



## Monthly Update for August & September

### **1st Circuit:**

*Palmquist v. Shinseki*, \_\_ F.3d \_\_ (2012) (2012 WL 3125131)

<http://www.ca1.uscourts.gov/pdf/opinions/11-2110P-01A.pdf>

In *Palmquist*, Plaintiff allegedly suffered unlawful retaliation (for his 2004 discrimination claim) under the Rehabilitation Act based in two adverse employment actions. Thus, the Court had to determine if the Rehabilitation Act in fact provided *Palmquist* with a remedy, should he succeed in presenting evidence of the alleged retaliation.

The adverse employment actions brought by employee consisted of the reference given by his supervisor as a candidate for promotion and the failure of the Employer to promote him. On the first account, the Court analyzed that, since Plaintiff had requested judgment as a matter of law, the question they had before them was whether the evidence at trial was so one-sided as to compel a rational jury to find a retaliatory animus that caused the adverse employment action. Since the reference given had been found as intended to project employee's positive characteristics, the Court concluded that the jury would find that it was not driven by retaliatory animus.

On the second account, Plaintiff contended that he was entitled to a mix-motive remedy under the Rehabilitation Act for retaliation, yet the Court sustained that no such remedy is available under that Act. This as a result of the Act's language: its remedial scheme is borrowed from Title VII while its causation standard is borrowed from the Americans with Disabilities Act (ADA). Under the remedial scheme of Title VII, the Court clarifies that section 2000e-5(g)(2)(B) for mix-motive remedies nowhere mentions retaliation. In addition, the Court explains that ADA's causation standard is a 'but-for' causation, and not a 'motivating factor' causation. The latter was not satisfied by Plaintiff. As such, the District Court's decision in favor of the Employer was affirmed.

*Cordero-Suarez v. Rodriguez*, \_\_ F.3d \_\_ (2012) (2012 WL 3139581)

<http://www.ca1.uscourts.gov/pdf/opinions/11-1991P-01A.pdf>

This case required the Court to determine if defendants, three supervisors, were liable under §1983 for Plaintiff's alleged discrimination claim due to political affiliation. Additionally, the Court had to determine if the claim was untimely.

Regarding the three supervisors, the Court dismissed the claim against two of them given that they were not directly involved in the discrimination. The Court held that Section 1983 does not impose purely supervisory liability on individual supervisors. On the other hand, the Court concluded that Plaintiff's claim against the one supervisor allegedly responsible of wrongdoing was untimely since the averred severe or pervasive conduct had occurred more than a year before Plaintiff filed her case. Though Plaintiff argued that her claim based on previous conduct was not untimely under the continuing violation doctrine, the Court held that Plaintiff's transfer from department changed her environment and, as such, did not considered it as a continuing violation. In support of this conclusion, the Court took into account that the defendant was no longer her supervisor and his conduct from then on (the transfer) could not be characterized as severe or pervasive. As such, the Court dismissed Plaintiff's entire case.

*N.L.R.B. v. International Broth. Of Teamsters, Local 251*, \_\_ F.3d \_\_ (2012) (2012 WL 3289345)

<http://www.ca1.uscourts.gov/pdf/opinions/11-1818P-01A.pdf>

This case required the Court to determine if it should uphold and enforce an Order from the National Labor Relations Board ("NLRB") on whether a letter of agreement of May 28, 1999 between the Union and the Employer violated Section 8(e) of the National Labor Relations Act



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(the "Act") by impermissibly preventing the Employer from doing business with two third-party subcontractors. It should be noted that the Administrative Law Judge (ALJ) found that the letter did not violate the section above mentioned.

Said letter stated that the Employer would not utilize two of its subcontractors unless they would pay the employees at the prevailing rate. Later, in the year 2001, the Employer announced that it would use those subcontractors, which still did not pay at the prevailing rate. The Union then went on strike for several days to protest the Employer's decision.

Though there is much deference given to NLRB's decisions, here the Court found that, when analyzing the letter, the NLRB failed to take into account all the surrounding circumstances in order to determine if the intention of the letter was a primary dispute against the Employer or his subcontractors. This analysis is essential in order to verify if said letter did or did not violate Section 8(e) of the Act. The Court held that the dispute was against the Employer and did not have an impermissible purpose because the intention was to preserve the union-employees' jobs. As a result, it did not violate Section 8(e) of the Act. Regarding the 2001 Union strike, the Court held that the lawfulness of the strike depended on the lawfulness of the letter of agreement. Thus, the strike was deemed lawful.

*Espinal v. National Grid NE Holdings 2, LLC*, \_\_\_ F.3d \_\_\_ (2012) (2012 WL 3600863)

<http://www.ca1.uscourts.gov/pdf/opinions/11-1682P-01A.pdf>

In *Espinal*, Plaintiff alleged racial discrimination and hostile work environment in violation of Title VII and Massachusetts law. In his complaint, Plaintiff alleged his Employer punished him too harshly for a rules violation on the basis of his Hispanic heritage and that the Employer permitted other employees to harass him.

The Court held that Plaintiff did not prove a prima facie case of racial discrimination because he failed to demonstrate the existence of a disparate treatment

between him and his co-worker which he contended had been treated with preference. This, because his co-worker was, after an investigation, suspended in the same manner as the Plaintiff. Regarding the hostile work environment claim, the Court did not consider if the Plaintiff demonstrated the acts as severe or pervasive given that the Employer took reasonable steps to address the alleged harassment. It emphasized that the Employer's efforts exempted it from liability even when Plaintiff did not cooperate nor make use of the means provided.

