Monthly Update for April 2015

MONTHLY CIRCUIT UPDATES

Fourth Circuit

***West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. Apr. 2, 2015)**

The Black Lung Benefits Act provides benefits to coal miners who are totally disabled due to pneumoconiosis. A coal miner who had worked for over twenty-one years in underground coal mines filed a claim for benefits under the Act. In order to receive benefits under the Act, a claimant must show that he has pneumoconiosis arising from coal mine employment, and that the disease is a substantially contributing cause of his totally disabling respiratory impairment.

The Act establishes a rebuttable presumption that a claimant with at least fifteen years of employment in an underground coal mine and a qualifying respiratory disability is entitled to benefits. The party opposing a claimant's entitlement to benefits may defeat the presumption by showing that the claimant does not have pneumoconiosis arising from his employment or that no part of the disability was caused by such a disease.

In light of the miner's work history, the ALJ applied the fifteen-year presumption and concluded that the miner suffered from a totally disabling respiratory condition. The ALJ further concluded that the mine operator failed to rebut the presumption by showing that the miner's pneumoconiosis did not contribute in any way to his disability—the "rule-out" rebuttal standard. The mine operator sought review of the ALJ's decision before the Benefits Review Board, which affirmed the ALJ's decision.

The mine operator petitioned for review in the Fourth Circuit and argued that the ALJ and the Benefits Review Board applied the wrong standard for rebutting the fifteen-year presumption. When the presumption applies, the Act states that the presumption is rebutted if "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis," but the mine operator argued that this standard applies only to the Secretary of Labor and not to coal mine operators. Applying the analysis set forth in *Chevron v. Natural Resources Defense Council*, the Fourth Circuit first concluded that because the statute is silent regarding the standard a coal mine operator must meet to rebut the presumption, the agency may fill that "gap" by regulation. The Fourth Circuit further concluded that under the Act's regulatory scheme, the rebuttable presumption standard applies to any "party opposing entitlement," including coal mine operators.

Based on a review of the record evidence, the Fourth Circuit concluded that the mine operator failed to rebut the fifteen-year presumption and that the ALJ's factual determinations were supported by substantial evidence. For these reasons, the Fourth Circuit denied the petition for review.

***Hobet Mining, LLC v. Epling*, No. 13-1738, 2015 WL 1742397 (4th Cir. Apr. 17, 2015)**

A coal miner who had worked for over twenty-one years in underground coal mines sought benefits under the Black Lung Benefits Act. Given the respondent's work history, the ALJ applied the fifteen-year presumption and concluded that the miner had pneumoconiosis arising from coal mine employment, and that the pneumoconiosis caused his disability. To rebut the fifteen-year presumption, the mine operator offered testimony from a physician who opined that the miner's respiratory impairments resulted from obesity and sleep apnea, rather than pneumoconiosis. The physician further opined that even if the miner suffered from pneumoconiosis, that disease would not be the cause of the miner's disability.

The mine operator's testifying physician later changed his opinion, concluding that the miner did in fact suffer from pneumoconiosis arising from his coal mine employment. The physician maintained, however, that the pneumoconiosis would not be the cause the miner's disability. The ALJ found that the physician's testimony was entitled to little weight and, because the mine operator failed to rebut the presumption, awarded the coal miner benefits. The Benefits Review Board affirmed, and the mine operator petitioned for review in the Fourth Circuit.

In reviewing a decision to award black lung benefits, the appellate court considers only whether substantial evidence supports the ALJ's factual findings, and whether the legal conclusions of the

Benefits Review Board and the ALJ are rational and consistent with applicable law. The mine operator challenged the ALJ's finding that the miner's pneumoconiosis caused his disability, arguing that the ALJ and the Board improperly discredited the opinion of the operator's testifying physician.

Based on long-standing precedent, the Fourth Circuit noted that an erroneous failure to diagnose pneumoconiosis may not be credited at all unless the ALJ can identify specific and pervasive reasons for concluding that the physician's causation analysis does not rest on the misdiagnosis. In this case, the Fourth Circuit found that the record contained substantial evidence that the physician's causation analysis was closely tied to his initial misdiagnosis of the miner's respiratory condition. Accordingly, the Fourth Circuit concluded that the ALJ and the Board properly discredited and afforded little weight to the opinion of the mine operator's testifying physician.

Because substantial evidence supported the ALJ's finding that the mine operator failed to rebut the fifteen-year presumption, the Fourth Circuit denied the petition for review.

