



Monthly Update for July

3rd Circuit

<http://www2.ca3.uscourts.gov/opinarch/131144p.pdf>

In *Conestoga Wood Specialties Corp., et al. v. Secretary, Health and Human Services*, released July 26, 2013, the Third Circuit addressed the controversial issue whether the federal requirement that employer health insurance provide coverage for contraceptives violates the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, when applied to private, for-profit corporations. By a 2-1 majority, a Third Circuit held that private, for-profit corporations cannot engage in religious exercise under the Free Exercise Clause or the RFRA, splitting with the Ninth Circuit on this threshold issue. Given this determination, the majority did not reach the underlying free exercise/RFRA issue.

The case was an appeal taken by the corporation and its sole shareholder, the Hahn family, from a District Court denial of a preliminary injunction.

Appellants alleged that regulations promulgated by the Department of Health and Human Services, (HHS), which require group health plans and health insurance issues to provide coverage for contraceptives, violated the RFRA and the Free Exercise Clause.

The Patient Protection and Affordable Care Act requires non-exempt group plans to provide coverage, without cost-sharing, for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration, a subagency of HHS.

The HRSA delegated the creation of guidelines on this issue to the Institute of Medicine. The IOM recommended that the HRSA adopt guidelines that require non-exempt group plans to cover all approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.

Under regulations adopted February 15, 2012, 77 Fed. Reg. 8725, group health plans and health insurance issuers are required to provide coverage consistent with the HRSA guidelines in plan years beginning on or after August 1, 2012, unless the employer or the plan is exempt. These regulations were updated on July 2, 2013, but the updates had no impact on the litigation.

The Hahns own 100 percent of the voting shares of Conestoga. Conestoga is a Pennsylvania for-profit corporation that manufactures wood cabinets and has 950 employees. The Hahns practice the Mennonite religion. The Hahns objected to two drugs that, in their view, may cause the demise of an already conceived but not yet attached human embryo. Specifically, they objected to being obligated to provide emergency contraception drugs such as Plan B (the “morning after pill”) and ella (the “week after pill”).

The Third Circuit reviews a district court’s denial of a preliminary injunction for abuse of discretion, but also reviews the underlying factual findings for clear error and questions of law *de novo*. A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. A plaintiff seeking an injunction must meet all four criteria.

The threshold question was whether a for-profit, secular corporation can exercise religion. Appellants offered two theories under which a private corporation could exercise religion. The majority rejected each.

A. *The Citizens United Theory*

In *Citizens United*, the Supreme Court held that the Government may not suppress political speech on the basis of the speaker’s corporation identity, and struck down statutory restrictions on corporate independent political expenditure. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010). *Citizens United* “recognizes the application of the First Amendment to corporations generally without



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distinguishing between the Free Exercise Clause and the Free Speech Clause, both which are contained within the First Amendment. Accordingly, whether *Citizens United* is applicable to the Free Exercise Clause is a question of first impression.”

The majority then cited *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14 (1978), as the controlling precedent. “Certain ‘purely personal’ guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals...Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.” *Id.* Based on *Bellotti*, the majority was required to consider whether the Free Exercise Clause has historically protected corporations, or whether the guarantee is purely personal.

The majority found *Citizens United* to be “grounded in the notion that the Court has a long history of protecting corporations’ rights to free speech.” The majority found no such history with respect to the Free Exercise Clause. “In fact, we are not aware of any case preceding the commencement of litigation about the {contraceptive} Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights.”

The majority then reasoned that it could not see how a for-profit “artificial being, invisible, intangible, and existing only in contemplation of law,” that was “created to make money could exercise such an inherently human right. We simply cannot understand how a for-profit, secular corporation apart from its owners, can exercise religion.”

Appellants, as well as the dissent, cited to cases in which courts have ruled in favor of free exercise claims advanced by religious organizations. None of these cases involved secular, for-profit corporations. “We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follows that for-profit, secular

corporations can exercise religion.”

Appellants argued that the free exercise and free-speech clauses must be interpreted the same because they are separated in the First Amendment by a semicolon, which supposedly shows intent that the two clauses be interpreted the same. The majority did not accept this argument. Historically, each clause had been interpreted separately and independently. The majority found no support for the textual argument that the two clauses must be interpreted identically.

