Monthly Update for August

1st Circuit

***Pearson v. Massachusetts Bay Transp. Authority,* __ F.3d __ (2013) 2013 WL 3507785**
http://media.ca1.uscourts.gov/pdf.opinions/12-1956P-01A.pdf

The District Court issued summary judgment dismissing Plaintiff's race discrimination Complaint. The First Circuit held that Defendant's proffered reason for termination was not pretext for discrimination and Plaintiff's termination was not retaliatory. The Court also concluded that Plaintiff's termination was not motivated by racial animus. Regarding the retaliation claim, the First Circuit emphasized that causation moves forward and not backwards, stating that no protected conduct after an adverse employment action can serve as the predicate for a retaliation claim. In this particular case, Defendant's officials had recommended that Plaintiff be terminated before Plaintiff engaged in the alleged protected conduct (writing to his legislator).

***Verizon New England, Inc. v. Rhode Island Dept. of Labor and Training,* __ F.3d __ (2013) 2013 WL 3742486**
http://media.ca1.uscourts.gov/pdf.opinions/12-2398P-01A.pdf

The First Circuit affirmed the District Court's dismissal of the claim based on the *Younger* abstention doctrine. Verizon requested a declaratory and injunctive relief against the Rhode Island Dept. of Labor and Training ("RIDLT") regarding a pending case in state court. The state claim involved the RIDLT Board of Review's finding that Verizon's actions constituted a constructive and actual lockout, and employees who were dismissed due to the lockout were entitled to receive unemployment benefits under the Rhode Island Employment Security Act. Verizon appealed the Board of Review's decision and filed suit in federal court arguing that the Board's decision was preempted by the NLRA.

***O'Connell v. Marrero-Recio,* __ F.3d __ (2013) 2013 WL 3782233**
http://media.ca1.uscourts.gov/pdf.opinions/12-2191P-01A.pdf

Plaintiff argued that she was terminated due to her political beliefs and was retaliated against for asserting her free speech and freedom of association rights. The First Circuit affirmed the District Court's dismissal of the case. As emphasized by the Court, in the First Circuit, it is a settled principle that the First Amendment does not protect all government employees from layoffs based on political-party affiliation. Plaintiff had held a position as Human Resources Director at two government agencies. Her claim of violation to her freedom of speech right was dismissed since the speech at issue exclusively revolved around her professional responsibilities. Additionally, it was held that her trust position did not enjoy First Amendment protection thereby defeating her claim of violation of her freedom of association rights.

***Doral Financial Corp. v. García-Vélez,* __ F.3d __ (2013) 2013 WL 3927685**
http://media.ca1.uscourts.gov/pdf.opinions/12-1519P-01A.pdf

The First Circuit was requested to vacate an arbitral award that granted severance compensation and pre-award interest to a former employee who was terminated. The Court affirmed District Court's decision to uphold the arbitration award. The employment contract had an arbitration clause whereby any controversy related to the agreement would be governed in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Plaintiff contended that the award should be vacated because during the arbitration process, the arbitrator refused to hear evidence pertinent and material to the controversy when he refused to issue subpoenas. The First Circuit held that the record was devoid of evidence showing that Plaintiff was not afforded a "fair hearing". Additionally, it found that Plaintiff's subpoena requests were premised on a hunch that it

would have yielded relevant information. The Court emphasized the deference owed to arbitration awards and stated that it cannot vacate such an award based on speculation alone.

***Sun Capital Partners III, LP v. New England Teamsters*, __ F.3d __ (2013) 2013 WL 3814984**
http://media.ca1.uscourts.gov/pdf.opinions/12-2312P-01A.pdf

The First Circuit was required to evaluate if Plaintiffs (two equity funds) were "employer" under §1301(b)(1) of the Multiemployer Pension Plan Amendments Act (MPPAA). If they were, Plaintiffs were responsible for the payment of withdrawal pension obligations of a company they had acquired and that later filed for bankruptcy. The Court held that one of the equity funds satisfied the "employer" definition and remanded for further factual development regarding the second equity fund.

Plaintiffs sought a declaratory judgment holding that that they were not liable to the multiemployer pension fund under MPPAA alleging that they were mere passive investors that indirectly controlled and tried to turn around the company that was acquired. Said company, in turn, had been making contributions to the Trucking Industry Pension Fund on behalf of its employees pursuant to a collective bargaining agreement up until a year and a half after its acquisition.

The "employer" determination entailed a first-time definition of being in "trade or business" under §1301(b)(1) of MPPAA. It was emphasized that said phrase is not defined in the Treasury regulations and has not been given a definitive, uniform definition by the US Supreme Court. The First Circuit adopted the "investment plus" standard for determining if a company is "in trade or business". Said standard requires the Court to determine: (1) whether the private equity fund was engaged in an activity with the primary purpose of income or profit, and (2) whether it conducted that activity with continuity and regularity.