***Freight Drivers and Helpers Local Union No. 557 Pension Fund v. Penske Logistics LLC*, No. 14-1464, 2015 WL 1787776 (4th Cir. Apr. 21, 2015)**

After the pension fund timely filed an amended complaint, the defendant moved to dismiss on the grounds that a party challenging an MPPAA arbitration order must file a motion in accordance with the Federal Arbitration Act rather than a complaint. The defendant further argued that even if the district court treated the amended complaint as a motion, the motion would be untimely since it was not filed within thirty days of the arbitration order, as required by section 1401(b)(2). The district court agreed, ruling that a motion, rather than a complaint, was the proper mechanism for challenging the arbitration order. The district court further ruled that the pension fund's filing, even if viewed as a motion, was untimely. The pension fund appealed. The Fourth Circuit reversed, holding that filing a complaint was the appropriate procedure to seek review of the arbitration order. The Fourth Circuit noted that 29 U.S.C. ♉ 1401(a) states that a party "may bring an action" in district court to challenge an arbitration award.

The Fourth Circuit further noted that the action must be brought in accordance with section 1451 which, in turn, sets forth rules for service of a "complaint in any action" brought under section 1401. The Fourth Circuit found that the text of these statutes "in no uncertain terms" refers to a civil action initiated by a complaint. Accordingly, the Fourth Circuit concluded that the pension fund properly challenged the MPPAA arbitration order by filing a complaint in district court.

The Fourth Circuit further concluded that the pension fund's amended complaint was timely because it related back to the filing date of the original complaint under to Rule 15(c) of the Federal Rules of Civil Procedure. The Fourth Circuit found that the substantive allegations in both complaints were identical and, further, that the defendant failed to identify any prejudice or lack of notice that would prevent the application of Rule 15(c). As a result, The Fourth Circuit reversed and remanded for further proceedings.

Submitted by:
Paul K. Sun, Jr.
Ellis & Winters LLP
Post Office Box 33550
Raleigh, North Carolina 27636
Direct Telephone: 919-865-7014
Office Telephone: 919-865-7000
Direct Facsimile: 919-573-5514
Office Facsimile: 919-865-7010
E-mail: paul.sun@elliswinters.com>

Paul Sun's practice focuses primarily on business litigation and appeals. Sun has experience in the areas of trade secrets and unfair competition, employment law, business and health care fraud (civil and criminal), consumer claims, premises and product liability, and contract disputes. He is a Fellow of the American College of Trial Lawyers, and a member of the American Law Institute. Sun has a B.A. degree from Wittenberg University, a master's degree from Vanderbilt University, and a J.D. degree from Duke University. Before entering private practice, He served as law clerk to Hon. J. Dickson Phillips, Jr., of the United States Court of Appeals for the Fourth Circuit.

Fifth Circuit

***Squyres v. The Heico Companies, LLC, et al.*, No. 13-11358, (4/2/2015)**

Plaintiff was the President and sole owner of JPS, a company involved in the transportation industry. He sold his business to an affiliate of Heico, and as part of the transaction, executed a three year employment agreement. At the end of the three years, Heico did not renew the agreement, and the parties were unable to reach agreement on the terms of a continuing employment arrangement. Plaintiff was seventy years old at the time; he alleged that the failure to renew his agreement, as well as the failure to enter into a new agreement, was discriminatory based upon his age in violation of the ADEA and the Texas Commission on Human Rights Act. The district court dismissed the case on summary judgment, and the Fifth Circuit affirmed.

The Court did not resolve the nuanced dispute between the parties about whether the failure to renew an employment agreement or reach a new agreement constituted adverse action. Instead, using the *McDonnell-Douglas* framework, the Fifth Circuit focused on the pretext element of the test.

The Court found that Heico, through affidavits and other evidence, articulated legitimate, non-discriminatory reasons for its decisions in dealing with Squyres, namely a drop in performance and a displeasure with his overall work. Squyres was unable to offer evidence to contradict those legitimate reasons, and the stray remarks he identified (including one made by him) were insufficient to show animus. The Court also declined to expand Squyres's position to include arguments made by the AARP in an amicus brief in the first instance, and also rejected Squyres complaints about an inability to conduct discovery due to his counsel's broken ankle and other arguments advanced about leave to amend pleadings. The district court's ruling was affirmed.

***McKinney v. Creative Vision Resource, LLC*, No. 14-30839, (4/13/2015).**

Creative Vision provides hoppers – the persons that work on the back of garbage disposal trucks – to the company that has the contract for a portion of the City of New Orleans. It was formed in 2011, and virtually all of its employees worked for a predecessor entity named Berry's. While the hoppers worked for Berry's, they were represented by Local 100, a union, in collective bargaining negotiations in 2007 and 2009. Following the formation of Creative Vision and the hiring of the hoppers, Local 100 contacted Creative Vision and asked that it negotiate and bargain with it as the exclusive representative of the hoppers. Creative Vision declined, and Labor 100 filed an unfair labor practice charge against it in June of 2011. The NLRB filed its own administrative complaint in March of 2012, and then sought an injunction from the district court in July of 2012.