*Santaliz-Rios v. Metropolitan Life Ins. Co.*, \_\_\_ F.3d \_\_\_ (2012) (2012 WL 3734344)

<http://www.ca1.uscourts.gov/pdf/opinions/11-1279P-01A.pdf>

The Court had to determine whether Plaintiff's action was time-barred due to a contractual provision between the Employer and MetLife or if the period had been tolled by a previous lawsuit he had filed in 2004 and later voluntarily withdrew.

Plaintiff brought an action under the Employee Retirement Income Security Act (ERISA) against the plan administrator for reinstatement of long term disability (LTD) benefits. He had received disability benefits for twenty-four (24) months until the year 2002, but in order to continue receiving those benefits, he had to demonstrate to MetLife that he suffered from a long term disability. To obtain the benefits, he brought action against MetLife in the year 2004, which he voluntarily withdrew in 2005. He then filed his claim again in the year 2010.

The Court decided that his action had not been tolled, and in fact was time-barred. It emphasized the group policy between the Employer and MetLife which contained a three-year limitations period on legal claims against MetLife. Having previously found a two-year contractual provision limitation on ERISA claims reasonable in *Island View*, 548 F.3d at 27, the Court had no problem accepting MetLife's three-year limitation provision. As such, his 2010 claim had surpassed the three-



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year limitation provision, even if the 2004 claim had tolled the action.

*Pagan-Colon v. Walgreens of San Patricio, Inc.*, \_\_\_ F.3d \_\_\_ (2012) (2012 WL 3793126) <http://www.ca1.uscourts.gov/pdf/opinions/11-1089P-01A.pdf>

In *Pagan-Colon*, the Court had to determine several controversies: (a) if Plaintiff, given the jury's verdict, had suffered retaliation for conduct protected under the Family and Medical Leave Act (FMLA); (b) if FMLA permitted backpay of overtime; (c) if Plaintiff was entitled to liquidated damages under FMLA; and (d) if Plaintiff's wife had a valid cause of action for emotional distress under Article 1802 of the Puerto Rico Civil Code.

The jury issued a verdict in favor of Plaintiffs but did not award liquidated damages. The Court affirmed the jury verdict finding that there was sufficient evidence to support the verdict. In its Opinion the Court explained that "one way to establish pretext is for the plaintiff to show that the employer gave different and arguably inconsistent explanations for taking the adverse employment action". Regarding whether the FMLA allows overtime to be included in the backpay, the Court held that it did. It found that it was included in the phrase "other compensation" in 29 U.S.C. §2617(a)(1)(A)(i)(I). It also held that, to calculate said overtime backpay, the District Court used the accurate calculation (the year-to-date average consisting of a five-month period) instead of Defendant's proposal of a 12-month average of the previous year which resulted in less overtime hours. Moreover, the Court affirmed the District Court's decision not to allow liquidated damages under FMLA for Plaintiff. Lastly, the Court certified to the Puerto Rico Supreme Court the question of whether Plaintiff's wife has a valid cause of action for emotional distress under Article 1802 when such a

relief was unavailable to the main Plaintiff under the federal law (FMLA).

*Torres-Santiago v. Municipality of Adjuntas*, \_\_\_ F.3d \_\_\_ (2012) (2012 WL 3871524) <http://www.ca1.uscourts.gov/pdf/opinions/10-2248P-01A.pdf>

Plaintiffs asked the Court to determine whether the District Court had abused its discretion in awarding attorney fees to the municipality after granting summary judgment in Defendant's favor.

Plaintiffs filed a claim against the municipality, its mayor, and their respective supervisors alleging political discrimination due to transfers they suffered. The Court held that the Complaint included both frivolous claims and non-frivolous claims. Specifically, the Court held that there was a reasonable basis for the claim against the municipality and its mayor. However, it held that there was no reasonable basis for a claim against the supervisors.

The Court also discussed whether Defendant offered to settle the claim as part of the required elements to determine if the claim is frivolous. Such a settlement offer, described as a "sound settlement offer", was presented by Defendant, but not accepted by Plaintiffs. The District Court for the District of Puerto Rico had concluded that Plaintiffs' claim became unreasonable from the moment they rejected the sound settlement offer. However, the First Circuit Court emphasized that "[t]he mere failure to accept even a "sound settlement offer" does not convert a reasonable claim into a frivolous one, and neither the municipality nor the (Court) explained why the reasonable claims...had become unreasonable or groundless by the time trial approached".



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Based on its analysis, the First Circuit Court vacated the award of attorney fees and instructed the District Court to only award fees attributable solely to the additional costs of defending the frivolous claims.

*International Union v. Ray Haluch Gravel Co.*, \_\_\_ F.3d \_\_\_ (2012) (2012 WL 3984621)  
<http://www.ca1.uscourts.gov/pdf/opinions/11-1944P-01A.pdf>

This case required the Court to resolve two issues of first impression in the First Circuit. The first related to judgment finality. The second was what happens when an employer fails to keep appropriate records concerning work covered by the benefit-remittance provisions of a collective bargaining agreement (CBA).

Defendant entered into a series of CBAs with Plaintiff. Under the last CBA, which was effective from May 2005 through April 2011, Defendant paid contributions to several benefit funds. In 2007, Defendant's books were audited and were found to have unreported work allegedly covered by the CBA. As such, Plaintiff's complaint sought recovery of both delinquent contributions and attorneys' fees under the Employee Retirement Income Security Act (ERISA). The District Court resolved the case with two separate decisions: the first one resolved the delinquent contributions claim (awarding Plaintiff contributions for some of the work and denying another); and, 38 days later, it resolved the claim for attorneys' fees. Plaintiff later appealed the decision regarding the delinquent contributions that were not awarded.