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4th Circuit

***Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local 27*, No. 12-1429 (4th Cir. August 26, 2013)**
http://www.ca4.uscourts.gov/Opinions/Published/121429.P.pdf

In *Waugh Chapel South*, the Fourth Circuit Court of Appeals upheld the dismissal of claims against a labor management fund for violation of the secondary boycott provisions of the Labor Management Relations Act (LMRA), on the ground that the fund was not a "labor organization" within the meaning of the National Labor Relations Act (NLRA). The Court reversed the dismissal of the LMRA claims against two labor unions, holding that the *Noerr-Pennington* doctrine did not warrant dismissal where there was a genuine issue of material fact whether the unions indiscriminately filed (or directed) a series of legal proceedings without regard of the merits and for the purpose of violating federal law.

The plaintiffs, two real estate developers were planning to lease units in their shopping centers to Wegmans Food Markets, Inc., which does not employ unionized labor. According to the plaintiffs, a union official told the plaintiffs that if Wegmans did not unionize, the United Food and Commercial Workers ("UCFW") would "fight every project you develop where Wegmans is a tenant." Thereafter, the UFCW filed a series of legal actions (lawsuits and administrative proceedings) either directly or by proxy against the developers.

After defending the legal challenges, the plaintiffs sued two UCFW locals and the Mid-Atlantic Retail

Food Industry Joint Labor Management Fund ("Fund"). The plaintiffs alleged that the defendants orchestrated the legal proceedings to force the plaintiffs to terminate their relationship with a non-union supermarket, in violation of the secondary boycott provisions of the LMRA.

The defendants moved to dismiss, and the district court granted the motion. The district court ruled that the Fund was not a "labor organization" under the NLRA and therefore not subject to the secondary boycott provisions. The district court further ruled that because none of the prior legal challenges was objectively baseless, the *Noerr-Pennington* doctrine insulated the unions from liability for pursuing their legal challenges to the developments.

On appeal, the Fourth Circuit addressed whether the Fund was a "labor organization" under the NLRA. The NLRA defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5). The Court held that because the complaint did not allege that the Fund had engaged in a pattern or practice of "dealing with" employers, it was not a "labor organization" and therefore not subject to the secondary boycott provisions. Accordingly, the Court affirmed the district court's dismissal of the complaint against the Fund.

The Court noted that it has given a "broad interpretation" to the "dealing with" requirement, but that requirement denotes a "bilateral mechanism" through which an employee entity and management reciprocally interact. An employee entity may be a "labor organization" if its purpose or activity involves "dealing with" employers, but the Fourth Circuit found that the Fund did not satisfy either of these criteria. The plaintiffs' complaint alleged that the Fund's charter prohibited it from participating in union collective activities. In addition, there was no "bilateral mechanism" where the only interaction of the Fund and an employer was the alleged secondary boycott. The Court also rejected the Fund's argument that because it had designated itself a "labor organization" for tax purposes it should be deemed a "labor organization" for purposes of the labor laws.

Next, the Fourth Circuit considered whether the *Noerr-Pennington* doctrine provided a defense to the unions. The *Noerr-Pennington* doctrine safeguards the First Amendment right to petition the Government for redress of grievances, including litigation activity and alleged labor law violations. However, the Court explained, "the First Amendment offers no protection when petitioning activity ostensibly directed toward influencing governmental action is a mere sham to cover . . . an attempt to violate federal law." *See Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

The Supreme Court established the "sham litigation" exception to the *Noerr*-Pennington doctrine in *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). "Sham litigation" occurs where "a pattern of baseless, repetitive claims . . . emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused." *Id.* at 513. The Fourth Circuit ruled that this test applied in this case because it involved a series of proceedings, as opposed to a two-part test that the Supreme Court used in *Professional Real Estate Investors* when there was only one alleged sham proceeding.[1]

In reviewing the defendants' motion[1] under the *California Motor* test, the Fourth Circuit found that "the vast majority of the legal challenges failed demonstrably." The Court pointed out that only one out of fourteen of legal actions the defendants filed or directed could be called successful. This "batting average" at least suggested "a policy of starting legal proceedings without regard to the merits and for the purpose of [violating the law]." Additionally, the Court noted other indications of bad faith, including the withdrawal of ten of the fourteen legal actions "under suspicious circumstances." The Court concluded that in light of the poor litigation record and signs of bad-faith conduct, a factfinder could conclude that the unions had abused their right to petition the courts and that

Noerr-Pennington protection would not apply. Thus, the Court reversed the dismissal of the claims against the unions and remanded the action to the district court for further fact-finding as to whether the dismissed or withdrawn lawsuits were part of a pattern or practice of filing sham litigation.

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6th Circuit

***Frazier v. Life Ins. Co. of North America*, _ F.3d _, 2013 WL 3968766 (6th Cir. Aug. 5, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0206p-06.pdf

In *Frazier*, a participant challenged the denial of her claim for long term disability benefits under ERISA. Affirming judgment in favor of the plan administrator, the Sixth Circuit initially rejected the participant's argument that the de novo standard of review applied because no plan document existed granting discretion to the insurance company. The court determined that the policy was the plan document under ERISA and that language requiring "satisfactory proof" of disability was sufficient to invoke the arbitrary and capricious standard.