While the suit was pending in federal court, the administrative hearing proceeded, and it was still pending when the Fifth Circuit issued its ruling. In February of 2013, the NLRB asked the district court to issue an injunction, and Creative Vision moved to dismiss the request, arguing injunctive relief was moot given the delay in pursuing the relief. The district court denied the motion to dismiss, but did not issue an injunction until July of 2014. Creative Vision brought the appeal.

The Court noted that the NLRA allows for issuance of an injunction in similar situations if the Board has reasonable cause to believe an unfair labor practice has occurred and if the relief is "equitably necessary, or, in the words of the statute, 'just and proper'." The court declined to adopt a more complex or onerous standard, and focused on whether the injunction was just and proper based on the equities.

The Court found that the district court had abused its discretion in awarding the injunction because the purpose of the injunction should be to preserve the status quo -- that is, to avoid erosion of rights that are secured by the NLRA. A court should grant such an injunction when concrete harms sought to be prevented by the NLRA, "as a practical matter, have not yet taken their adverse toll." Here, however, the Court found that the NLRB and the district court failed to articulate such concrete harms so as to serve as the basis for an injunction, noting

that the harms identified were better addressed in the NLRB's administrative processes, not the district courts via injunction.

***Jenkins v. City of San Antonio Fire Dept.*, No. 14-50483 (4/20/2015)**

Jenkins worked in the San Antonio Fire Department for many years, and was a District Chief during the time relevant to the dispute. In 2009, a co-worker left, and a realignment of responsibilities occurred at that time, and again in 2011. Jenkins did not suffer a reduction in rank or benefits, but he perceived the realignments as discrimination based upon his race, color, or age, or as retaliation for providing a statement in support of a co-worker's previous EEOC Charge of Discrimination. The EEOC issued a right to sue letter on May 16, 2012 related to these claims by Jenkins.

In 2012, a new position opened, and a review panel was comprised to make recommendations to the Chief for the position. The panel unanimously selected someone other than Jenkins, the Chief took the panel's recommendation, and Jenkins filed another EEOC Charge of Discrimination.

Jenkins filed suit in federal court on August 20, 2012, regarding the claims in the first charge, and he would later amend his Complaint to more specifically allege the basis of his second charge. The district court granted summary judgment, finding that his claims from the first charge were not timely. But, even if timely, the court found the claims (as well as the more recent claims) to fail for a lack of a *prima facia* case. Jenkins appealed.

First, the Fifth Circuit resolved an open question of how many days are presumed to elapse between issuance of a Right to Sue letter and receipt by the plaintiff. The Fifth Circuit cited cases utilizing between two and nine days for notice, and settled upon three days as the appropriate time frame (when there is an absence of other evidence of the date on which notice is received). Using that time frame, Jenkins' claims arising from the first EEOC Charge were untimely.

As to the second set of claims, the Fifth Circuit began by noting the application of the *McDonnell Douglas* framework, including the establishment of a *prima facia* case. The Court focused on the adverse action requirement, and it found that Jenkins failed to show that his failure to obtain the new position would have provided him any greater financial or other benefit or that the lack of appointment resulted in a significant lack of prestige in some way. To the contrary, denial of the lateral position from the one he held was an objective analysis, and Jenkins' subjective view that it would have been a more prestigious position was not controlling. Therefore, summary judgment was appropriate.

***McMullin v. Mississippi Dept. of Public Safety*, No. 14-60366 (4/6/2015)**

McMullin was employed as a training officer and later a lieutenant with the Mississippi Department of Public Safety. In 2012, the Director of the HP Training Division transferred to another division, and McMullin was interested in applying for the job. She confirmed via word-of-mouth that it would be posted, and that the Mississippi DPS would seek applicants for the job. In fact, on February 27, 2012, in accordance with DPS procedure, McMullin sent a letter of interest to the DPS Commissioner, the Human Resources Legal Liaison, and Director of Highway Patrol. The DPS took no action on her letter of interest because the position had not yet been formally posted.

On March 26, 2012, the DPS formally posted the opening of the Director position, and it stated that applications would be accepted for five days. Master Sergeant Marshall Pack ultimately received the position, and he recalls receiving notice of the position being open either by email or by mail to his home address, or possibly both. McMullin did not receive personal notice. Pack and the other applicant also received notice via a fax to the offices

to which they were stationed; McMullin's office did not receive such a notice.

In subsequent litigation, the DPS was unable to identify how many total candidates were interviewed, who conducted the interviews, or even what position exactly was being filled. What was clear was that McMullin was not interviewed. The same day as Pack's interview, he was informed he would receive a promotion to lieutenant and the position of Director.