Defendant argued that the appeal was untimely, for although it was properly submitted regarding the second decision, it had surpassed the time period to appeal from the first decision. The First Circuit Court held that "...*Budinich* should (not) be read

mechanically to apply to all claims for attorneys' fees, whatever their genesis". It held that the CBA provided the payment of attorneys' fees as an element of the damages in the event of a breach. Hence, the judgment had become final with the District Court's second decision and the appeal was not time-barred, since attorneys' fees were part of the merits of the case.

Regarding the delinquent contributions, where the District Court had held that Plaintiff lacked evidence to trigger the burden-shifting paradigm under *Haluch I* and *Haluch II*, the First Circuit Court determined otherwise. It expressed that, in this type of case, the burden-shifting occurs only when a fiduciary seeking unpaid contributions shows both that (a) some employees performed covered work that was not reported to the plan and that (b) the employer neglected to maintain adequate records. In such a case, the presumption is that the employer is liable for all hours potentially representing covered work. Yet, this presumption is rebuttable by offering evidence to either overcome or limit its effects. The Court, held that Plaintiff had triggered the presumption, but remanded the case for further proceedings.

*Loubriel v. Fondo del Seguro del Estado*, \_\_\_ F.3d \_\_\_ (2012) (2012 WL 4239812)  
<http://www.ca1.uscourts.gov/pdf/opinions/11-1555P-01A.pdf>

The Court had to determine if Plaintiff's claim was untimely by considering the 90-day requirement of an EEOC's right-to-sue notice and a "continuing violence" allegation (which would toll the 90-day filing period).

Plaintiff alleged having received the notice on September of 2008, while the EEOC issued and mailed it on May of 2008. When Plaintiff



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submitted her claim, 144 days had already elapsed. Yet, she argued that the filing period did not begin to run until she had actually received the notice, resulting then in a timely claim. The Court concluded, not on the basis of when the Plaintiff received said notice, but rather on her attorney's receipt. It held that "[i]n contemplation of law, notice to the attorney is notice to the claimant" echoing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92-93 (1990). Since the notice to the attorney was not impugned by the probative evidence, and given the presumption that a notice provided by a government agency is deemed to have been placed in the mail on the date shown on the notice and received within a reasonable time thereafter: the Court concluded that the claim was time-barred.

With respect to the "continuing violation" argument, the Court recognized that such an allegation may toll an *initial* claim. It stated: "[b]y the time that she receives a right-to-sue notice, a claimant is necessarily aware of the defendant's discriminatory conduct; she has by then already recognized the occurrence of discrimination and filed her administrative claim". As such, this allegation did not toll the 90-day period which made the claim untimely.

*Jones v. Nationwide Life Ins. Co.*, \_\_ F.3d \_\_ (2012)  
(2012 WL 4373690)

<http://www.ca1.uscourts.gov/pdf/opinions/12-1414P-01A.pdf>

Plaintiff alleged disability discrimination under state law and Americans with Disabilities Act (ADA). The Court ruled in favor of Defendant analyzing Plaintiff's arguments of: qualified individual, reasonable accommodation, interactive process, and disparate treatment.

Plaintiff suffered from a condition in his left arm

which, after having an accident in the year 2006, made him undergo a series of surgeries and take certain medication until the year 2008. Regarding his job, during the year 2006, Plaintiff received a notice that his company would be offering a new service to their clients which required the personnel to pass a licensing exam. On December 2007, the employer had notified its personnel that, effective January 1, 2009, passing the exam would be a condition of employment in certain areas, including Plaintiff's work area. Jones had taken and failed the exam on multiple occasions. Furthermore, on December 28, 2008, when Plaintiff first mentioned the possibility of his medical condition affecting his ability to pass the exam to his supervisor, he immediately offered Plaintiff a position in another area which did not require the license. Before that date, Plaintiff never claimed to be disabled or requested any accommodation

Regarding the "qualified individual" prong, the Court determined that the passing of the exam had become an essential function of the job, particularly after the December 2007 notice. Additionally, the "reasonable accommodation" prong failed because Plaintiff did not show facial reasonableness. Firstly, he did not link his accommodation request to his disability. Also, he did not demonstrate to the employer any reason to conclude that this time he would pass it. Yet, more importantly, the Court emphasized that his request came too late and after he knew his employment was being terminated due to his failure to perform an essential function of his job. Regarding the interactive process argument, Plaintiff failed to establish that he was qualified to perform the essential functions of his job with or without a reasonable accommodation. Lastly, his disparate treatment argument also failed because the employer had offered him a transfer as an option.



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### 3<sup>rd</sup> Circuit

In *Zavala, et al. v. Wal-Mart Stores*, the Third Circuit returned yet again to the subject of employee class actions in wage and hour disputes, this time in the context of cleaning crew members who sought class action certification under the Fair Labor Standards Act (FLSA) to pursue compensation for alleged unpaid overtime work. The workers were all illegal immigrants who took jobs with various contractors and subcontractors that Wal-Mart had engaged to clean its stores. The workers nonetheless alleged that Wal-Mart had exercised hiring and firing authority over them, and was therefore liable as their "employer" for overtime pay owed under the FLSA. The District Court rejected final certification of a FLSA class action. The Third Circuit affirmed.

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). As the Third Circuit described in *Symczyk v. Genesis Healthcare Corporation*, courts have developed a two-step procedure for handling FLSA class actions. The putative lead plaintiff will first move for "conditional certification" based upon a threshold showing of common interest.

The certification at this point is limited to the providing of notice to potential class members and to discovery, with the District Court being responsible for managing the process of notifying and joining additional parties. At the close of discovery, typically upon the defendant's motion to "decertify," the court then engages in an in-depth analysis of whether particular plaintiffs truly have a sufficient common interest to be joined into a single collective action.