Addressing the merits of the claim, the Sixth Circuit held that the denial was rational. Among other things, the court noted that the participant improperly relied on a declaration describing her purported actual job duties that was submitted to the district court but was not part of the administrative record. The court noted that even if the declaration was in the administrative record, it would not necessarily be relevant because the policy required the administrator to look to the duties of the occupation as it is normally performed in the general labor market of the national economy. In rejecting the participant's remaining arguments, the Sixth Circuit concluded that the administrator rationally relied on the employer's description of the participant's job; that it sufficiently consulted doctors to acquire their notes for information related to the participant's condition; that it was not required to rely on the participant's subjective description of her pain levels; and that there was no evidence that an inherent conflict of interest actually affected the denial decision.

***Boaz v. FedEx Customer Information Services*, _ F.3d _, 2013 WL 3985015 (6th Cir. Aug. 6, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0209p-06.pdf

In *Boaz*, an employee alleged that she was paid less for performing the same duties as a male employee and that FedEx failed to pay her overtime. Her employment agreement stated, "To the extent the law allows an employee to bring legal action against Federal Express Corporation, I agree to bring that complaint within the time prescribed by law or 6 months from the date of the event forming the basis of my lawsuit, whichever expires first." Relying on this provision, the district court dismissed the employee's claims because the last alleged illegal activity occurred more than six months prior to the filing of the lawsuit.

Reversing the dismissal, the Sixth Circuit cited Supreme Court decisions stating that employees may not waive their FLSA rights to minimum wages, overtime or liquidated damages, either prospectively or retrospectively. It then concluded that as applied to the employee's claim, the six-month limitation period acted as a waiver of her FLSA rights and was invalid. In reaching this conclusion, the Sixth Circuit rejected FedEx's argument that courts have enforced similar limitations period for claims arising under other statutes, such as Title VII.

Addressing the EPA claim, the Sixth Circuit first concluded that employees cannot waive claims under that statute. The court then reached the same conclusion as it did for the FLSA claim and declared the limitations provision in the employment agreement invalid. Finally, the court rejected FedEx's arguments that the claims failed on their merits.

***Srouder v. Dana Light Axle Mfg.*, _ F.3d _, 2013 WL 4007646 (6th Cir. Aug. 7, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0211p-06.pdf

In *Srouder*, an employee appealed the district court's order granting summary judgment in favor of his former employer. The employee sued alleging interference with his rights under the FMLA. During his employment, the employee had problems with his attendance and with obtaining proper medical certifications for various absences that he claimed were FMLA protected. Eventually, the employee developed a medical condition that required surgery. The employer later terminated the employee for his failure to follow the employer's call-in requirements of the employer's attendance policy with respect to the employee's surgery. Under the policy, each employee was responsible to personally call in his own absences. Moreover, the policy expressly provided, "All absences must be phoned into [the number provided] on a daily basis. Calls to other numbers will not be acceptable."

Affirming the district court's order granting summary judgment to the employer, the Sixth Circuit held that that an employer may enforce its usual and customary notice and procedural requirements against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with the employer's requirements. In this case, the court ruled that the employee produced no evidence demonstrating the type of "unusual circumstances" that would have justified the employee's failure to follow the call-in requirements of the employer's attendance policy.

In reaching this decision, the Sixth Circuit acknowledged that it previously addressed this question in *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2003). The Sixth Circuit stated that to the extent *Cavin* held to the contrary, its holding has been effectively nullified by the subsequent revisions to 29 C.F.R. § 825.302(d). In *Cavin*, the Sixth Circuit held that "the FMLA does not permit an employer to limit his employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA." *Id.* at 716. The Sixth Circuit reasoned that the holding in *Cavin* was a result of the then-current text of the regulation for foreseeable FMLA leave. As stated in *Srouder*, the language of 29 C.F.R. § 825.302(d) has been materially altered and now explicitly provides that employers may condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements, absent unusual circumstances. In the revisions to the FMLA regulations, effective January 16, 2009, 29 C.F.R. § 825.302(d) now provides in part that "[w]here an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA -protected leave may be delayed or denied . . ."

***City of Pontiac Retired Employees Ass'n v. Schimmel*, _ F.3d _, 2013 WL 4038582 (6th Cir. Aug. 9, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0215p-06.pdf

In *Schimmel*, the Sixth Circuit issued an opinion vacating a district court decision which had denied a request for a preliminary injunction brought by Michigan public sector retirees seeking to prevent changes to their retiree health benefits.

After the passage of Public Act 4, Louis Schimmel, the Emergency Manager for the City of Pontiac modified collective bargaining agreements to shift a large portion of the city's benefit obligations onto employees. Retired employees filed a putative class action, raising several federal claims, including unconstitutional impairment of contract, preemption

under federal bankruptcy law and deprivation of property without due process. The district court denied a motion for a temporary restraining order seeking to prevent Schimmel's orders from taking effect and later denied a motion for a preliminary junction.

On appeal, the majority declined to decide the case on federal constitutional grounds, concluding that state law could provide an alternative basis for deciding the case. The majority vacated the order denying the motion for preliminary injunction. It also remanded for the district court to conduct additional fact-finding and consider state law issues of (a) whether the Michigan Legislature complied with the Michigan Constitution when it voted to make Act 4 immediately effective and (b) the effect that the referendum rejection of Act 4 had on any actions taken while the law was in effect.