The Court compared the objective characteristics of both Pack's and McMullin's qualifications for the position, and the evidence greatly favored McMullin. Pack had served for seven fewer years, and he had several adverse incidents in his employment past, including termination for engaging in sexual activity with a confidential informant, declining to report drug activity, and seizing cash without accounting for its seizure. The Court also noted that there were several discrepancies in the evidence, but that it appeared that only lieutenants were eligible for promotion to the Director position, and Pack was promoted to lieutenant the same day as his promotion to the Director position. The Court also cited the conflicting statements made by the DPS to the EEOC in responding to the charge of discrimination regarding the position and what had occurred.

The district court granted summary judgment, finding that there was no evidentiary support for any element of the *prima facia* case. However, the Fifth Circuit found the district court to be clearly and plainly incorrect, and it relied on the *McDonnell-Douglas* analysis for its reasoning. The Court focused on the fact that McMullin was a member of a protected class and that she was qualified for the position. The dispute centered on whether McMullin applied for the position and was rejected for it. The Court noted the inconsistencies in the DPS's position regarding the number of open positions, who applied, when, and who received the job or jobs. With the defendant's own inconsistencies, the Court found that the evidence was sufficient to find that McMullin applied for the job and was denied the job. Therefore, the Fifth Circuit found that an issue of fact existed as to the *prima facia* case.

The Court then noted that the DPS did not articulate any legitimate, non-discriminatory reasons for its decision to promote Pack. Consequently, the Court found that the DPS failed the second element of the *McDonnell-Douglas* analysis, and that summary judgment should be denied with the case to be remanded for trial.

Submitted by:
Steven F. Griffith, Jr.
Shareholder
Baker Donelson Bearman Caldwell & Berkowitz, PC
201 St. Charles Ave., Suite 3600
New Orleans, Louisiana 70170
Direct: 504.566.5225
Fax: 504.636.3925
Email: sgriffith@bakerdonelson.com
www.bakerdonelson.com

Steven F. Griffith Jr., a shareholder in the New Orleans office with a national practice, assists clients in various industries, including construction, marine and hospitality. Steve's practice includes a focus on unique wage and hour issues, and he defends nationwide collective actions brought under the Fair Labor Standards Act, as well as related class actions across the country. His experience also includes extensive litigation experience on civil rights claims, Title VII, the ADA, FMLA and ADEA. Prior to practicing, he served as judicial clerk for Chief Justice Pascal F. Calogero Jr., in the Louisiana Supreme Court from 2000 to 2001.

Sixth Circuit

***E.E.O.C. v. New Breed Logistics*, No. 13–6250, ___ F.3d ___, 2015 WL 1811018 (C. A. 6, Apr. 22, 2015)**
www.ca6.uscourts.gov/opinions.pdf/15a0074p-06.pdf

In *EEOC v. New Breed Logistics*, the Equal Employment Opportunity Commission ("EEOC") sued New Breed on behalf of four employees who

supervisor about his inappropriate conduct towards three female employees. The supervisor made sexually explicit comments to the women on multiple occasions and inappropriately touched at least one of them. The three female employees repeatedly asked the supervisor to stop, and one anonymously complained on the employer's telephone complaint line. The supervisor found out about the report. A male employee who witnessed the supervisor's conduct also told him to stop. Ultimately, the employer terminated all four employees within several weeks of one another. The supervisor had either a direct or indirect role in each termination decision. A jury found the employer liable on each claim and awarded the four employees a total of over $1.5 million in compensatory and punitive damages.

The Sixth Circuit affirmed a $1.5 million jury verdict in the plaintiffs' favor, ruling that Title VII's use of the term "opposing" any unlawful employment practice includes less formal internal complaints made by employees about discriminatory employment practices, such as a demand made by an employee to the alleged harassing supervisor that he/she stop. The court also affirmed the award of punitive damages, stating that the employer did not make good-faith efforts to prevent harassment and retaliation. The Court noted that (i) the employer did not distribute its anti-harassment policies to temporary employees, like the three female plaintiffs; (ii) evidence showed the employer failed to investigate the claim after one of the female plaintiffs anonymously reported it on the employer's telephone complaint line; and (iii) the investigator initially only asked the supervisor if the charges were true and did not undertake an effort to interview any of the women in the supervisor's department.

***Wheeling & Lake Erie Ry. Co. v. Bhd. of Locomotive Engineers & Trainmen*, No. 13-4356, __ F.3d ___, 2015 WL 1758641 (C. A. 6, Apr. 20, 2015)**
www.ca6.uscourts.gov/opinions.pdf/15a0071p-06.pdf.