B. The “Passed Through” Theory

Appellants also argued that Conestoga can exercise religion under a “passed through” theory developed by the Court of Appeals for the Ninth Circuit in *EEOC v. Townley Engineering & Manufacturing Company*, 859 F.2d 610 (9th Cir. 1988), and in *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), in which the Ninth Circuit held that for-profit corporations can assert the free exercise claims of their owners. The majority rejected this theory outright.

After carefully considering the Ninth Circuit’s reasoning, we are not persuaded. We decline to adopt the *Townley/Stormans* theory, as we believe that it rests on erroneous assumptions regarding the very nature of the corporate form. In fact, the Ninth Circuit did not mention certain basic legal principles governing the status of a corporation and its relationship with the individuals who create and own the entity. It is a fundamental principle that “incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created” the corporation. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The “passed through” doctrine fails to acknowledge that, by



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incorporating their business, the Hahns themselves created a distinct legal entity that has legally distinct rights and responsibilities from the Hahns, as the owners of the corporation.

Because Conestoga is an entity separate and distinct from the Hahns, the mandate does not actually require the Hahns to do anything. "All responsibility for complying with the Mandate falls on Conestoga. We recognize that, as the sole shareholders of Conestoga, ultimately the corporation's profits will flow to the Hahns. But ... [t]he owners of an LLC or corporation, even a closely-held one, have an obligation to respect the corporate form, on pain of losing the benefits of that form should they fail to do so."

Under the RFRA, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability {unless the burden} (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a)-(b). As with the inquiry under the Free Exercise Clause, the court's preliminary inquiry is whether a for-profit, secular corporation can assert a claim under the RFRA. Under the plain language of the statute, the RFRA only applies to a "person's exercise of religion" *Id.* at §2000bb-1(a). The majority's "conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion."

Finally, the majority found that the Hahns had no viable claim. "The Mandate does not impose any requirements on the Hahns. Rather, compliance is placed squarely on Conestoga." The Hahns chose to utilize the corporate form and cannot "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms."

Judge Jordan authored a lengthy dissent. He not only would find the Free Exercise Clause and RFRA

applicable to private corporations. He would also find that those enactments prohibited the mandate from being applied to Conestoga.

The majority decision in *Conestoga* has logical appeal but leave open many questions: Does the absence of a "long history" of cases extended free exercise rights to corporations in and of itself mean that corporations can have no such rights in any case? Should closely-held family corporations be treated differently than publically-traded corporations with thousand of shareholders? What about business entities such as true partnerships or sole proprietorships? Would the court's analysis be affected if the corporation's bylaws or articles of incorporation included a religious purpose?

These questions, together with the vigorous dissent and the split with the Ninth Circuit, suggest that the majority decision will not be the last word on the subject. The case is a strong candidate for *en banc* and Supreme Court review.

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4th Circuit

***Mercer v. The Arc of Prince Georges County, Inc.*,
No. 13-1300, 2013 WL 3470489 (July 11, 2013)
(per curiam)**

<http://www.ca4.uscourts.gov/Opinions/Unpublished/131300.U.pdf>

In *Mercer*, the Fourth Circuit affirmed the district court's grant of summary judgment for the



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defendant on the plaintiff's claims for interference and retaliation, in violation of the Family Medical Leave Act ("FMLA"). The Court held: 1) the district court did not err in dismissing the plaintiff's interference claim because there was no genuine issue of material fact as to whether the plaintiff was entitled to reinstatement upon her return from FMLA leave; 2) the district court did not err in dismissing plaintiff's retaliation claim because there was no genuine issue of material fact with respect to whether the defendant's proffered explanation for its decision was pretext for terminating her employment due to taking FMLA leave; and 3) the district court did not err in dismissing the plaintiff's complaint prior to affording her the opportunity to conduct discovery.

The defendant is a private, non-profit organization that provides services to those with developmental disabilities. In 2004, the defendant hired the plaintiff to serve as a finance and benefits coordinator. Her job responsibilities included applying for and processing initial applications for benefits for the defendant's clients under the Food Stamp Program, as well as applying for and processing renewals and redeterminations for benefits under this program. In 2007, the defendant placed the plaintiff on conditional employment status due to poor work performance. She returned to her regular status the following month. In 2009, while the plaintiff was on medical leave, the defendant discovered that some of the food-stamp-eligible clients were no longer receiving benefits. After the plaintiff returned to work, she was instructed to ensure that paperwork was submitted to renew the clients' benefits. In 2010, she received an annual review with marks indicating "satisfactory" performance. Thereafter, the defendant found out that some food-stamp-eligible clients were no longer receiving benefits and again instructed the plaintiff to pursue reinstatement of benefits for those clients.