The majority addressed the state law issues despite the fact that neither party raised them. Citing the doctrine of constitutional avoidance, the majority determined that the best course of action was to remand for the district court to conduct additional fact finding. The majority also denied the Michigan Attorney General's request to intervene to brief the referendum rejection issue.

In its decision, the majority opined that the Legislature appeared to have ignored the Michigan Constitution's requirement of a two-thirds vote for determining whether a statute will have immediate effect by using a "rising vote" practice. According to the majority, under this practice, "a two-thirds vote occurs whenever the presiding officer says it occurs – irrespective of the actual vote." For Act 4, despite the fact that the passage of the statute fell twelve votes short of the two-thirds majority in the House, the presiding officer determined that the statute would have immediate effect. The majority described this as a "farce" and stated that it only occurs "through the obvious fiction that twelve House members immediately changed their positions."

In a lengthy dissent, Judge Griffin stated that he would have affirmed the denial of the preliminary injunction.

***Findlay Truck Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, _ F.3d _, 2013 WL 4035436 (6th Cir. Aug. 9, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0213p-06.pdf

In *Findlay Truck Line*, the Sixth Circuit addressed whether courts retained equitable authority to enjoin interim withdrawal liability payments under the Multi-Employer Pension Plan Amendments Act ("MPPAA"). The employer had ceased making contributions to the Fund during a strike and was notified by the Fund that it may have withdrawn. After the union filed a disclaimer of interest, the Fund determined that the employer's obligations to make pension contributions under the terms of the collective bargaining agreements had ceased and therefore had withdrawn from the Fund.

In response, the employer filed a complaint alleging that assessment of withdrawal liability was improper because the union's disclaimer of interest was "inappropriate and contrary to law"; it was not obligated to make interim payments despite language in the MPPAA because the payments would cause irreparable harm; and arbitration, which is required under the MPPAA when there are disputes over withdrawal liability, was not necessary because the district court could address the factual and legal issues. The district court eventually dismissed the complaint, but issued an injunction under Federal Rule of Civil Procedure 65, enjoining the Fund from collective any withdrawal liability until the matter was resolved in arbitration.

On appeal, the Sixth Circuit determined that its prior case law was not dispositive on whether there were any equitable exceptions to the MPPAA's "pay now, dispute later" provisions, which require interim withdrawal liability payments to be made pending the outcome of arbitration. After surveying its sister circuits, the Court determined that the plain language of the statute mandated interim withdrawal liability payments. It reasoned that "clearly-worded statutes have the power to divest courts of their equity powers" and also that the statute represented a specific provision that took preference over the

general provisions in the Judiciary Act of 1789 and Rule 65 that provide district courts with the equitable power to issue injunctions.

Finally, the Sixth Circuit rejected the Fund's arguments regarding the dismissal order, noting that "'arbitration reigns supreme' for withdrawal liability disputes." The court declined to create a new exception to the arbitration mandate for alleged "union-mandated" withdrawals and also held that the remaining arguments were for the arbitrator to decide.

***Sharp v. Aker Plant Services Group*, _ F.3d _, 2013 WL 4038583 (6th Cir. Aug. 9, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0216p-06.pdf

In *Sharp*, an employee appealed the district court's order granting summary judgment in favor of his former employer. An employee filed an action against his former employer alleging that his termination had been based on age. After the employee was terminated, his supervisor mentioned that age played a factor in the decision to terminate. In a subsequent conversation, that the employee secretly recorded, the supervisor stated, among other things:

> [A]nd again[,] it's not that your abilities all of a sudden ceased to exist, or got worse, or anything like that, we just, I hate to keep repeating myself, but we're all of the same age and we're all going to retire and I had an opportunity to bring the next generation in, so that's what we decided to do. So ah.

Reversing the district court's order granting summary judgment, the Sixth Circuit ruled that the employee offered direct evidence that, if believed by the jury, proves that age was the reason his employer terminated him. The Sixth Circuit reasoned that facts in this case, when examined in the light most favorable to the plaintiff-employee (non-moving party), justified the conclusion that the employer is accountable for whatever age bias the supervisor harbored because the employer terminated the employee based on the supervisor's recommendation. Additionally, the Sixth Circuit stated that although the supervisor was not the ultimate decision maker, those decision makers relied solely on the supervisor's forced rankings and recommendation of who could be terminated without disrupting current projects.

***Waldo v. Consumers Energy Co.*, _ F.3d _, 2013 WL 4038747 (6th Cir. Aug. 9, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0217p-06.pdf

In *Waldo*, an employee brought federal and state law sex discrimination, hostile work environment and retaliation claims against her employer. Before jury deliberations, she withdrew her state law claims and the jury ruled in favor of the employer on the remaining federal claims. The employee then filed a motion for new trial pursuant to Rule 59, arguing that the jury verdict on the retaliation and hostile work environment claims was against the clear weight of the evidence. The district court denied the motion on the retaliation claim, but granted it on the hostile work environment claim. The second jury ruled in favor of the employee. The district court remitted the damages to Title VII's statutory damage cap and then awarded the employee attorney fees for nearly all of the time spent litigating the case, including the first unsuccessful trial. The fee award was more than twice the compensatory damage award.