In *Wheeling & Lake Erie Ry Co v Bhd of Locomotive Engineers & Trainmen*, Docket No. 13-4356 (Apr. 20, 2015) the Wheeling & Lake Erie Railway Company sued the Brotherhood of Locomotive Engineers and Trainmen (the "Union") to enjoin a strike over an alleged violation by Wheeling, during negotiations, of a provision in the parties' collective bargaining agreement that required a conductor in the Union to be assigned to each train. The U.S. District Court for the Northern District of Ohio entered a preliminary injunction barring the Union from taking any economic action against Wheeling, concluding that the parties were engaged in only a minor dispute under the Railway Labor Act.

The Sixth Circuit vacated the injunction and remanded the case for dismissal of Wheeling's complaint, holding that the parties' dispute during negotiations was a "major dispute" under the Railway Labor Act. It explained that a "major dispute" – which precludes injunctive relief – arises where a collective bargaining agreement does not exist or where one of the parties seeks to change unilaterally the terms of an existing collective bargaining agreement. The Court reasoned that, because a "major dispute" existed, the Railway Labor Act's status quo rules were triggered. Wheeling then violated the status quo when it "prematurely and unilaterally resorted to self-help" and replaced union conductors on trains with management personnel before negotiations had been exhausted under the statute.

***E.E.O.C. v. Ford Motor Co.*, No. 12–2484, ___ F.3d ___, 2015 WL 1600305 (C. A. 6, Apr. 10, 2015)**
www.ca6.uscourts.gov/opinions.pdf/15a0066p-06.pdf.

In *EEOC v Ford Motor Co*, Docket No. 12-2484 (Apr. 10, 2015), the Equal Employment Opportunity Commission ("EEOC") sued Ford under the ADA on behalf of former employee Jane Harris, alleging that Ford failed to reasonably accommodate Harris's disability by denying her request to telecommute due to her irritable bowel syndrome, and retaliated against her for bringing the issue to the EEOC's attention. Ford, after attempting to accommodate Harris's disability in other ways, denied her request to telecommute on as as-needed basis, up to four days per week. The U.S. District Court for the Eastern District of Michigan granted summary judgment to Ford on both claims.

The Sixth Circuit affirmed, ruling that regular and

predictable on-site job attendance was an essential function of, and a prerequisite to perform other essential functions of, Harris's resale-buyer job, which was a "highly interactive" position that required "good, old-fashioned interpersonal skills." These included meeting with steel suppliers at their sites, and meeting with Ford employees and steel stampers at their sites. Resale-buyers at Ford were required to work in the same buildings as stampers so they could meet on a moment's notice. These facts, according to the Court, demonstrated that being on-site was an essential function of the job and being on-site was the only way to perform other essential functions of the job.

The Court rejected the EEOC's argument that the employee was entitled to work from home because Ford had let others telecommute. According to the Court, the most another coworker was authorized to work from home was two days per week, and that particular employee actually telecommuted only one day per week. The Court noted further that, unlike Harris, every telecommuter was a good performer and agreed in advance to come into work on their set telecommuting day if needed at the worksite. According to the Court, "Harris's proposed accommodation was unreasonable."

Eighth Circuit

***United States ex rel. Miller v. Weston Educ., Inc.*, 2015 U.S. App. LEXIS 7084 (8th Cir. Apr. 29, 2015), http://media.ca8.uscourts.gov/opndir/15/04/141760P.pdf**

Chickoiyah Yehnee Miller and Cathy Lynn Sillman filed a qui tam False Claims Act suit against Heritage College, their former employer, alleging it fraudulently induced the Department of Education (DOE) to provide funds by falsely promising to keep accurate student records, and employment retaliation claims under the FCA and state law. The trial court granted summary judgment on all claims and the Eighth Circuit reversed on the qui tam claims, but upheld dismissal of the wrongful discharge claims.

A jury could find that Heritage College knew it had to keep accurate grade and attendance records and intended not to do so. Both relators claimed that heritage altered grade and attendance records from 2006 to 2012 to maximize Title IV funds. Miller saw an administrator increase student grades without instructor knowledge or consent, erasing the grades in a paper grade book and replacing them. She also saw administrators alter attendance records to mark absent students as present. At meetings in 2009 and 2010, Miller heard administrators discuss keeping students at Heritage long enough to get all Title IV funds possible. Two other program managers testified that administrators ordered them to go through instructor grade books and change failing grades to passing. Other Heritage employees and instructors witnessed or participated in altering grade and attendance records, and Heritage did not dispute that it altered records. The relators presented evidence in documents that the college knew that it had to keep accurate grade and attendance records, and evidence of a pattern of inaccurate record keeping.

The Eighth Circuit further held that the college's promise was material to the government's disbursement decisions because the college could not have executed the Program Participation Agreement (PPA) with the DOE without stating it would maintain adequate records and, without the PPA, the college could not have received any Title IV funds.