In *Zavala*, the District Court had allowed a class to be conditionally certified, but then granted Wal-Mart's motion to decertify upon the close of discovery, finding that the "breadth of factual circumstances underlying each individual's claim did not permit trial of the case as a collective action." The District Court reasoned that although a "fairly lenient standard" applied for conditional certification, a "stricter standard" applied on final certification. However, the District Court did not articulate that "stricter standard" or "precisely quantify the burden borne by the plaintiffs" in seeking final certification.

On appeal, the Third Circuit was required to address three distinct legal issues (1) the standard of appellate review of FLSA class decertifications, (2) the standard that District Courts should apply in granting or denying final class certification under the FLSA, and (3) the level of proof the plaintiffs must satisfy to obtain final class certification.

As to the standard of appellate review, the *Zavala* Court agreed with other circuits that an abuse of discretion standard was appropriate, but then added that "this is not the type of abuse of discretion review afforded matters that are 'committed to the discretion of the trial court.'" Instead, an abuse of discretion will be found if the District Court's determination "rests upon a clearly erroneous finding of fact, an errant conclusion of law, or



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an improper application of law to fact." The *Zavala* Court referred to this as the "clear-error prong of this type of abuse of discretion review."

As to the standard that District Courts should apply in granting or denying final class certification under the FLSA, the *Zavala* Court found it "clear from the statutory text ... that standard to be applied ... is whether the proposed collective plaintiffs are 'similarly situated.'" The *Zavala* Court then reasoned that an ad-hoc approach should be applied to determine whether the "similarly situated" standard has been met. The ad-hoc approach "considers all the relevant factors and makes a factual determination on a case-by-case basis." Relevant factors include, but are not limited to, whether the plaintiff are employed in the same corporate department, division and location; whether they advance similar claims and seek substantially the same forms of relief; whether they have similar salaries and circumstances of employment; and, whether the employer has similar or dissimilar defenses to the various plaintiffs' individualized claims.

The *Zavala* Court added that the ad-hoc approach is "the only approach approved by other Courts of Appeals." The *Zavala* Court noted that two other approaches had been adopted by certain District Courts, but the *Zavala* Court neither identified them nor explained why the ad-hoc approach was preferable.

As to the burden of proof, finding no other Court of Appeals decision that had directly answered the question, the *Zavala* Court held that plaintiffs are required to establish that they satisfy the "similarly situated" requirement by a preponderance of evidence. Demonstrating that the putative class plaintiffs are in fact "similarly situated ... seems impossible unless {p}laintiffs can at least get over the line of 'more likely than not.' At the same time, a stricter standard would be inconsistent with

Congress' intent that the FLSA should be liberally construed."

Applied to the case at hand, the *Zavala* Court agreed that the plaintiffs had failed to prove that the putative class members met the "similarly situated" standard. Simply sharing a common status as illegal immigrants was not sufficient. "{T}he putative class members worked in 180 different stores in 33 states throughout the country and for 70 different contractors and subcontractors. The individuals worked varying hours and for different wages depending on the contractor." Also, "different defenses might be available to Wal-Mart with respect to each proposed plaintiff, including that individual cleaners were not Wal-Mart employees ... and that {Wal-Mart} paid some of its contractors an adequate amount to support an appropriate wage for the cleaners."

Being similarly situated "means that one is subjected to some common employment practice that, if proved, would help demonstrate a violation of the FLSA." Although the *Zavala* plaintiffs had provided some evidence of a "common link among the proposed class," the evidence was "of minimal utility in streamlining resolution of these cases. Liability and damages still need to be individually proven."

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### **6<sup>th</sup> Circuit:**

*Handy-Clay v. City of Memphis, Tennessee*, \_\_\_ F.3d \_\_\_, 2012 WL 4352228 (6th Cir. Sept. 25, 2012)

#### **Sixth Circuit Allows City Employee to Proceed with Claim that She was Discharged for Complaints Protected by the First Amendment**

The plaintiff, Bridgett Handy-Clay, was the public records coordinator for the City of Memphis. She worked out of the city attorney's office.

She alleged that some time after she began her employment in 2007, she began receiving complaints from the local newspaper and others about delays in processing public-record requests. She further asserted that there was a culture at the city that led to the concealment of public information. Plaintiff also began expressing concerns that employees of the city attorney's office were abusing the city's leave and pay policies by not reporting their absences from work.

The plaintiff complained about the city's delays in producing public records and about corruption in the city attorney's office to the city attorney, the senior legal attorney, the acting deputy city attorney, a city payroll employee, and the city's chief administrative officer. Allegedly, the city failed to respond to any of the complaints. Instead, she asserted that her complaints caused her to experience "continuing interference, retaliation, and disparate treatment."

In August, 2010, the plaintiff submitted her own request for "documents regarding vacation, sick and bonus time, time sheets, docked pay, personnel files, and payroll check requests for City Attorney's office employees, including [the city attorney]" whom she believed was also abusing the city's leave and pay policies. She further communicated this concern to a city councilman and human resources.

The following day, the plaintiff's employment was terminated for "failure to adhere to unspecified policies and procedures" and an "alleged poor attendance and leave record."

Four months later, the plaintiff filed suit against the city and several of its officials in the U.S. District Court for the Western District of Tennessee. She alleged violations of Tennessee law, common law retaliation, wrongful termination, tortious interference with at-will employment, breach of the duty of good faith and fair dealing, and deprivation of constitutional rights in violation of 42 U.S.C. § 1983 under the First and 14th Amendments. The district court dismissed her § 1983 claims pursuant to Rule 12(b)(6), finding, in part, that the First Amendment did not protect any of her speech.