On appeal, the Sixth Circuit first concluded that the district court did not abuse its discretion when it granted a new trial. The court stated that non-sexual conduct may be illegally sex-based when it evinces anti-female animus. Next, the court held that facially neutral incidents may be included in a hostile work environment claim when there is some basis for inferring that incidents sex-neutral on their face were in fact discriminatory. The court also concluded that there was sufficient evidence of a hostile work environment, and there was a reasonable basis for holding the employer liable. Finally, the Sixth Circuit ruled that the district court properly considered evidence that occurred prior to the 300 days before she filed her EEOC charge

because the evidence demonstrated ongoing isolation and an atmosphere of hostility towards the employee that continued into the 300 day period.

Next, addressing the denial of the motion for judgment as a matter of law at the end of the second trial, the court found that there was ample evidence that the employee was subjected to severe or pervasive harassing behavior. The Sixth Circuit also found that a reasonable jury could have inferred that the isolation and ostracization that occurred within the 300 day charge filing period was motivated by gender based harassment. Finally, court concluded that a reasonable jury could have found that there was a basis for holding the employer liable.

Addressing the attorney fee award, the Sixth Circuit affirmed the decision to award the employee all of the fees incurred by her attorneys, including those related to the first trial and the claims she was not successful on, concluding that the district court did not abuse its discretion in finding that all of the claims were related and involved a common core of facts. In dissent, Judge Sutton explained, "I know of no case in which an appellate court upheld all fees for the first (losing) trial when the only reason for the second trial was the trial court's grant of a new trial under Civil Rule 59(a)(1)(A)." Judge Sutton would have reduced the fee award, noting that it does not seem likely that the same Congress that capped compensatory damages at $300,000 and prohibited punitive damages for the merits claim "would have been cheerfully indifferent to runaway, if not punitive, fee awards that bear no relation to this damages award." Finally, Judge Sutton explained that it would not have been difficult for the district court to make a rough cut between the fees for the successful federal claim and the fees for the unsuccessful federal and state law claims because the district court showed this was possible by ordering a new trial on the harassment claim, but not the retaliation claim. Sutton ended by explaining, "I am prepared to hold my nose in upholding a lot of fee awards, whether they seem too small or too large at the time. But a blanket fee award of $684,506 for losing six of seven claims, including for *all* of the work in losing the first jury trial, is not one of them."

***Tackett v. M & G Polymers USA*, _ F.3d _, 2013 WL 4045989 (6th Cir. Aug. 12, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0219p-06.pdf

In *Tackett*, retirees, dependents of retirees and the union that currently represents plant employees filed a lawsuit under the Labor Management Relations Act and ERISA after M&G Polymers USA announced that the retirees would be required to contribute to the cost of their health coverage. After a bench trial, the district court found in favor of plaintiffs, entered a permanent injunction reinstating lifetime, contribution free health care benefits and reinstating coverage to the post-2007 versions of the plans.

On appeal, the Sixth Circuit first noted that in its prior decision granting in part and affirming in part the district court's ruling on a motion to dismiss all claims, it had noted that the relevant language indicated intent to vest benefits. The court explained, however, that the prior decision did not conclusively determine that the retirement benefits had vested. Nonetheless, the Sixth Circuit concluded that the district court correctly performed its own analysis when it determined that vested occurred. It held that the district court did not clearly err when it found that "cap" letters purporting to cap the company's contribution towards retiree health benefits did not apply to the plant at issue. The court further concluded that the district court did not clearly err by concluding that the CBAs vested a right to lifetime contribution-free benefits in pre-August 9, 2005 retirees.

Finally, the Sixth Circuit rejected the plaintiffs' cross-appeal that the district court incorrectly ordered that the retirees and dependents be re-enrolled in the current plan, rather than the pre-2007 versions of the plans. Citing *Reese v. CNH America*, the Sixth Circuit explained that the 2007 changes to the plan – including prescription drug copays increasing from $4 to $10; annual prescription drug deductibles increasing from $175 to $250; and an increase in the out-of-pocket limits from $500 to $4,000 – were not unreasonable in

light of changes in health care.

***Adamov v. U.S. Bank National Association*, _ F.3d _, 2013 WL 4055234 (6th Cir. Aug. 13, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0221p-06.pdf

In *Adamov*, a bank district manager from Azerbaijan alleged that his termination was because of national origin discrimination and in retaliation for his complaints of discrimination. He alleged that the vice-chairman of the bank, who was three levels above him in the hierarchy, made a handful of comments over the years that he found offensive, such as "Oh, your accent gives you up" and "Immigrants don't usually climb the corporate ladder." Adamov brought these comments to his direct supervisor, who assured him that the vice-chairman was not prejudiced against him. Shortly thereafter, the bank opened an investigation into Adamov's banking activities and terminated him for making a personal loan to a bank customer in violation of the bank's ethics policy.