The Eighth Circuit noted that the evidence could be interpreted by a jury in the college's favor, "[b]ut at summary judgment this court examines whether there is a genuine issue of material fact; it does not weigh the evidence or decide credibility."

The appellate court upheld dismissal of the common law wrongful discharge claims and Miller's FCA retaliation claim.

Missouri's common law wrongful discharge requires a plaintiff to "show that he reported to superiors or to public authorities *serious* misconduct that constitutes a violation of the law and of *well established* and *clearly mandated* public policy." Neither plaintiff did so here because their vague opposition to the college's conduct did not implicate a specific legal requirement or regulation.

***Dalton v. ManorCare of West Des Moines IA, LLC*, 2015 U.S. App. Lexis 5536 (8th Cir. Apr. 7, 2015)**
http://media.ca8.uscourts.gov/opndir/15/04/133743P.pdf

Plaintiff was employed by Defendant as a nurse from March 2010 until her termination in on March 3, 2011. During the summer and fall of 2010, she experienced significant weight gain and edema. In January 2011, Plaintiff was diagnosed with Stage One Chronic Kidney Disease ("CKD"), associated with obesity. According to the record evidence, CKD is not "really a disease because kidney function is actually normal to above normal at that point."

In early 2011, Plaintiff's supervisor, Holly Benedict, received complaints about Plaintiff's job performance. On February 21, 2011, Benedict and Human Resources Director, Memorea Schrader, met with Plaintiff about the performance issues, and issued her a Third/Final Written Warning for violating Major/Type B Work Rules. The warning cited inappropriate negative comments about her work at the nurses' station where patients could overhear; failure to notify staff members she had cancelled a meeting; and taking an extended lunch break and failing to attend patient care conferences. Plaintiff was also issued a First Written Warning because Plaintiff had arrived late, left early, or called in on ten different days within one month. Plaintiff explained that she was late because of medical reasons, and was told she was not eligible for FMLA.

On Friday, February 25, 2011, Benedict spoke to Plaintiff about a number of unfinished tasks. When Benedict checked on Plaintiff's progress later in the day, she learned that Plaintiff had left without completing care plans and call-light responses. Benedict also discovered a lab report on Plaintiff's desk that had abnormal results and had not been passed on to the appropriate nurse.

Early on Monday, February 28, Plaintiff called Benedict to report that she was having chest pains and was going to the emergency room. Plaintiff was discharged later in the day without a definite diagnosis, but with a note excusing her from work until Wednesday, March 2. Plaintiff reported the note to Benedict. When Plaintiff came to work on March 2, she was suspended pending an investigation into failing to perform job functions. Plaintiff asked again about FMLA leave, but was told again she was ineligible. The following day, Plaintiff was issued a warning for failing to observe written/oral instructions and carry out job responsibilities without errors that, combined with her prior final warning, resulted in her termination.

The District Court granted summary judgment on all of Plaintiff's claims, and the Eighth Circuit affirmed. First, the Court held that Plaintiff did not qualify for FMLA because she could not show that she had a "serious health condition" as required by the FMLA. The Court noted that the FMLA defines "serious health condition" as "an illness, injury, or impairment or physical or mental condition that involves" inpatient care or "continuing treatment by a health care provider." Plaintiff was not diagnosed with a serious health condition, such as congestive heart failure, liver disease, or primary kidney disease, her edema and obesity did not affect her ability to perform the functions of her position, and Defendant accommodated her need to attend medical appointments. Moreover, Plaintiff's short incapacitations were "short-term conditions" that FMLA was not intended to cover.

Second, the Court held that even if Plaintiff had a chronic serious health condition, her termination was unrelated to it. Plaintiff had been given a final warning for performance deficiencies unrelated to her medical conditions or attendance issues, and when her performance continued to fail, was terminated consistent with the employee handbook.

Submitted by:
Phillip Kitzer, Attorney
Teske, Micko, Katz, Kitzer & Rochel
Email: kitzer@teskemicko.com
www.teskemicko.com
222 South 9th Street, Suite 4050
Minneapolis, MN 55402
Phone: 612-746-1558

Phillip Kitzer's practice consists solely of representing employees in employment-related disputes. He represents clients in matters involving whistleblower retaliation, employment discrimination and retaliation, and workers' compensation retaliation. He is a past President of the Minnesota chapter of the National Employment Lawyers Association, and currently serves as *ex officio* and Chair of the Legislative Committee.