In 2011, the plaintiff was involved in an automobile accident and went on FMLA leave. During this period, the defendant discovered many more food-stamp-eligible clients were not receiving benefits. When the plaintiff returned to work, the defendant placed her on administrative leave because of

unsatisfactory job performance. At the end of the administrative leave period, the plaintiff took additional FMLA leave. The defendant conducted an investigation that revealed the plaintiff failed to maintain benefits for 99 out of its 160 food-stamp-eligible clients. The defendant terminated the plaintiff's employment because of unsatisfactory job performance and noted that she was ineligible for rehire.

The plaintiff filed an action in district court alleging that the termination of her employment constituted unlawful interference with and retaliation for the exercise of her rights under the FMLA. The defendant moved to dismiss, or in the alternative, or summary judgment. The district court granted summary judgment on the plaintiff's FMLA claims.

First, the Fourth Circuit considered the plaintiff's FMLA interference claim. The plaintiff asserted a genuine issue of material fact existed as to whether she would have been terminated from her employment if she had not taken FMLA leave. The plaintiff pointed to evidence of generally favorable performance reviews; to the defendant's affiant's lack of knowledge of her job history and performance; to her claim that occasional lapses in food-stamp-clients' benefits were routine and not attributable to poor performance; and to the fact that she did not learn of the specific grounds for the defendant's decision until after she was notified of her termination. The Court noted that being on FMLA leave does not provide an employee with any greater rights than she would have had without out taking leave; thus, the FMLA does not require an employee to be restored to her prior job after FMLA leave if she would have been discharged had she not taken leave. The Court also noted that an employer can discipline or terminate the employment of an at-will employee regardless of whether the employer discovered the evidence supporting that decision while the employee was on FMLA leave.

The Court held that the defendant was entitled to summary judgment because it presented evidence that it would have terminated the plaintiff's employment for her poor job performance regardless of her FMLA leave, and the plaintiff's evidence would not allow the jury to decide



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otherwise. The plaintiff's primary basis for connecting the termination of her employment to her FMLA leave was its timing, but the Court said that timing, while relevant, will rarely be independently sufficient to create a triable issue of fact. In so holding, the Court again did not decide which party bears the burden of proof on a FMLA interference claim, noting the circuit split on this issue.

The Court also held that the defendant was entitled to summary judgment on the plaintiff's FMLA retaliation claim. The Court analyzed this claim under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973). Thus, to establish a prima facie case, the plaintiff had to show: 1) she engaged in protective activity; 2) she suffered an adverse employment action; and 3) the adverse action was causally connected to her protected activity. The Court determined that the plaintiff had presented sufficient evidence to establish a prima facie case where the timing of her termination demonstrated the requisite causal connection between her FMLA leave and the defendant's employment action under the lower prima facie burden. The Court agreed with the district court that the defendant presented undisputed evidence that it terminated the plaintiff for her unsatisfactory work performance and rejected the plaintiff's pretext argument. The plaintiff claimed that the defendant offered shifting explanations for terminating her employment. The Court acknowledged that an employer giving different justifications at different times may be probative of pretext; however, the Court found the record in this case did not support such an inference. The Court said that the defendant consistently cited the plaintiff's "unsatisfactory job performance" as the reason for the plaintiff's initial temporary administrative leave and her termination. Accordingly, the record did not support the plaintiff's contention of pretext.

Finally, the Court turned to the plaintiff's assertion that the district court erred in dismissing her claims before she had the opportunity to conduct discovery. The Court emphasized that it places great weight on the Rule 56(d) affidavit, where the non-moving party can provide the specific reasons it needs

discovery. Here, the plaintiff did not provide an affidavit, and in responding to the defendant's summary judgment motion, she failed to identify any evidence that she believed would be adduced through discovery. In these circumstances, the Court agreed with the district court that there was no basis to deny the defendant's summary judgment motion.

***Craddock v. Lincoln National Life Insurance Company*, No. 13-1123, 2013 WL 3782786 (4th Cir. July 22, 2013) (per curiam)**

<http://www.ca4.uscourts.gov/opinions/Published/131123.U.pdf>

In *Craddock*, the Fourth Circuit vacated and remanded the district court's dismissal of the plaintiff's employment discrimination claims. The Court held the facts as alleged by the plaintiff in her second amended complaint stated plausible claims for relief under the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA").