Adamov filed suit alleging state law discrimination claims, which was removed to federal court based on diversity jurisdiction. After the bank filed a motion to dismiss asserting that the National Bank Act preempted state discrimination laws regarding employment of certain national bank officers, Adamov submitted a draft EEOC charge that contained only a national origin discrimination claim. Before the court decided the motion, Adamov actually filed the EEOC charge, but added a retaliation claim. After receiving a right to sue letter from the EEOC, he filed a motion to amend. In respond to a second motion to amend, relying on the draft charge, the district court *sua sponte* dismissed the retaliation claim for lack of subject matter jurisdiction based on a failure to exhaust his administrative remedies. The court later granted summary judgment on the discrimination claims.

On appeal, Adamov claimed that the district court erred in its pretext analysis because it relied on an ethics policy that post-dated the date of the loan. Although he claimed that the bank failed to produce evidence that it had an ethics policy that prohibited loans to friends on the date the loan was made, the Sixth Circuit held that the argument mischaracterized the bank's burden, which was one of production, not persuasion. Even if a written policy did not exist, he failed to show that the reasons given by the bank were not the true reasons for terminating him. The Sixth Circuit also rejected Adamov's arguments that the remaining circumstantial evidence demonstrated pretext. Among other things, the court noted that while the temporal proximity between reporting the complaints and the investigation is relevant to the retaliation claim, it was "less probative" with respect to the national origin discrimination claim. Thus, the Sixth Circuit affirmed dismissal of the discrimination claim. Addressing the retaliation claim, however, Sixth Circuit held that the district court erred in applying a jurisdictional analysis because administrative exhaustion is not jurisdictional.

***Mendel v. City of Gibraltar*, _ F.3d _, 2013 WL 4105641 (6th Cir. Aug. 15, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0232p-06.pdf

In *Mendel*, after the employee was terminated, he sued his employer for allegedly violating his rights under the FMLA. The employer, the City of Gibraltar, contended that the volunteer firefighters were not employees, and that therefore the employer did not employ fifty or more employees, as required under the FMLA's definition of "eligible employee." The volunteer firefighters are paid $15 per hour for the time they do spend responding to a call or maintaining equipment but do not work set shifts or staff a fire station. The volunteer firefighters must complete training on their own time without compensation and are not required to respond to any emergency call. Additionally, the voluntary firefighters maintain other employment and have no consistent schedule working as volunteer firefighters. The district court granted the employer's motion for summary judgment ruling that the volunteer firefighters were not employees for purposes of the FMLA.

Reversing, the Sixth Circuit held that the volunteer

firefighters were in fact "employees," not volunteers, within the meaning of the FLSA and FMLA. Additionally, the Sixth Circuit Court reasoned that the substantial wages paid to the volunteer firefighters ($15 per hour) constituted compensation, not nominal fees (as described in 29 C.F.R. § 533.106(f)).

***Kindred Nursing Centers East, LLC v. NLRB*, _ F.3d _, 2013 WL 4105632 (6th Cir. Aug 15, 2013)**
http://www.ca6.uscourts.gov/opinions.pdf/13a0231p-06.pdf

In *Kindred Nursing Centers East*, the Sixth Circuit approved a National Labor Relations Board ("Board") representation unit determination that included 53 certified nursing assistants ("CNAs") but did not include 33 additional nonprofessional service and maintenance employees that the employer argued should be included in the unit. The employer challenged the Board's decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011), which purported to: (1) overrule *Park Manor Care Center*, 305 NLRB No. 135 (1991), which had adopted a test to determine the appropriate of a bargaining unit in a nursing home; (2) return to applying the "traditional community-of-interest approach" to nursing homes; and (3) clarify that when the petitioned for unit contains a "readily identifiable" group who share a community of interest and the employer contends the unit is inappropriate because it does not contain additional employees, the employer has the burden "to demonstrate that the excluded employees share an overwhelming community of interest with the included employees."

The Sixth Circuit rejected each of the employer's arguments. First, it concluded that the Board did not adopt a new approach, but rather clarified the community-of-interest test based on prior precedents. Second, the Court held that the "overwhelming community-of-interest" test did not represent a material change in the law. Instead, the Court determined that the "overwhelming community-of-interest," which placed the burden on the employer, was used before with court approval.

Third, the Sixth Circuit concluded that *Specialty Healthcare* did not violate section 9(c)(5) of the National Labor Relations Act, which states that "the extent to which the employees have organized shall not be controlling" when the Board determines whether a unit is appropriate. The Court determined that the Board did not assume that petitioned for unit was appropriate but instead applied the community-of-interest test to determine whether there were substantial factors establishing that the CNAs shared a community of interest.

Finally, the Court rejected the argument that the Board was required to follow notice-and-comment rulemaking before creating a new rule for determining and appropriate bargaining unit. According to the Court, because the Board is not precluded announcing new principles in an adjudicative proceeding, it may also choose to follow one of its already existing principles in such a proceeding.