On appeal, the Sixth Circuit agreed with the district court's finding that the plaintiff's complaints about interfering with her ability to produce records were not protected under the First Amendment because they were directly related to her alleged job responsibilities, and, therefore, made in her capacity as an employee and not as a private citizen.

The Sixth Circuit disagreed, however, with the district court's other findings on the plaintiff's First Amendment claims. The Sixth Circuit found that she presented enough evidence to show that she spoke as a citizen about the alleged violations of city policies related to absences, leave, and pay, both to her superiors and outside her chain of command. The Court found it notable that the plaintiff was not asked to investigate the alleged misconduct or to give her opinion on any violations. The Court also pointed out that the plaintiff's contact with the city payroll employee, councilman, and human resources employee was "clearly" not part of her official job responsibilities.

The Court also found that the plaintiff's concerns about city policy violations touched on a matter of public concern because they addressed alleged corruption and mismanagement of public funds by public employees.

Finally, the Court found that there was enough evidence in the record to support the finding that the defendants knew about the plaintiff's protected



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speech and that the chronology of events supported an inference of causation “particularly because [the plaintiff] was terminated the day after she made her own records requests.”

The Court, therefore, reversed the district court's ruling on the defendant's 12(b)(6) motion and remanded the case for further proceedings.

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### 7<sup>th</sup> Circuit:

*Scruggs v. Carrier Corp.* (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/L20V4R8N.pdf>

#### **Court Affirms Summary Judgment For Defendant in FMLA Case, Finding That Defendant Had An “Honest Suspicion” Of Plaintiff's FMLA Abuse**

The Seventh Circuit affirmed summary judgment for Defendant Carrier Corporation on Plaintiff Daryl Scruggs's FMLA interference and retaliation claims. This case involved a plant employee who was suspected of, and ultimately terminated for, FMLA misuse. The Court initially noted that a defendant to an FMLA interference claim need only show that its refusal to reinstate an employee after returning from FMLA leave was based on an “honest suspicion” that the employee was abusing his leave. Because Carrier Corp. terminated Scruggs only after receiving a surveillance report indicating that he misused his FMLA certified and approved leave, the Seventh Circuit held that Carrier Corp. had an “honest suspicion,” and that the district court properly granted summary judgment on Scruggs' interference

and retaliation claims.

*Hanson v. Caterpillar, Inc.* (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/L20WDGUT.pdf>

#### **Court Affirms Summary Judgment For Defendant, Finding Plaintiff Was Not A Qualified Individual With A Disability Under The ADA**

The Seventh Circuit affirmed summary judgment for Defendant Caterpillar, Inc. on Plaintiff Pamela Hanson's ADA claim. In doing so, the Court addressed Hanson's sole allegation on appeal: whether Caterpillar regarded Hanson's neck injury as precluding her from being able to perform a broad range of jobs. Hanson was a manufacturing plant employee who sustained a severe neck injury on the job, and was subsequently terminated because the resulting medical restrictions prevented her from performing the job for which she was hired, or any other available, permanent position. The Court held that evidence of Caterpillar placing Hanson in three separate, temporary jobs within her medical restrictions showed that Caterpillar did not regard her as being impaired as to a broad range of jobs.

*Bolden v. Walsh Construction Co.* (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/L20WSU5O.pdf>

#### **Court Decertifies Two Title VII Classes, Finding Both Lack Of Commonality And Manageability**

The Seventh Circuit reversed the district court's class certifications in a Title VII race discrimination case. This case involved former employees of a large, national construction company alleging that several of Defendant Walsh Construction Co.'s superintendents engaged in racial discrimination. The Court found that both classes certified by the district court did not comply with Rule 23.



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Using *Wal-Mart v. Dukes* as guidance, the Court noted that the classes lacked commonality, as required by Rule 23(a)(2). Particularly, the Court focused on *Wal-Mart's* language regarding multi-store classes, recognizing that local managerial discretion can destroy commonality. The Court further reasoned that due to the site-specific experiences, the classes, as certified, would not be manageable. Prior to reversing the district court's class certifications, the Seventh Circuit suggested alternative class specifications for the plaintiffs to consider.

*Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund and Jack Stewart v. CPC Logistics, Inc.* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LV0N9B35.pdf>

### **Court Holds An Actuarial Decision That Violates ERISA By Not Being Based On The Actuary's Best Estimate Is Unreasonable, And Hence Reversible By An Arbitrator**

This case involves Defendant CPC Logistics, Inc, a member of multiemployer pension plan, and its withdrawal from the plan, which resulted in CPC becoming liable to employees who had vested rights for CPC's pro rata share of the shortfall created by their withdrawal. An arbitrator held the calculation of CPC's withdrawal liability was overaccessed. The district court upheld the arbitrator's determination and the plan appealed. ERISA requires that the computation of withdrawal liability from a multiemployer defined benefits pension plan be based on "the actuary's best estimate of anticipated experience." Here, the Seventh Circuit found that an actuarial decision that violates ERISA by not being based on the actuary's best estimate is unreasonable, and hence reversible by an arbitrator. Segal Company, the plan's actuary, used two different formulas to arrive at their "best estimate": one formula for tax purposes and another for withdrawal liability. Later, to attract more employers to the plan, the pension fund switched how it calculated withdrawal liability. However, because this change

was made during the year and at the trustees' request to attract new employers to the plan by manipulating withdrawal liability and not neutral actuarial factors, the Court held the change to be unreasonable, in violation of ERISA, and reversible by an arbitrator.