The plaintiff, who was hired in 1969 by the defendant's predecessor, was in an automobile accident in 1980 that left her with a "massive brain injury." When she returned to work, the defendant accommodated her disabilities by assigning her to perform filing, filing maintenance, processing mail processing. The plaintiff's impairments included "short-term memory impairment, somewhat limited ability in reading and writing, limited keyboard speed, and weakness of eye muscles." In 2011, after receiving an oral warning that she had been making mistakes, and two written warnings that she needed to improve and become more efficient, the plaintiff was terminated. She was 59 years old at the time.

Thereafter, the plaintiff sued defendant in state court, alleging violations of the ADEA and the ADA. The defendant removed the action to district court and moved to dismiss. The plaintiff filed an amended complaint and then a second amended complaint, which the defendant moved to strike. The district court considered the second amended complaint when it reviewed the defendant's motion



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to dismiss, granted the motion to dismiss, and denied as futile the plaintiff's motion for leave to file the second amended complaint.

The Fourth Circuit first considered the dismissal of the plaintiff's ADEA claim. The Court ruled that the district court based its decision on a misreading of Fourth Circuit and Supreme Court precedent. Specifically, the Court explained that the district court erroneously required the plaintiff to plead the elements of a prima facie case under the standard of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Relying on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002), the Fourth Circuit explained that the *McDonnell Douglas* framework is "not a pleading requirement." Quoting *Swierkiewicz*, the Fourth Circuit said "the Supreme Court rejected the notion that the 'requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.'" 534 U.S. at 511.

The Court said it was a "close question," but held that the plaintiff had stated a claim for relief under the ADEA. In determining that the allegations in second amended complaint stated a claim for relief that was plausible on its face, the Court highlighted two of the plaintiff's allegations: 1) the plaintiff alleged that all younger employees in her department were trained on how to use a scanner, but she was not trained despite her requests; and 2) the plaintiff further alleged that she could have performed the scanning work and that scanning positions were available, but the defendant's human resources personnel told her she could not work again for the defendant as a temporary or permanent employee. The Court acknowledged the defendant may have neglected to train the plaintiff and refused to rehire her for permissible reasons. Nevertheless, the Court ruled there was a reasonable inference from the facts alleged that the defendant acted because of the plaintiff's age. Accordingly, the Court held this was sufficient to allow the ADEA claim to survive a motion to dismiss.

The Court also held that the plaintiff stated a claim for relief under the ADA. The Court highlighted the same facts it found sufficient to state a plausible

claim for relief under the ADEA: that all non-disabled employees were trained in how to use a scanner but she was not; and that she could have performed the scanning work, that scanning positions were available, but the defendant refused to consider rehiring her. The Court noted that the ADA expressly recognizes "reassignment to a vacant position" as reasonable accommodation. In sum, the Court held the plaintiff pleaded a viable ADA claim.

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6th Circuit

NLRB; Union Representation: *GGNSC Springfield v. N.L.R.B.*, __ F.3d __; 2013 WL 3305740 (6th Cir., July 2, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0170p-06.pdf>

In *GGNSC Springfield*, the plaintiff operated the Golden Living Center, a short- and long-term nursing facility that employs over 100 employees, including RNs, licensed practical nurses (LPNs), and certified nursing assistants (CNAs) who provide direct care for patients in the facility's two wings. The "employment hierarchy" at the Center placed an Executive Director at the top and in charge of overseeing the entire facility. Various department heads and a Director of Nursing reported directly to the Executive Director. Two Assistant Directors of Nursing oversaw each of the facility's wings. The RNs and LPNs (known as "charge nurses") reported directly to the Assistant Directors of Nursing. Typically, each wing was staffed with two charge nurses and between two and six CNAs. Although



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all charge nurses have similar duties, only the RNs attempted to collectively bargain in this case, which efforts the Center opposed. The issue was whether the Center's RNs were "supervisors" and, thus, not permitted to organize and collectively bargain under the National Labor Relations Act (NLRA). The Center argued that the RNs were supervisors "because they have the authority to discipline, assign, and responsibly direct CNAs all by using independent judgment." But the National Labor Relations Board disagreed and ordered the Center to bargain with the RNs. The Center appealed.