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8th Circuit

***Kelly v. Omaha Housing Authority*, 721 F. 3d 560 (8th Cir. July 22, 2013) (Civil Procedure – Minimal Portion of Trial Transcript Insufficient).**
http://media.ca8.uscourts.gov/opndir/13/07/12267

Monthly Update for August

1P.pdf

Bonnie Kelly ("Kelly") was terminated by the Omaha Housing Authority ("OHA"), and thereafter sued the OHA and executive director for race and sex discrimination and First Amendment retaliation. The matter proceeded to a jury trial. The First Amendment retaliation claim was dismissed under Rule 50 (judgment as a matter of law ("JAML")) and the jury found for OHA on the discrimination claims. Kelly appealed the JAML ruling. OHA filed a motion to dismiss the appeal based upon Fed. R. App. P. 10(b), arguing that Kelly ordered an insufficient portion of the trial transcript for the Court to conduct a meaningful review.

Kelly only ordered the portion of the trial transcript that contained her testimony, so the remainder was not transcribed and thus not available on the Court's Case Management/Electronic Case Files System. Fed. R. App. P. 10(b) provides that it is the appellant's duty to order the transcript. The appellant must order the part of the transcript (if not all) that is necessary for a determination of the validity of any claimed error. The lack of a transcript precludes the Court from conducting a meaningful review.

As to the JAML, the Court held that it must consider all the evidence of the record, and while her testimony is important and relevant, it is only a small part of the testimony and evidence that was presented during the four day trial. The Court held that without the remaining relevant portions of the trial transcript, it cannot "meaningfully review the district court's findings, engage in the intense factual inquiry required to analyze Kelly's retaliation claim, or consider 'all of the evidence in the record.'" (Internal citations omitted). Accordingly, the Court refused to address the merits of Kelly's First Amendment retaliation claim and granted OHA's motion to dismiss the appeal.

***Lucas v. Jerusalem Cafe*, 721 F. 3d 927 (8th Cir. July 29, 2013) (FLSA Protection for Unauthorized Alien Workers).**
http://media.ca8.uscourts.gov/opndir/13/07/122170P.pdf

Elmer Lucas and five other aliens ("Plaintiffs") worked for Defendant Jerusalem Cafe for less than minimum wage and without receiving overtime wages. The Plaintiffs, all undocumented aliens, sought wages due for work performed under the FLSA. The district court, noting the employers' account of the facts to be a "fantastic story" (claiming they were volunteers and posing for pictures), held that the Plaintiffs' immigration status was "irrelevant" as they were seeking FLSA wages for work already performed – not prospective relief (which would be unlawful under the Immigration Reform and Control Act of 1986). The jury found for the Plaintiffs and awarded backwages, liquidated damages, attorneys' fees and expenses. Jerusalem Cafe moved for JAML or a new trial arguing that the Plaintiffs were prohibited by law from receiving any wages and lacked standing to sue. The district court denied the motion. Joining the only other circuit to address this issue directly (the Eleventh Circuit), the Eighth Circuit Court of Appeals upheld the district court ruling, holding that: "employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws. The employers' arguments to the contrary rests on a legal theory as flawed today as it was in 1931 when jurors convicted Al Capone of failing to pay taxes on illicit income."

The Court went on to note that there is no reason why employers who unlawfully hire workers should be exempt from paying wages that, if the worker were a lawful employee, they would have to pay, and that there is no reason for treating such employer more leniently: "Like the Eleventh Circuit, we hold that aliens, authorized to work or not, may recover unpaid and underpaid wages under the FLSA". (citing *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988)).

***Johnson v. Securitas Security Svcs.*, ___ F. 3d ___, 2013 WL 4504589 (8th Cir. Aug. 26, 2013) (Age Discrimination).**
http://media.ca8.uscourts.gov/opndir/13/08/122129P.pdf

Carlyn Johnson ("Johnson") was 76 years of age

when terminated from employment with Securitas Security Services ("Securitas"). Johnson had worked for Securitas since age 70 as a Utility Officer, providing on-site security guard services. His record was spotless except for a single car accident while on duty for 20 consecutive hours and thereafter allegedly leaving his post one hour early. During his employment, his supervisor, Robert Hesse ("Hesse"), made comments to Johnson such as: he "needed to hang up his Superman cape," he was "too old to be working" and that he "needed to retire". Hesse compared Johnson to his 86 year old father and suggested to other Securitas managers that they not schedule Johnson to work 50, 60 hours per week. The district court held the comments to be stray remarks and granted judgment for Securitas. Johnson appealed the determination.

The Eighth Circuit Court of Appeals reversed the decision, noting that there are questions of fact. The Court held that the record contains evidence that would allow a jury to find that Johnson was meeting Securitas' job expectations prior to the on-site accident. Further, the Court held that the comments made by Hesse, an individual who may have played a role in the decision to terminate him, could show motivation to terminate him based on age animus. Further, the Court noted there were at least four material facts in dispute (1) whether Johnson actually left prior to his shift ending; (2) whether the Human Resources director was aware of his age when she terminated him; (3) whether Hesse, who was the source of the age related comments was a decision maker in determining whether to terminate his employment; and (4) whether similarly situated younger employees were treated differently following their mishaps. Accordingly, the Court held that Johnson provided enough admissible evidence to raise genuine doubt as to the legitimacy of Securitas' motive and thus summary judgment improper.