*Loretta Capeheart v. Melvin C Terrell* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LV0MGW84.pdf>

### **Court Vacates The District Courts Judgment To Relinquish Supplemental Jurisdiction Over State-Law Claims 'Only In Extraordinary Circumstances' And Remands The Case With Instructions To Dismiss The Federal Claims As Unripe**

Ms. Capeheart sued university officials in their official capacity under § 1983 seeking to enjoin Defendants from instituting a proposed policy limiting demonstrations and to enjoin her employers from retaliating against her for her speech by depriving her of awards and positions she may be entitled to. The Seventh Circuit was asked to determine whether or not these claims are unripe. The Court refused to speculate as to whether she will be denied a reward or position on the basis of her speech because the alleged past discriminatory actions would not constitute a "pattern or course of retaliatory conduct such that Capeheart is in 'immediate' danger of suffering future injuries." The Court also found the policy limiting demonstrations was not ripe for an injunction as it was a proposed policy that has been criticized and withdrawn. The Court stated that there are some circumstances in which a proposed rule may be ripe for an injunction, but there must be some chance the policy will actually go into effect. Instead, Capeheart may bring these claims in a federal forum once they become more than conjecture.



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*Otto May Jr. v. Chrysler Group LLC* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LV0MHNN4.pdf>

### **Court Finds That A Jury Was Presented With Sufficient Evidence To Conclude A Hostile Work Environment Existed At Chrysler And Reinstates Jury Award Of Punitive Damages**

The Seventh Circuit upheld the jury's verdict finding Defendant Chrysler Group, LLC was liable to Plaintiff Otto May Jr. for the hostile work environment by its failure to "respond in a manner reasonably likely to end the harassment." The jury was presented with evidence of the actions Chrysler took to combat hostile work environment and alternative theories on what they could have done, including Chrysler's failure to interview people on a list provided by May, install surveillance cameras, or start an investigation sooner. The Court concluded that based on this evidence, a genuine issue was presented to the jury and it was not unreasonable for them to find Chrysler liable. The Court determined that the award of punitive damages was appropriate. The Seventh Circuit found that Chrysler's failure to respond had moved from negligent to reckless and that the shockingly insufficient investigation considered along with the extent and duration of the harassment (over three years and seventy incidents including death threats) presented sufficient evidence for a reasonable jury to find punitive damages appropriate.

*Levin v. Madigan, et al* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LTOPCPS8.pdf>

### **Court Addresses An Issue Of First Impression And Finds That The Age Discrimination In Employment Act Is Not The Exclusive Remedy For An Age Discrimination Claim And The Plaintiff Was Not Precluded From Bringing An ADEA And § 1983 Claim**

The Seventh Circuit affirmed the district court's denial of qualified immunity to Defendants and held that the ADEA is not the exclusive remedy for age

discrimination in employment claims. This case involved a former Illinois Assistant Attorney General who, after his termination, filed suit against various employees of the Attorney General's Office in their individual capacity, in addition to filing suit against the State of Illinois and the Office of the Attorney General. The Court addressed the Defendants' argument that they were entitled to qualified immunity with regards to Levin's § 1983 claim, specifically because, in their opinion, the ADEA precluded a § 1983 claim. Addressing this issue of first impression, the Court first looked to other cases that found § 1983 equal protection claim preclusion and held that the most important consideration is congressional intent. Though commenting that all other circuits that have considered this issue have found that the ADEA is the exclusive remedy, the Seventh Circuit held otherwise, finding a lack of legislative history or statutory language that would indicate congressional intent to the contrary.

*Halasa v. ITT Educational Services, Inc.* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LTOPE4J2.pdf>

### **Court Affirms Summary Judgment For Defendant, Finding Employee Was Not Terminated "Because Of" Conduct Protected By The False Claims Act**

The Seventh Circuit affirmed the district court's grant of summary judgment for Defendant ITT Educational Services on Plaintiff Jason Halasa's False Claims Act claim. This case involved a former College Director for ITT that identified and reported several irregularities in ITT's handling of federally subsidized grants and loans for its student body. Though the Court held that Halasa engaged in conduct that would be covered by the False Claims Act, Halasa could not show that he was terminated "because of" his protected conduct. The Court then turned to the issue of whether FED. R. CIV. P. 26 permits ITT to recover the deposition costs and fees of its expert witness. The Court determined that, though witness fees are generally



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governed by § 1821, the flexibility offered by Rule 26 superseded the specific cap set forth in § 1821 and awarded ITT its “reasonable fee” related to its expert witness’ deposition.

*David Feldman v. Olin Corporation* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LT0Z2ORW.pdf>

### **Court Reverses In Part Summary Judgment For Defendant Finding A Genuine Dispute Regarding Plaintiff's Disability**

The Seventh Circuit reversed the district court’s grant of summary judgment for Defendant Olin Corporation on Plaintiff David Feldman’s ADA claim, but affirmed summary judgment on Feldman’s state law retaliation claim. Further, the Court dismissed Feldman’s appeal from the award of sanctions based on lack of jurisdiction, and reversed and remanded the district court’s denial of Feldman’s motion for sanctions. This case involved a metal manufacturing worker, Feldman, who was diagnosed with fibromyalgia and sleep apnea and due to subsequent medical restrictions, could not work flex-shift positions. Addressing the issue of whether Feldman had a qualifying disability, the Court found Olin’s argument that Feldman could have worked in some capacity during the day to be unpersuasive and ultimately found that there was a genuine dispute of material fact as to whether Feldman was disabled by limitation on the quantity and quality of his sleep. In addressing whether Feldman was a qualified individual who could perform the essential functions of his job, the Court pointed out that while it generally defers to an employer’s determination of what these functions are, it will not fully extricate itself and its judgment from this determination. It further held that employers may be required to bypass procedural requirements (job bidding, for example) in order to meet their obligations under the ADA of providing reasonable accommodations.