Ninth Circuit

***Kurshwitz v. Univ. of California*, No. 12-17580, 2015 WL 1530436 (9th Cir. Apr. 7, 2015).**

Plaintiff grad student and teaching assistant sued Employer, U.C. Berkeley for discrimination under Title VII, and failure to accommodate a disability in violation of Titles I and II of the Americans with Disabilities Act ("Act"). The Ninth Circuit affirmed the award of summary judgment to the Employer for Plaintiff's failure to timely file a discrimination charge with the EEOC, a required precondition to filing suit under Title VII and Title I of the ADA. Claims under Title II of the ADA and Section 504 of the Rehabilitation Act were likewise untimely filed beyond the relevant limit period.

***Garrido v. Raytheon Co.*, No. 13-55745, 2015 WL 1731078 (9th Cir. Apr. 16, 2015).**

Plaintiff brought suit against Employer Raytheon Company asserting racial discrimination and retaliation under California's Fair Employment Housing Act. The Ninth Circuit affirmed the award of summary judgment on the racial discrimination claim for Plaintiff's failure to raise a genuine issue of material fact as to whether he performed his job satisfactorily or whether similarly situated individuals outside his protected class were treated more favorably. Summary judgment on Plaintiff's claim of retaliation was likewise affirmed because he failed to raise a genuine dispute of material fact as to whether there was a causal link between any protected activity and the adverse employment action.

***Soliman v. CVS RX Servs., Inc.*, 570 F. App'x 710 (9th Cir. 2014).**

Plaintiff Soliman sued his employer, CVS RX Services Inc. for breach of contract and intentional

Dismissal of the complaint was affirmed on grounds that the statute of limitations had run on the claims for intentional infliction of emotional distress and fraud. Dismissal of the breach of contract claim was dismissed for failure to allege a claim for breach of contract. Plaintiff sought to avoid dismissal of the complaint by deliberately omitting the document up0o which his claim was based.

***Wolfe v. BNSF Ry. Co.*, 749 F.3d 859 (9th Cir. 2014).**

Plaintiff was a longtime employee of BNSF who was terminated after he crashed a hi-rail truck head-on into a freight train. Plaintiff filed a complaint in Montana state court asserting that it was the Employer's mismanagement and negligence of its employees that caused the train collision and that Employer mismanaged the subsequent investigation and disciplinary proceedings. The complaint was dismissed on Employer's motion for summary judgment. Employer argued that the state law claims were preempted by the Railway Labor Act, 45 U.S.C.Section 151-88. The Ninth Circuit reversed finding that Plaintiff's claims were not preempted but asserted state claims independent of the Collective Bargaining Agreement.

***Milano v. Carter*, No. 13-56082, 2015 WL 1666451 (9th Cir. Apr. 15, 2015).**

Plaintiff sued Employer United States Department of Defense for hostile environment sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964. The Ninth Circuit affirmed an award of summary judgment in favor of Employer on that ground that the single incident of sexual harassment on which Plaintiff based her claim while offensive, was not sufficiently severe to alter the terms and conditions of her employment. The court also found that because the harasser was not a supervisor who had authority to take tangible employment actions against Milano, his single act could not have altered Milano's working conditions. Finally, the court affirmed summary judgment on the Plaintiff's retaliation claim, finding that granting Plaintiff's request for a footstool was not an adverse employment action and that Plaintiff failed to present any evidence showing that the Employer's legitimate non-retaliatory reasons for transferring Milano to the cashier position and issuing

her a write up were mere pretexts for retaliation.

***Acii v. Autozone, Inc.*, Nos. 13-55517, 13-55543, 2015 WL 1742116 (9th Cir. Apr. 17, 2015).**

Plaintiff sued Auto Zone alleging he was terminated because of his age. On appeal from a jury verdict in favor of AutoZone, the Ninth Circuit affirmed, holding that the district court correctly used the "substantial motivating reason" standard of causation in its instructions to the jury on the age discrimination claim. The court also held that the district court did not err in failing to sua sponte reopen the case to allow him to present more evidence on the substantial motivating reason issue as Plaintiff 's argument was based on a misinterpretation of the record.

Submitted by:
Whitney M. Sedwick Meister | Director | Fennemore Craig,P.C.
2394 East Camelback Road, Suite 600 Phoenix, AZ
Tel: 602.916.5412 | Fax: 602.916.5612 | Mobile: 480.776.4491
Admitted in Arizona, Colorado

Ms. Morgan divides her practice between employment law and human resource issues, estate and trust litigation and general business advice. She serves in a general counsel capacity to private individuals and physicians groups as well as the Reno-Tahoe Airport Authority. She holds a Juris Doctorate from the University of the Pacific, McGeorge College of Law and a Bachelor of Arts degree from the University of Nevada, Reno. She is licensed in state and federal courts in Nevada and California. She is a member of the Washoe County and American Bar Associations.