***Jackman v. Fifth Judicial District Dept. of Correctional Svcs.*, ___ F. 3d ___, 2013 WL 4529461 (8th Cir. Aug. 28, 2013) (Race Discrimination).**
http://media.ca8.uscourts.gov/opndir/13/08/123250P.pdf

Ebony Jackman ("Jackman") is an African-American woman who has been employed by the State of Iowa as a Residential Officer since 2000. Jackman alleged she was subject to a variety of discriminatory conduct and harassment by co-workers and a supervisor. Jackson was never terminated, suspended, or demoted and continues to be employed by the state without a loss in pay or benefits. However, Jackman alleged that due to work-related stress, she exhausted her leave options and needed to borrow leave from a leave bank comprised on donated leave from other state workers. The district court granted the state's motion for summary judgment from which she appealed.

The Eighth Circuit affirmed the district court ruling, holding that Jackman did not suffer an adverse employment action. Jackman argued that the depletion of her sick leave is the equivalent of a constructive discharge, but she can't afford to quit her job. The Court held that not only did she not suffer an adverse employment action, but the fact that she was allowed to use donated leave was a favorable employment benefit. As Jackman was not forced to take leave (paid or unpaid), she cannot establish constructive discharge based upon leave use. Further, although Jackman had several performance counseling sessions and coaching (and abnormally long and detailed log in her personnel file), the Court held that no adverse action was taken as a result of her longer personnel file. As to her harassment claim, the Court held that the conduct described (offensive comments) was not severe or pervasive when compared to other cases on the issue.

***Adair v. ConAgra Foods*, ___ F.3d ___, 2013 WL 4608803 (8th Cir. Aug. 30, 2013) (FLSA).**
http://media.ca8.uscourts.gov/opndir/13/08/123565P.pdf

Two laborers ("Plaintiffs") alleged their employer, ConAgra Foods ("ConAgra"), violated the Fair Labor Standards Act ("FLSA") when ConAgra failed to compensate Plaintiffs (and others similarly situated) for time spent walking between changing

stations where they don and doff their uniforms and walking to and from the time clock where they punch in and out. The Plaintiffs are represented by one of two unions, both of which agreed that ConAgra was to furnish and launder protective gear uniforms, which must be put on and taken off at the facility.

The FLSA limits the scope of the workday, and the Portal-to-Portal Act amends the Act, to exclude time spent changing clothes from hours worked, if excluded by express terms of or by custom or practice or under a bona fide collective bargaining agreement. 29 U.S.C. § 203(o). The district court held the protective gear was "clothes" and that the time donning and doffing the gear is uncompensated by custom or practice of a bona fide collective bargaining agreement. However, the district court held, noting "substantial disagreement in the case law", that the donning and doffing began and ended the workday as they are an "integral and indispensable" part of the Plaintiff's work activity and thus denied ConAgra's motion for summary judgment that the walking time was not compensable.

The district court granted the parties' joint motion to certify the issue for interlocutory appeal. The Eighth Circuit reversed the district court's decision, agreeing with the Fourth, Ninth and Tenth Circuits, and disagreeing with the Eleventh Circuit. The Court succinctly summarized its decision as follows:

> [T]he time spent by the laborers donning and doffing their uniforms is excluded by agreement from the hours for which they are employed. As such, donning and doffing is not an activity that the laborers are employed to perform, and it is therefore not a principal activity that begins and ends the workday. It follows that time spent walking between the clothes-changing stations and the time clock is not part of the workday and workweek for which the employer is liable to pay overtime compensation under the Act.

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11th Circuit

***Weekes-Walker, et. al. v. Macon County Greyhound Park, Inc.* (August 5, 2013)**
http://www.ca11.uscourts.gov/opinions/ops/201214673.pdf

In Weekes-Walker, et. al. v. Macon County Greyhound Park, Inc., the court was presented with an appeal from Macon County Greyhound Park, Inc. (Macon) regarding former employees' class action claims under the Worker Adjustment and Retraining Act of 1988 (WARN Act). Specifically, the employees claimed Macon thrice violated the WARN Act's requirement of 60 days notice by an employer prior to a mass layoff or plant closing. In return, Macon argued the requirements did not apply to the company because the layoffs did not meet the statutory definition under the Act for "mass layoff" or "plant closing," and that they fell within the confines of the unforeseeable business circumstances defense.

The case stemmed from Alabama Governor Riley's creation of the Governor's Task Force on Illegal Gambling, which ultimately resulted in a clampdown of electronic gambling at Macon's racetrack, and in turn, a series of terminations. The terminations incurred in waves in January, February, and August. Prior to the terminations, Macon did not provide a formal notice to affected employees pursuant to the WARN Act. While the lower court aggregated the January and February layoffs to hold they constituted a "mass layoff" and the August layoffs as "plant closing," the 11th Circuit disagreed,

yet reached a similar conclusion. Specifically, the court found that the Act did not permit the January layoff to be aggregated with February to qualify under the Act and definition of plant closing, but still, the employees laid off in January could still be considered "affected employees" entitled to notice of the February closing. The court noted that whether Macon was liable would hinge on whether the January layoff was intended to exceed 6 months, or whether the February closing changed a short term layoff to an employment loss under the Act.

With regard to the unforeseeable business circumstance defense, the court found the employer could not invoke the defense without previously providing notice to affected employees.

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