The Sixth Circuit first addressed the Center's argument that a recent decision from another Circuit Court voiding the NLRB's recent orders because it did not have at least three lawfully appointed members also renders void the NLRB's order here. Explaining that the issue is not a "jurisdictional" one, the Sixth Circuit refused to consider the Center's argument, which it raised for the first time on appeal.

Turning to the merits, the Sixth Circuit concluded that the Center "met its burden to demonstrate that its RNs utilize independent judgment in exercising their disciplinary authority." Specifically, the Court explained, the RNs have more than a mere reporting function with respect to disciplinary matters. Indeed, RNs, when confronted with CNA misconduct, can either do nothing, provide verbal counseling, or draw up a written memorandum – without the need for approval or consultation from their superiors. This choice, according to the Court, "depends on the RN's determination of how severe a violation is" and "there is no doubt when faced with a lesser violation the Center's RNs choose whether to issue an employee memorandum (discipline), to provide verbal counseling (not discipline), or to take no action at all." Because the RNs may issue actual discipline in the form of written memoranda under the Center's disciplinary policies (or choose not to do so), they are "supervisors", and the NLRB's failure to recognize the written memoranda as part of the Center's formal disciplinary scheme demonstrates that its decision was not supported by substantial evidence. The Sixth Circuit, thus, vacated the NLRB's decision.

ERISA; LTD Claims Administration: *Engleson v. Unum Life Ins. Co. of America*, __ F.3d __; 2013 WL 3336741 (6th Cir., July 3, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0173p-06.pdf>

In June 2001, after suffering from numerous medical conditions, the plaintiff in *Engleson* stepped down from his position as Vice President in charge of managing the casualty and property insurance lines for Seibert-Keck insurance. Plaintiff, upon stepping down, filed a claim for long term disability under the Seibert-Keck's long term disability plan managed by the defendant. His claim was denied, and plaintiff filed internal appeals with the defendant in August 2001 and November 2001. Both appeals were denied. Plaintiff returned to work in 2007, but by August 2008 he was again unable to continue work due to his medical conditions. He filed again for disability benefits. The claim was approved, with a "disability date" of August 2008, not June 2001. Plaintiff sued, alleging violations of ERISA and seeking benefits back to June 2001.

The United States District Court Northern District of Ohio concluded that the three year contractual limitations period barred the suit seeking benefits back to June 2011 and dismissed it. It reasoned that, under the Plan's provisions, plaintiff "had until March 12, 2005 to file a legal action with respect to his 2001 claim" and, thus, deemed his filing in 2009 to be untimely. The Sixth Circuit affirmed, concluding that the plaintiff's 2009 suit seeking benefits back to 2001 was eight years too late because the terms of the Plan gave him only three years to file it. Thus, "neither the law nor principles of equity allow us to excuse the tardiness of [plaintiff's] suit.

Rejecting the plaintiff's claim that the defendant was required to inform him of his "right to seek review in federal court and the contractual time limitation attached to that right in its claim denial letters," the Court explained that, to satisfy ERISA's informational requirements under the applicable



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2000 version of the Code of Federal Regulations, the defendant needed only to provide “appropriate information” about internal appeals processes, not external judicial review (as the newer version of the regulations now requires). Next, the Court rejected the plaintiff’s argument that its 2008 letter granting benefits, but expressly denying backdating benefits to 2001, constitutes another denial of his 2001 claim subject to appeal and triggering a new contractual limitations period. According to the Court, the defendant treated the 2001 and 2008 claims as two separate claims, even assigning two “wholly different case numbers.” Also, because both internal appellate reviews in 2001 provided the same ground for denial, the defendant had no need to repeat the specific reason for declining to reconsider the plaintiff’s plea to backdate benefits to 2001. Thus, the Court “fail[ed] to see any lasting connection between two claims that would lead us to construe the 2008 letter as a denial of the 2001 claim.”

Finally, the Court rejected the plaintiff’s argument that the Summary Plan Description did not provide for the three-year contractual limitations period for judicial review. Citing to the Supreme Court’s 2011 decision in *CIGNA Corp. v. Amara*, the Sixth Circuit explained that SPDs are meant to convey information simply and in summary fashion. In other words, they “lack controlling effect in the face of plan language to the contrary.” Thus, because the Plan provided for the three-year contractual limitations period for seeking judicial review, the SPD’s failure to do so is not a violation of ERISA. Further, the ERISA provision requiring an SPD to set forth “applicable time limits” applies only to “procedures governing claims for benefits” – that is, according to the Court, internal time limits relates to the processing of claims, not contractual limitations periods for judicial review.