*Eunice Magnus v. St. Mark United Methodist Church* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LT1183R2.pdf>

### **Court Affirms Summary Judgment For Defendant Finding Plaintiff Failed To Prove Associational Discrimination Under The Americans With Disabilities Act**

The Seventh Circuit affirmed the district court’s grant of summary judgment for Defendant St. Mark United Methodist Church on Plaintiff Eunice Mangus’ ADA claim. This case involved a Church administrative worker who was unable to work her scheduled weekend shifts due to caring for her disabled daughter. Magnus argued that she was terminated as a result of her association with her daughter, an individual with a disability. However, the Court found Magnus’ argument unpersuasive, reasoning that employers are not required to offer reasonable accommodations to those who themselves are not disabled, but merely associated with an individual with a disability. The Court noted that though an employer may not terminate an employee due to on a baseless assumption regarding the employee’s potential need to care for a disabled individual, here, that was not the case. Ultimately, the Court held Magnus was terminated due to troubles with work performance and her inability to work her scheduled shifts, not her association with her daughter.

*Jeff Pagel v. TIN Inc.* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/LV0J6VW0.pdf>

### **Court Reverses Summary Judgment For Defendant On Plaintiff's FMLA Interference And Retaliation Claims**

The Seventh Circuit reversed summary judgment for Defendant TIN Inc. on Plaintiff Jeff Pagel’s FMLA interference and retaliation claims, finding that though the record was sparse, it still contained enough conflicting evidence to give rise to a genuine issue of material fact. This case involved a salesman for a containerboard supplier who was



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terminated after taking what he believed was FMLA-qualifying leave. TIN argued that Pagel was terminated for poor sales numbers and poor job performance. Pagel hotly disputed TIN's argument, asserting that TIN did not adjust their expectations to take Pagel's FMLA leave into account. The Court noted that though the FMLA does not require an employer to adjust their performance standards for time actually worked by an employee, it may mandate that standards be adjusted so an employee is not punished for their FMLA-protected absences. Despite a relatively incomplete record, the Court held that Pagel presented sufficient evidence of FMLA interference and retaliation such that a reasonable jury could find in his favor.

*Donna Nicholson v. Pulte Homes Corporation, et al*  
(7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/LV0K9OKE.pdf>

### **Court Affirms Summary Judgment For Defendant Finding Plaintiff Failed To Put Defendant On Adequate Notice Of Need For FMLA Leave**

The Seventh Circuit affirmed the district court's grant of summary judgment for Defendant Pulte Homes Corporation on Plaintiff Donna Nicholson's FMLA interference and retaliation claims. This case involved a sales associate for a national home builder who claimed to have been terminated as a result of her need to take FMLA-protected leave to care for her seriously ill parents. Nicholson attempted to argue that though she did not follow Pulte's articulated leave policy, she engaged in sufficient communications with her manager such that her manager should have been put on inquiry notice. The Court found this argument unpersuasive, instead holding that Nicholson's conversations with her manager fell short of what inquiry notice requires. Rather, the Court reasoned that Nicholson merely communicated the *possibility* of needing to take leave, and noted that Nicholson herself characterized this issue as being *open-ended*. The Court also agreed with the district court's holding that Nicholson's retaliation claim must fail as she could

not prove she engaged in protected activity under the FMLA.

*Victor George v. Junior Achievement of Central Indiana, Inc.* (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/M80VCFX7.pdf>

### **Court Determines "Inquiry" in Section 501 of ERISA Includes both Formal and Informal Inquiries by Employer or Employee**

The Seventh Circuit vacated the district court's grant of summary judgment for the defendant on the plaintiff's ERISA retaliation claim, and remanded the case back to the trial court. This case involved an executive who was terminated after lodging multiple complaints regarding money withheld from his paychecks but not deposited into his retirement and health savings accounts. The defendant argued that Section 501 of ERISA (prohibiting retaliation) would not apply to the plaintiff's complaints, as they did not rise to the level of formality required by the statute's use of the word "inquiry." The Court engaged in a lengthy analysis of the statutory text and determined that in the context of Section 501, "inquiry" signifies either formal or informal proceedings or questions that are initiated by the employer or the employee.

*Alyce Couch v. United States of America* (7th Cir. 2012)

<http://www.ca7.uscourts.gov/tmp/M80VTETT.pdf>

### **Court Holds Postal Service's Contracted Drivers Are Not Borrowed Employees For The Purposes Of The Federal Tort Claims Act And The Illinois Workers Compensation Act**

The Seventh Circuit reversed the district court's grant of summary judgment for the defendant on the plaintiff's claim under the Federal Tort Claims Act. This case involves a driver (the plaintiff's



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deceased husband), employed by a trucking company that contracted with the U.S. Postal Service. The driver died as a result of an injury sustained at a Postal Service facility. The defendant argued that the trucking company employee was a borrowed employee and as such, workers' compensation would be his and his wife's sole remedy. In determining whether the employee was a borrowed employee, the Court used the common law "control" test (focusing on the degree of control exercised by the borrowing employer) and the *Belluomi* test (requiring an initial determination of whether there is a *lending* employer). Ultimately, the Court determined that *Belluomi* was the proper test as it took language directly from the Illinois Workers Compensation Act, found that the driver was not a borrowed employee and was thus not limited to remedies under the IWCA. Further, the Court found that it was "unfair and doctrinally incoherent" to allow the defendant to claim a driver was an independent contractor when the contracted trucking company was the target of a negligence suit, but turn around and claim the driver is a borrowed employee when the government is the target a tort claim.

