske failed to win a new contract with its customer, Indianapolis Star newspaper. Penske and the union worked out an agreement to provide certain severance benefits to the displaced union workers. Dissatisfied with the benefits, the union employees sued Penske and the union under what they characterized as a hybrid breach-of-contract/duty-of-fair representation action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The district court held that since the collective bargaining agreement did not promise any severance benefits, the first requirement of a hybrid action was missing. The district court also held that since plaintiffs never complained to the union or used its internal remedial processes about the issue they were in no position to maintain that the union violated its duty of fair representation. Before the Seventh Circuit, plaintiffs argued that the agreement between Penske and Star had provided that if Penske decided to provide severance benefits to its employee should it lose its business with Star, then Star would cover the costs of these benefits. Plaintiffs argue that since Penske could have shifted the expense of the severance benefits it could have provided more generous benefits to Plaintiffs. Plaintiffs also argued that the union did not bargain hard enough with Penske for additional benefits and should be liable on that ground. The Court determined that the initial claim was a contract claim and, lacking allegations supporting diversity, could only be brought before the Court pursuant to the Court's supplemental jurisdiction. The Court then held that there was no federal jurisdiction because the contention that the Board did not bargain hard enough to obtain benefits beyond the collective bargaining agreement is not a suit for a violation of the collective bargaining agreement and rather is a pure unfair labor practice claim and within the NLRB's primary jurisdiction. The Court affirmed summary judgment on behalf of defendants on the hybrid contract/DFR claim and vacated with instructions to dismiss for lack of subject matter jurisdiction the judgment with respect to plaintiff's claims based on the logistics agreement and the union's failure to bargain harder for extra severance benefits.

Dass v. Chicago Board of Education (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/I40K24HO.pdf>



Monthly Update for April

Court Affirms Summary Judgment For Employer on Title VII and § 1981 National Origin Claims, Holding That a Subjectively More Difficult Job Assignment is not a Materially Adverse Employment Action and That Plaintiff's Must Proffer Circumstantial Evidence Pointing Directly to an Employer's Discriminatory Actions to Survive Summary Judgment

The Seventh Circuit affirmed the District Court's grant of summary judgment on Appellant's Title VII national origin and § 1981 claims, holding that after Appellant abandoned any indirect method theory argument, none of her proffered evidence pointed directly to national origin discrimination.

Veronica Dass, an Indian female, alleged, inter alia, that the Chicago Board of Education and Chicago Public Schools ("CPS) discriminated against her based on her national origin when they elected not to renew her employment for the 2007-2008 school year. In support of her claims, Dass offered direct evidence of discrimination that included the following: 1) Paula Jeske, her principal, allegedly telling Dass she should look for a job on the North Side where most Indian kids go; 2) Jeske strongly opposing a previous grievance filed by Dass, seeking reinstatement after an error caused her displacement; 3) Jeske assigning Dass to a seventh-grade class, as opposed to an open third-grade class; and 4) Jeske's decision to send the assistant principal to observe and report on Dass' classroom shortly after being assigned the seventh-grade class. However, these and Jeske's personal observations revealed poor classroom management. In December of 2006, Dass requested and took medical leave through June of 2007. It was during this time that Jeske recommended to the Board that Dass not be renewed for the upcoming school year. Jeske also recommended that two other teachers, neither of Indian origin and both born in the United States, not be renewed.

The Court initially noted that Dass abandoned any argument under the indirect method theory, before turning to Dass' contentions that her seventh-grade class assignment and Jeske's subsequent recommendation for non-renewal were motivated by discriminatory animus. Because even plaintiffs proceeding under the direct method of proof must still show an adverse employment action, the Court first addressed the two alleged adverse actions. Previous Seventh Circuit cases have articulated

three categories of adverse employment actions that may be actionable: first, cases in which the financial terms of employment are diminished (including termination); second, cases in which the financial terms of employment stay substantially the same, but future career prospects are significantly diminished; and third, cases in which the employee's job responsibilities and remuneration stay the same, but the conditions of employment are negatively affected in a significant way. Both parties agree that the non-renewal decision was an adverse action. However, Dass claims that her seventh-grade assignment caused the terms of her employment to be substantially and negatively affected. The Court, disagreeing with this proposition, points out that a plaintiff's subjective belief that one position is much more difficult than their preferred position is not sufficient to make it materially adverse. Even more, Dass offered no evidence of reduced responsibilities or pay, or that her future career opportunities were diminished. As such, the Court found that Dass failed to raise a genuine issue of material fact as to whether her classroom assignment was a materially adverse employment action. However, the Court would consider the assignment as part of Dass' proffered circumstantial evidence to prove discrimination.

The Seventh Circuit next addressed whether Dass presented sufficient circumstantial evidence to survive summary judgment. Beginning its analysis by focusing on the oft-used "convincing mosaic" language, the Court enumerated that this language was meant as a guide, and did not create a new standard. Instead, a plaintiff proceeding under the direct method of proof may survive summary judgment by offering evidence from which a reasonable trier of fact could infer that the adverse employment action resulted from the plaintiff's status as a member of a protected class. In the Seventh Circuit, circumstantial evidence may take the form of various behaviors from which discriminatory intent can be inferred, more favorable treatment enjoyed by similarly situated employees outside of the plaintiff's protected class, or evidence that a plaintiff was not hired for a job he was qualified for and the employer's proffered reason was pretext for discrimination. Though Dass offered evidence of Jeske's comment suggesting Dass look for a job on the North Side where most of the Indian kids go, this comment was made approximately ten months prior to Jeske's recommendation that Dass be non-renewed. Though the Seventh Circuit has expressly rejected a



Monthly Update for April

bright-line rule with regards to temporal proximity, Jeske's comment was not made contemporaneous with or causally related to a discharge. Furthermore, the Court held that no reasonable trier of fact could find that Dass' non-renewal was based on her national origin. Because the Seventh Circuit requires that the circumstantial evidence point *directly* to a discriminatory reason for the adverse employment action, the Court would not include the remainder of Dass' circumstantial evidence as part of her "convincing mosaic" and affirmed the District Court's judgment.