Failure to Promote; Title VII Disparate Impact:
Howe v. City of Akron, __ F.3d __; 2013 WL 3779320 (6th Cir., July 22, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0187p-06.pdf>

In *Howe*, the plaintiffs were members of the Akron Fire Department who, after taking a promotion exam for the ranks of Captain and Lieutenant, failed to receive promotions. They sued the defendant alleging that the promotion exam “adversely impacted twelve Caucasian Captain candidates on the basis of race, eight Lieutenant candidates on the basis of age, and three African-American Lieutenant candidates on the basis of both age and race.” The district court for the Northern District of Ohio, after the plaintiffs received a favorable jury verdict, awarded each Lieutenant and Captain compensatory damages, including front pay in lieu of equitable relief. The district court granted the defendant’s motions for a new trial on the issue of damages, and it agreed to also consider the plaintiffs’ motion to alter or amend the judgment to request equitable relief in the form of promotion. On July 11, 2011, during a pre-trial conference, the court granted the plaintiffs’ motion for preliminary injunction (seeking the promotions) and ordered 18 firefighters promoted no later than July 18, 2011. The defendant appealed that ruling.

Administered and scored by an outside consulting firm, the promotion exam included a 100-question multiple choice test on technical job knowledge and two oral assessment exercises. The Lieutenant exam also included a written work-sample exercise. The Captain exam did not contain an additional written component, but included an additional oral assessment involving a group exercise. Promotional candidates were placed on an “eligibility list” in an ordered ranking upon achieving at least a 70% scaled score on the exam. The scaled score was then converted into a ninety-point scale, with points added for seniority. Then, for each available position, the three top-ranked individuals from the list were considered for the promotion. From there, the Chief would interview the candidates, although all individuals were, in fact, promoted according to their place on the ranked list. The plaintiffs challenged the exam because the promotion rates for individuals in certain protected categories did not reflect the corresponding exam passage rates.

The Sixth Circuit reviewed the district court’s preliminary injunction for an abuse of discretion, noting that the district court had not yet issued a



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final judgment on the merits. The defendant argued that the plaintiffs cannot show a likelihood of success on the merits because they did not identify a particular part of the promotion exam process that resulted in the alleged disparate impact. According to the Sixth Circuit, the plaintiffs did not have to show that the various elements of the process are capable of separation from the overall process and identify them as causing the disparate impact because it was undisputed that individuals “were promoted in perfect consistency with their rank-order.” Thus, the plaintiffs did not have to show how much of the alleged disparate impact stemmed from the test component versus the interview component of the process. Here, the Court concluded, the plaintiffs adequately identified an employment practice – the entire promotion exam – that they believed caused the disparate impact.

Next, the Court agreed with the district court that the EEOC’s “four-fifths rule” – which instructs that a selection rate for those in protected categories that is less than four-fifths of the rate for the group with the highest rate is generally regarded as evidence of disparate impact – is not the only means by which a plaintiff may establish disparate impact. Thus, according to the Sixth Circuit, the district court did not abuse its discretion by looking to the “promotion rates” (as opposed to “exam pass rates”) as the proper metric for determining “adverse effect” in this case, where those who achieved a passing score were ranked and, thus, not placed on “equal footing.” According to the Court, “a comparison of exam pass rates cannot adequately capture the effects of a rank-order selection process.”

Arbitrability of Retiree Health Benefits: *VanPamel v. TRW Vehicle Safety Systems*, __ F.3d __; 2013 WL 3801638 (6th Cir., July 23, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0188p-06.pdf>

In *VanPamel*, the plaintiffs’ Union and the Defendant had negotiated a collective bargaining agreement in 1993 that included a provision for healthcare benefits for retirees. The Union and the defendant negotiated a termination agreement in

November 1996, in preparation for a plant closing, to govern the “terms and conditions applicable...to retirees and employees represented by the Union in the bargaining unit at the soon to be closed the plant.” The termination agreement extended the 1993 CBA and also contained an arbitration provision. In January 2011, the defendant “terminated prescription drug coverage for Medicare-eligible retirees, replacing it with an annual contribution to a health reimbursement account for retirees and their dependents.” The plaintiffs sued alleging that the change violated the defendant’s contractual obligations, and the defendant moved to compel arbitration, which the United States District Court for the Eastern District of Michigan granted. On appeal, the plaintiffs argued that retirees cannot be compelled to arbitrate benefit disputes with their former employers.