Tenth Circuit

***Ellis v. J.R.'s Country Stores*, March 9, 2015.**

Ellis worked as the manager of a J.R.'s store in Colorado in 2007. She was paid a weekly salary of $625, as well as a monthly bonus based on her store's performance. J.R.'s Pay Plan required each manager to work "a minimum of 50 hours per week and a minimum 5 day work week."

On April 3, 2012, J.R.'s reduced Ellis' paycheck for the week of March 16 to March 22, 2012 from $625 to $593.80, because she reported working only 40.91 hours. This was the only instance in which Ellis received less than her predetermined pay. Ellis resigned a few days later, and claimed that she was owed $42,187.50 in unpaid overtime wages because J.R.'s one-time deduction destroyed her exempt status and entitled her to three years' worth of retroactive overtime pay. The district court awarded summary judgment, and the Tenth Circuit affirmed.

Under the FLSA, "[a]n employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis." 29 C.F.R. § 541.603(a)(emphasis added). Whether an employer making such improper deductions should be deemed not to have intended to pay on a salary basis turns on whether the employer has an "actual practice of making improper deductions." *Id.* (emphasis added). The Regulations provide several factors for resolving this issue: [1] the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; [2] the time period during which the employer made improper deductions; [3] the number and geographic location of employees whose salary was improperly reduced; [4] the number and geographic location of managers responsible for taking the improper deductions; and [5] whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. 29 C.F.R. § 541.603(a). The FLSA's regulations also provide a savings provision for "[i]mproper deductions that are either isolated or inadvertent," which allows the exemption to stand "if the employer reimburses the employees for such improper deductions." 29 C.F.R. § 541.603(c).

The 10th Circuit found that although J.R.'s deduction was deliberate rather than a clerical error, the Company could not be found to have an "actual practice" of making improper deductions. The Court held that not all of the five factors outlined above need to be considered, or afforded equal weight; some some courts have reviewed only the first and second factors. The 10th Circuit focused on the first and fifth factors.

First, J.R.'s only reduced Ms. Ellis' pay on a single occasion, even though she worked less than 50 hours on 13 separate occasions.

Second, the Court found that the Company's handbook contained a written policy which "clearly communicates that improper deductions are prohibited." J.R.'s policy provided that "[t]he Company prohibits deductions from an exempt, salaried employee's pay except under the circumstances set forth in the [FLSA] and state law." Critically, the policy also included a complaint mechanism: "If you believe that improper [deductions have occurred], it will promptly reimburse the employee and ensure the mistake will be corrected in the future." This language met the Regulations' requirement that a policy "prohibits the improper pay deductions specified in [subsection] (a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future." 29 C.F.R. § 541.603(d).

Court approves requiring minimum work hours for exempt employees, making up lost time.

Ms. Ellis also argued that her exempt status was destroyed by requiring her to work a minimum number of hours, and by requiring her to make up time lost due to vacation or sick time. Although the Court did not sanction the improper deduction of pay, it found that requiring exempt employees to work a minimum number of hours was permissible under the FLSA, and that "[a]n employer may require an exempt employee to make up work time lost due to personal absences of less than a day without loss of the exemption."

Exception applies to "isolated *or* inadvertent" deductions, even where isolated deductions are intentional.

Finally, the Court interpreted the saving provision in Subsection (c) to apply even where a deliberate violation is committed. Subsection (c) provides that "[i]mproper deductions that are *either isolated or inadvertent* will not result in loss of the exemption for any employees subject to such improper deductions, *if the employer reimburses the employees* for such improper deductions." 29 C.F.R. § 541.603(c) (emphases added). Plaintiff argued that the exception does not apply where the employer intentionally deducted pay, as opposed to a mere clerical error. While some circuits have held that the exception applies only where the employer makes and corrects an innocent mistake, the Court held that the disjunctive terminology of subsection (c) indicated that an employer can take advantage of the exception by correcting even an intentional error, provided the deduction is truly "isolated."

Submitted by:

James R. Moss, Jr., Esq.
Partner
222 South Main Street, Suite 552,
Salt Lake City, UT 84101
Main 385.202.2680 • Fax 385.282.5001
jrm@paynefears.com

James R. Moss, Jr. is the managing partner of Payne & Fears LLP's Salt Lake City office, and continues to work extensively with California clients from the firm's Irvine office. He specializes in representing employers in state and federal courts and before administrative agencies in all areas of employment law, including wrongful termination, discrimination, harassment, breach of contract, class actions, and trade secret litigation. Mr. Moss has extensive experience counseling clients on wage and hour issues, family and medical leave, disability accommodation, employee privacy and various other employment law matters. Mr. Moss is a member of the Utah Bar Association and the Orange County Bar Association, and has served as the Chair and on the Board of Directors of the Orange County Chapter of the J. Reuben Clark Law Society.