Benedix v. Village of Hanover Park (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/I40K33P1.pdf>

Court Affirms Dismissal of § 1983 Complaint, Holding that Non Policy-Making but Confidential Positions are Subject to Termination Based on Association

The Seventh Circuit affirmed the District Court's dismissal of Appellant Kimberly Benedix's claims against the Village of Hanover Park, holding that a municipality may properly terminate an individual holding a non-policymaking but confidential position based on their association.

Subsequent to terminating the Village Manager, Hanover Park passed an ordinance that abolished, along with two other positions, the Executive Coordinator to the Village Manager (the position Benedix held at the time). Benedix, in turn, filed a complaint pursuant to § 1983, alleging that the Village violated the First Amendment by holding Benedix's associations (her friendship and close working relationship with the ousted Village Manager) against her. Because the Village eliminated the three positions via ordinance, the District Court dismissed Benedix's complaint citing the Village's legislative immunity.

Upon review, the Seventh Circuit noted that a municipality, such as the Village, is not immune from claims under § 1983. Due to the suit's dismissal based on the pleadings, the Court began its analysis with the assumption that the Village's ordinance was passed to get rid of those associated with the former Village Manager. For those employed in policy-making positions, the Court noted, politics may be a legitimate job qualification.

As such, it is common for a person's associations to be held against them. Even further, those holding "confidential" positions (those in a policy-maker's immediate office) may be hired or fired based on their friendship or political associations.

Hicks v. Forest Preserve District of Cook County (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/I40K4GO2.pdf>

Court Affirms District Court's Denial of Appellant's Post-Trial Motions in Title VII Retaliation Case, Holding that Coercive Circumstances may Render an Accepted Demotion Involuntary and Materially Adverse, that Evidence of Temporal Proximity is Only Required Absent Direct Evidence of Retaliatory Animus

The Seventh Circuit affirmed the District Court's denial of Appellant's Motion for Judgment as a Matter of Law after a jury awarded Appellee \$30,000 in damages based on his race discrimination and retaliation claims.

Dwaine Hicks, Appellee, worked as a mechanic for the Forest Preserve District ("FPD") for two years. During this time he received twenty-eight disciplinary action forms from or approved by his supervisor, Thomas Thompson. In turn, Hicks, a black male, repeatedly complained that his supervisor treated him differently based on his race and the disciplinary forms were a scheme to force him out of his mechanic position. In 2006, a Hispanic employee also working under Thompson filed a race discrimination and retaliation charge based on Thompson's behavior. Hicks took part in the investigation conducted by the Cook County Commission on Human Rights on the complainant's behalf. One year later, Hicks filed a complaint with the Commission, alleging that Thompson retaliated against him for his participation in the investigation. Based on Thompson continuing to issue Hick's disciplinary citations, Hicks was offered a choice between a demotion to a significantly lower paid and non-mechanic position, or filing a grievance based on the citations from Thomas and potentially facing termination. On the advice on his union representative, Hicks accepted the demotion and almost immediately filed a charge with the EEOC, alleging discrimination based on race, and retaliation.



Monthly Update for April

The Seventh Circuit first addressed FPD's argument Hicks failed to provide sufficient evidence that he suffered an adverse employment action, and failed to prove causation between his protected activity and the alleged employment action (both required for a plaintiff to prevail on a retaliation claim). Because Hicks voluntarily accepted the demotion, had union representation, and options available outside the demotion, FPD contended that he could not have suffered a materially adverse employment action. A demotion that pays significantly less (like the one Hicks accepted), the Court held, is materially adverse. The Seventh Circuit disagreed with FPD's characterization of the demotion, finding that if it was neither requested nor acknowledged as necessary by the aggrieved employee. The Court recognized that given Hicks' testimony that he believed that if he did not accept the demotion he would be demoted, he did not have a choice at all. FPD further claimed that Hicks lacked sufficient temporal proximity to prove causation between his participation in his coworker's investigation and his demotion. The Court acknowledged that when a plaintiff proceeding under the direct method of proof relies solely on suspicious timing to prove causation, he must show that the protected activity and adverse employment action occurred close in time. However, not only did the Court emphasize that there is no bright-line rule used to determine whether proximity is sufficient, but Hicks also presented direct evidence of retaliatory animus at trial. While proximity may be helpful to prove causation, when the plaintiff introduces direct evidence of retaliation, close timing is not required. Addressing FPD's last argument for a judgment as a matter of law, the Court found the Hicks offered sufficient evidence to prove a "cat's paw" theory of liability, as the individuals responsible for the adverse employment action relied on Thompson's disciplinary citations.

The Court then reviewed the District Court's jury instructions and order for reinstatement for an abuse of discretion. Finding no such abuse, the Seventh Circuit first held that FPD is not entitled to a new trial based on erroneous jury instructions. In order for the court to order a new trial, the instructions must have not only confused or misled the jury, but also resulted in prejudice to the moving party. Neither of which occurred in this case. Lastly, the Court found that the District Court acted well within its discretion when it ordered Hicks'

reinstatement. The Court reiterated that reinstatement is the preferred remedy for an aggrieved employee, and courts should order this remedy whenever possible. According to the Seventh Circuit, the trial court is in a better position to determine whether the relationships between the parties allow for reinstatement. As such, the Court declined to find an abuse of discretion.

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