Noting the general presumption in favor of arbitration – particularly where there exists a broad arbitration clause – the Sixth Circuit held that the “arbitration provision in the termination agreement is controlling and is the exclusive remedy for disputes requiring interpretation or application of the Termination Agreement and the 1993 CBA.” Because the plaintiffs attempted to enforce their right to benefits pursuant to the Termination Agreement and the CBA “they cannot circumvent the arbitration provision simply by virtue of their retiree status.” The Court also noted that the plaintiffs retired in December 1997 and February 1998, respectively – well after the Termination Agreement – and that the 1993 CBA cannot be read in isolation without the Termination Agreement. Thus, because the retiree benefits were an express subject of the agreements at issue, and there is no contractual provision expressly excluding the dispute from the arbitration clause, the matter must be arbitrated. Rejecting the plaintiffs’ additional argument that they could only agree to arbitrate ERISA claims by expressly listing that specific statutory claim in the arbitration provision, the Court explained that “ERISA claims [which are derived, at least in part, from rights provided in the CBA] can be the subject of arbitration pursuant to a CBA, even without the express listing of ERISA claims in the arbitration provision, because the genesis of the claim is the agreement not the



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statute.”

FMLA; Certification Requirements: *Kinds v. Ohio Bell Telephone Co.*, __ F.3d __; 2013 WL 3868427 (6th Cir., July 29, 2013)

<http://www.ca6.uscourts.gov/opinions.pdf/13a0197p-06.pdf>

In *Kinds*, the plaintiff, a decades-long employee, sought leave under the Family and Medical Leave Act on October 13, 2009 for the nine weeks of work that she missed in 2009 due to a hospitalization following a domestic dispute. She had run out of accrued but unused paid leave. The defendant denied her request as to three of the nine weeks because she failed to provide timely documentation justifying her need for leave. Specifically, it had advised the plaintiff that she could apply for both short-term disability benefits and/or FMLA leave, and that she would have to submit an FMLA certification form only if her STD claim were to be denied. The STD administrator approved the plaintiff's request for six weeks of the nine-week period, but denied it for the first three weeks of the period. The defendant, in turn, approved the six-week period as FMLA leave, and on December 29, 2009 asked the plaintiff to submit an FMLA certification form demonstrating her need for FMLA leave for the first three-week period. She never returned a completed FMLA certification, despite the defendant giving her an extension by which to do so, per her request. The defendant denied her request, and in the denial letter offered the plaintiff yet another opportunity to submit a completed FMLA certification form if her failure to do so had been due to reasons out of her control. Thereafter, the plaintiff's physician submitted a completed FMLA certification form, but neither the plaintiff nor her physician provided any reason why she did not timely submit the requisite certification form prior to the denial decision. Consequently, the defendant denied the request. Per its attendance policy, the defendant discharged the plaintiff for unexcused absences, including for missing unexcused the three weeks not approved as FMLA leave.

The plaintiff sued, alleging that the defendant interfered with her rights under the FMLA. Specifically, the plaintiff asserted that the defendant failed to timely request the FMLA certification form – that is, within five days of her providing notice of her need for leave. The United States District Court for the Northern District of Ohio granted the defendant's motion for summary judgment. The Sixth Circuit affirmed.

Noting that the FMLA regulations contain an exception to the five-day rule for requesting a medical certification form – i.e., “[t]he employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration” – the Sixth Circuit rejected the plaintiff's argument that the exception applies only to situations where the employee fraudulently sought FMLA leave. It thus “decline[d] to adopt a regulatory interpretation so devoid of any statutory, regulatory, or precedential basis.” Instead, the Court explained, the STD administrator's denial of benefits for the three-week period provided adequate reason for the defendant to question the appropriateness of the FMLA leave because the standard for disability status in its Plan was similar enough to the definition of “serious health condition” under the FMLA “that denial of the former at least raises a question as to the appropriateness of the latter.” Thus, the Court held, the defendant timely requested medical certification, which the plaintiff failed to submit, thereby permitting the defendant to deny her request for FMLA-protected leave for the three-week period at issue.