*Jared Beatty v. Olin Corporation* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/M80X8I6U.pdf>

### **Court Affirms Summary Judgment For Defendant, Finding No Evidence Of Retaliatory Motive In Plaintiff's Common Law Retaliation Claim**

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's common law retaliation claim. This case involved a manufacturing plant employee who, after sustaining a workplace injury, was terminated for violating the company's call-in policy. The plaintiff missed approximately 6 weeks of work, and failed to

comply with the defendant's policy that requires employees to call in daily if they cannot come to work. The Court rejected the plaintiff's argument that his termination was the result of the defendant's anticipation of, and retaliation for, the plaintiff filing a workers' compensation claim. The plaintiff's evidence of retaliatory motive consisted of the temporal proximity between his work related injury and his termination, but he was unable to rebut the defendant's assertion that the decisionmaker in his termination had no knowledge of his injury. The Court reasoned that the plaintiff failed to produce any evidence of retaliatory motive, and failed to rebut the defendant's argument that his termination was a result of him violating the defendant's call-in policy.

*Equal Employment Opportunity Commission v. United Airlines, Inc.* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/M80XJ53K.pdf>

### **Court Holds That The Americans With Disabilities Act Requires Employees To Appoint Disabled Employees To Vacant Positions, Absent Undue Hardship**

This case involved the defendant's Reasonable Accommodation Guidelines that provided disabled employees with preferential, but not automatic, job transfers. The Seventh Circuit reversed the district court's dismissal of the EEOC's claims against the defendant, recognizing that prior Seventh Circuit precedent relied on by the defendant had been overturned by *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). *EEOC v. Humiston-Keeling*, 227 F.2d 1024 (7th Cir. 2002), the overturned case, held that a competitive transfer policy *did not* violate the ADA. The Court rejected the argument that any competitive transfer policy was in compliance with



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the ADA regardless of the surrounding facts. According to the Court, the two-step process, as articulated by the Supreme Court in *Barnett*, is case specific, and requires a showing by the employee that the accommodation of being transferred seems reasonable on its face, which may then be rebutted by the employer to show special circumstances that demonstrate the proposed accommodation would be an undue hardship. Thus, the Court held, absent a showing of undue hardship, an employer must appoint a disabled employee to a vacant position even over a more qualified and able bodied person.

*George McReynolds, et al v. Merrill Lynch & Co, Inc.* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/M80YD52W.pdf>

### **Court Affirms Dismissal Finding Plaintiff Could Not Base Complaint On Potential Discriminatory Effects Of Defendant's Employment Practices When Those Practices Were The Subject Of Ongoing Litigation**

The Seventh Circuit affirmed the dismissal of the plaintiffs' complaint, finding that the complaint alleged only that the employment practices in question incorporated the discriminatory effects of other employment practices, especially when the other practices were the subject of ongoing litigation. This case involved a class of brokers who claimed that the defendant's production-based compensation system violated their rights under Title VII and § 1981. The plaintiffs argued that the production-based program incorporated the discriminatory effects of an account-distribution policy that is currently the subject of a separate, ongoing federal lawsuit. The Court rejected the plaintiffs' argument, instead finding that the compensation system was race-neutral and exempt from challenge under Section 703(h) of Title VII as the system was not the result of

intentional discrimination. According to the Court, the plaintiffs failed to show that the complaint alleged sufficient facts to show that the compensation system was adopted *because of* its adverse effects on the protected class (African American brokers). The Court further held that the plaintiffs' claim was duplicative of the other law suit, and that any relief sought by this class could be obtained by joining the suit challenging the defendant's account distribution policy.

*Hamida H. Naficy v. Illinois Department of Human Services* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/M80ZDHNU.pdf>

### **Court Affirms Summary Judgment For Defendant On Plaintiff's § 1981 And Title VII Claims, Finding Insufficient Evidence Of Discriminatory Or Retaliatory Animus**

The Seventh Circuit affirmed the district court's grant of summary judgment for the defendant on the plaintiff's § 1981 and Title VII claims. Plaintiff, an Iranian social worker was reassigned to a part-time social worker position as a result of a site closure, alleged that she should have been placed in a full-time position at another location. The Court first proceeded under the direct method of proof, and found the plaintiff's evidence, that a Spanish-speaking position at another location had been given to a displaced Spanish-speaking social worker, was insufficient as it failed to "point[] directly" to a discriminatory motive. The Court next proceeded under the indirect method of proof and found that the plaintiff had failed to identify a similarly situated employee who was not adversely affected by the site closure. There were no open positions available to the plaintiff for which she was qualified. Finally, the Court noted that even under Judge Diane Wood's concurring opinion in



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*Coleman v. Donahoe* (which proposed disposing of the direct and indirect formulations), the plaintiff had not presented enough traditional circumstantial evidence such that a reasonable jury could find her part-time reassignment was because of her national origin, or prior protected activity.

*Carpet Service International, Inc. v. Chicago Regional Council of Carpenters* (7th Cir. 2012)  
<http://www.ca7.uscourts.gov/tmp/M80ZDHNU.pdf>

### **Court Affirms District Court's Ruling In Favor of Defendants, Finding No Unfair Labor Practices Under The Moore Dry Dock Standard**

The Seventh Circuit affirmed the district court's bench trial ruling in favor of the defendant on the plaintiff's unfair labor practices claim under the Labor Management Relations Act. This case involved a union picket of a primary employer who shared a job site with a secondary employer. The Court noted that a union may picket a primary employer so long as the picket does not directly involve or engage the secondary employer in the dispute. Under the *Moore Dry Dock* standard, the Court found that the union had not engaged in unlawful secondary activity and affirmed the judgment of the district court.

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