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Monthly Update for July

11th Circuit

Nall v. Mal-Motels, Inc. and Mohammad Malik (July 29, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201213528.pdf>

In *Nall v. Mal-Motels*, the court held that the circuit court's non-stipulated judgment following a settlement was not proper for a claim under the Fair Labor Standards Act. At issue in *Nall* was a settlement between an employee and employer for an FLSA overtime lawsuit.

The court noted that a settlement for claims stemming from the FLSA could only be valid two ways: 1.) under the supervisor of the Secretary of Labor; 2.) by a court stipulated judgment approving the agreement. In this matter, the district court entered a non-stipulated judgment dismissing the complaint, after granting the employer's opposed motion to approve and enforce the settlement agreement. Following *Lynn's Food Stores, Inc. v. United States*, the court vacated the decision and remanded for proceedings.

ComTran Group, Inc. v. U.S. Dept. of Labor (July 24, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201210275.pdf>

ComTran Group, Inc. v. U.S. Dept. of Labor involved a petitioned review of the Occupational Safety and Health Review Commission's final decision that ComTran violated provisions of OSHA, and whether the employer had "knowledge" of OSHA violations. The case began after one of the employer's supervisors was found digging a trench with an unprotected "spoil pile" at the edge of the excavation. The danger lay in the fact that the dig created an 11 foot, unsupported wall of earth, to which the supervisor was exposed to a potential cave-in.

While the court established the supervisor had knowledge of an OSHA violation, the court held that knowledge could not be imputed on the employer for the supervisor's own knowledge of the OSHA violation, when the employer did not have constructive or actual knowledge of the violation. The court noted long-established law that OSHA does not impose strict liability on employers for harmful working conditions. Instead, the court pointed out that OSHA aims to focus liability when harm can be prevented. In holding, the court looked to the established law in four other appellate courts which had been presented similar issues, and determined that a "supervisor's rogue conduct" could not be attributed to the employer in this situation and for violations of OSHA. Instead, the court held employer knowledge is established through actual or constructive knowledge.

Stroud v. McIntosh, et. al. (July 23, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201210436.pdf>

In *Stroud v. McIntosh, et. al.* the court held that an Alabama state agency waived their immunity defense from litigation in federal court (except from ADEA) after the agency removed a lawsuit containing state and federal claims to federal court.

The lawsuit involved claims of federal civil rights and state age discrimination against employer Alabama Board of Pardons and Paroles, which were filed in state court. The employer removed the case to federal court for subject-matter jurisdiction. In holding, the court affirmed the district court's judgment which held that while the agency's removal waived the agency's immunity from suit in a "federal forum," it did not waive agency's immunity from liability on the ADEA.

Scantland, et. al. v. Knight, Inc. et. al. (July 16, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201212614.pdf>



Monthly Update for July

Scantland, et. al. v. Knight, Inc. et. al. involved a group of current and former cable technicians and questions of misclassification and overtime under the Fair Labor Standards Act. The court underscored the importance of the “economic reality” test, which it used, when determining whether an individual is an employee or independent contractor and if the relationship demonstrates dependence. In finding the technicians were employees, rather than independent contractors, the court reversed and remanded the circuit court’s holding finding otherwise.

Leslie, et. al. v. Hancock County Board of Education, et. al. (July 12, 2013)

<http://www.ca11.uscourts.gov/opinions/ops/201213628.pdf>

In *Leslie, et. al. v. Hancock County Board of Education, et. al.*, the court was presented with questions of jurisdiction over an appeal of a school board, and whether the Board’s individual members violated an employee’s right for free speech by her termination. The claim stemmed from plaintiffs/employees’, former superintendent and assistant superintendent of the school system, public comments about the local tax policy, which they believed was deficient. After the two employees voiced these comments, a new Board of Education was elected, and the Board terminated the employees for their comments. The employees brought suit against the Board, as well as the members in their official and individual capacities, claiming First and Fourteenth Amendment violations. The Board claimed qualified immunity for the individual members.

In holding, the court found as follows: 1.) it did not have jurisdiction over the appeal of the Board and its officials pursuant to Supreme Court case law that district courts do not have pendent party jurisdiction in an official immunity appeal, when there is an appeal by another party which cannot assert the immunity; 2.) the individual members of the Board were entitled to qualified immunity, as they acted within their discretionary authority.

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